IN THE MATTER OF

AMERICAN RETAIL BOARD OF TRADE, INC., ET AL.

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

Docket C-898. Complaint, May 18, 1965—Decision, May 18, 1965

Consent order requiring a Springfield, Mo., collector of delinquent accounts, operating a small business with one office and one employee to assist with the individual respondent, to cease representing falsely, through the use of their trade name and the use of fictitious terms and statements in the course of business, that their business is a nationwide organization of retailers with corresponding attorneys and collectors affiliated with them.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the American Retail Board of Trade, Inc., a corporation, and Alvin B. Ayers, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, American Retail Board of Trade, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri with its office and principal place of business located at 1022 South Glenstone Street, M.P.O. 108, in the city of Springfield, State of Missouri.

Respondent Alvin B. Ayers is an officer of said corporation. He formulates, controls and directs the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The address of the individual respondent is the same as that of the corporate respondent.

PAR. 2. Respondents now operate, and have operated for more than one year last past, a collection agency under the name American Retail Board of Trade, Inc. Business is secured by respondents by solicitation of agents.

Respondents use assignment forms upon which each delinquent account is listed showing the name of the debtor, address, date of indebtedness incurred and the amount due. These assignment forms are sent from respondents' place of business in the State of Missouri to creditors located in various States of the United States. The creditor executes the form assigning the accounts, so listed, to respondents for collection on a commission basis, and returns it to respondents at Springfield or it is sent to respondents by one of their agents.

The debtors concerned reside in various States other than the State of Missouri. Respondents receive money from debtors located in States other than Missouri and transmit it, less their commission, to creditors who reside elsewhere than in Missouri. Respondents often receive checks from creditors representing debts paid direct to the creditor.

In carrying on their aforesaid business respondents maintain, and at all times hereinafter mentioned have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with other corporations, firms and individuals engaged in the business of collecting alleged delinquent accounts.

PAR. 4. Through the use of the name American Retail Board of Trade, Inc., said respondents represented, and now represent, directly or by implication, that the corporate respondent is a nation-wide organization of retailers.

PAR. 5. In truth and in fact, the corporate respondent is not an organization of retailers and has no connection with any organization of retailers but, on the contrary, the sole business of the respondents is the operation of an agency for the collection of alleged delinquent accounts.

Therefore, the statements and representations set forth in Paragraph Four are false, misleading and deceptive.

PAR. 6. Respondents, in the course and conduct of their aforesaid business, and for the purpose of inducing individuals, firms and corporations to sign the aforesaid assignments, as well as aiding in making collections from debtors, have made certain statements and representations, directly or by implication, with respect to their business. Typical, but not all inclusive, of such statements and representations are the following:

1. Nation-wide corresponding attorneys and collectors.
2. Dear Member.
3. Processing by our staff of experts is well under way.
4. Karl Quinn. Pre-Legal Dept.
5. Robert Formar. Collection Department.
6. Carl Stine, Manager, Collection Dept.
7. Manager—Legal Department.
8. J. W. Kerns, Pre-Legal Department.

PAR. 7. By and through the use of the aforesaid statements and representations, respondents represented, and now represent, directly or by implication, that:

1. The business of the respondents is nationwide in scope with corresponding attorneys and collectors directly affiliated and connected with them.

2. The corporate respondent is an organization having members.

3. The business of respondents is departmentalized and has a considerable staff of employees.

PAR. 8. In truth and in fact:

1. The business of the respondents is not nationwide in scope and does not have corresponding attorneys and collectors affiliated and connected with them but, on the contrary, respondents' business is a small one with no departments, one office and one employee to assist the individual respondent.

2. The corporate respondent has no members but, on the contrary, those designated as "members" are persons who have assigned alleged delinquent accounts to the respondents for collection.

Therefore, the statements and representations set forth in Paragraphs Six and Seven are false, misleading and deceptive.

PAR. 9. The use by respondents of the foregoing false, deceptive and misleading representations and practices has had, and now has, the tendency and capacity to mislead a substantial number of creditors and debtors into the erroneous and mistaken belief that such representations were, and are, true, and into the assignment of accounts to it for collection and in the collection of monies from debtors because of such mistaken and erroneous belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent American Retail Board of Trade, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 1022 South Glenstone Street, M.P.O. Box 108, in the city of Springfield, State of Missouri.

Respondent Alvin B. Ayers is an officer of said corporate respondent and his address is the same as that of the corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents, American Retail Board of Trade, Inc., a corporation, and its officers, and Alvin B. Ayers, individually and as an officer of said corporation, and said respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the solicitation of accounts for collection, or the collection of, or attempts to collect accounts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the name "American Retail Board of Trade, Inc." or any other name of similar import or meaning; or representing, directly or by implication, that they are an organization of retailers or are connected in any manner with an organization of retailers;

2. Representing in any manner, directly or by implication, that their business is other than that of a private collection agency engaged in collecting alleged past due accounts;

3. Representing, directly or by implication, that their business is nationwide in scope or that they have corresponding attorneys and collectors affiliated or connected with them;

4. Misrepresenting the size of the business through the use of fictitious names or departments or by any other means;

5. Representing that the corporate respondent has members or designating the persons who assign accounts to the respondents as "members."

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

IN THE MATTER OF

INTERSTATE TRAINING SERVICE CORPORATION ET AL.

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

Docket 5764. Complaint, Apr. 17, 1950—Decision, May 19, 1965

Order modifying cease and desist order of December 5, 1950, 47 F.T.C. 680, against sellers of a correspondence course in the operation, maintenance, and repair of Diesel engines, by modifying paragraphs 1, 2, 3, and 8 of the order prohibiting misrepresentation as to selection of students, length of course, relationship with manufacturers, and on-the-job training.

OPINION OF THE COMMISSION

On December 5, 1950 [47 F.T.C. 680], the Commission issued an order against respondents providing in pertinent part as follows:

It is ordered, That Conard E. Green and Leon A. Crouch, individually and as copartners trading under the name of Interstate Training Service, or trading under any other trade or partnership name, and their agents, representatives, and employees, directly or indirectly, through any corporate or other device, in connection with the sale, offering for sale or distribution of courses of study and instruction in Diesel training and training in heavy equipment and gasoline engines, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That students are selected and accepted on the basis of their mechanical aptitude or upon the recommendation of respondents' representatives;

2. That the training in Diesel engine equipment may be completed in 1 year with 1 or 2 hours a day devoted to the study of the course;

3. That respondents work closely with manufacturers, contractors or others in the Diesel engine field;

* * * * * * *

7. That the opportunities for employment, improvement, and advancement in the field of Diesel equipment operation are unusual and unlimited for those

who take respondents' course without many years of previous practical experience in that field;

8. That students receive resident shop or on-the-job training;

* * * * * * *

On March 15, 1965, respondents, by their attorneys, filed with the Commission an Amended Petition to Set Aside Cease and Desist Order. An answer partly in opposition to respondents' petition was filed by the Bureau of Deceptive Practices April 14, 1965.

Although respondents' petition alludes to prohibitions in the order other than those set forth above, it does not raise any substantial objection to them but rather confines itself to an assertion that respondents are in compliance.

Compliance with an order is not, under the Commission's Rules, sufficient reason for setting it aside, and accordingly in this opinion and order the Commission addresses itself solely to those prohibitions of the original order as to which respondents have submitted new facts and argument in favor of amendment, modification or excision.

In support of its petition that Paragraph 1 of the order be set aside respondents cite a catalog issued by them in conjunction with Interstate Training Service (ITS) Home Study Course 302 concerned with the maintenance, repair, and rebuilding of Cummins' Diesel engines. The catalog in question notes that enrollment in the course is restricted to "men who have demonstrated their interest in Diesel as a career" and is accordingly limited to persons who are qualified to take the course either by virtue of employment by Cummins Engine Company, in collaboration with which respondents offer the course, or because the applicant has had mechanical experience, or has completed preliminary Diesel courses offered by respondents or is employed by owners of Cummins' equipment.

In further support of their assertion that they should no longer be subjected to this proscription, respondents cite the affidavit of one H. M. Percifield, Manager, Service Development, Cummins Engine Company, Inc. Mr. Percifield attests that the qualification requirements for Course 302 are adhered to by Interstate Training Service.

In short, at least as to Course 302, it appears that respondent does make a determination as to the suitability of students and the affidavit of Mr. Percifield supports the assertion that the selectivity requirements as stated in the catalog are being met.

On the basis of the foregoing we are persuaded, as is the Bureau of Deceptive Practices, that the prohibition of our original order may be too rigorous, preventing as it does any representation as to selectivity and determination of qualifications. On the other hand, apart from the Course 302, the supporting data provided by respondents that they are exercising a degree of selectivity and predetermination of qualifications is supported only by an assertion in affidavits of respondent Green and one Fred Fulton, a member of the Accrediting Commission of the National Home Study Council, that such a selectivity and qualification program is in force and that the procedures of ITS conform to the standards established by the National Home Study Counsel Accrediting Commission, one of which requires the enrollment of only qualified students. This does not warrant excision of the provision in question. It does appear however that Paragraph 1 of our order should be modified to read as follows:

1. That students are selected or accepted on the basis of mechanical aptitude or upon the recommendation of respondents' representatives unless respondents are able to establish that selection is limited to persons having such aptitude or recommendation.

In support of its petition that Paragraph 2 of the order be set aside, respondent has furnished the affidavit of Earl M. Kruger, Director of the Diesel Division, Interstate Training Service Corporation, who offers the opinion that General Diesel Course 401 (50 manual) may indeed be completed within a period of 1 year with 1 or 2 hours devoted to study. This affidavit by an employee of respondent corporation does not of itself warrant a change in the original prohibition. Certainly it contains no new facts warranting a change.

However, as the Bureau of Deceptive Practices suggests, it would appear that this prohibition might be rephrased to permit truthful representation as to the period within which a course might be completed and yet provide adequate protection against deception. The following modified prohibition will accomplish this end:

2. That respondents' course of training in the maintenance, repair and operation of Diesel engines may be completed in any specified time unless respondents are able to establish either that all persons accepted pursuant to Paragraph 1 above may complete the training in the time specified or that in immediate conjunction with said representation respondents have clearly set forth the conditions or assumptions upon which said representation is based.

Respondents move that Paragraph 3 be stricken on the ground that they do in fact work closely with manufacturers, contractors and others. In support of their petition they have submitted 21 affidavits and supporting exhibits furnished by persons associated with manufacturers, contractors, etc. The affidavits in question make a strong showing that respondents should be permitted to represent truthfully that they have a good relationship with such firms.

Accordingly, Paragraph 3 of our order will be modified to read as follows:

3. That respondents work closely with or have any other relationship with manufacturers, contractors or others in the Diesel engine field unless respondents are able to establish the existence of such relationship.

In support of their petition for vacating Paragraph 7, respondents have furnished the affidavits of H. M. Percifield, cited above, and of L. O. Edwards, Service Standards Analyst of Cummins Engine Company. The affidavit of Percifield in this context states only that graduates of Interstate Training Service Cummins' approved Home Study Course are better qualified to make the most of Cummins' training than they would be otherwise. The affidavit further acknowledges the value of Interstate Training Service courses. Mr. Percifield also notes that after completion of the Cummins' approved Diesel Home Study Course a person of normal ability, initiative and intelligence "will be able to obtain employment as an apprentice Diesel mechanic" and that his opportunity for improvement and advancement is very high.

The other affidavit, that of L. O. Edwards, indicates only that his association with Interstate Training Service has been very satisfactory and that Interstate is performing a very valuable service to the industry.

The short answer to respondents' petition in this connection is that these two affidavits provide no justification for amending Paragraph 7 of our order.

In regard to Paragraph 8, material submitted by respondents indicates that, by arrangement with the Cummins Engine Company, students meeting certain eligibility requirements may receive factory training at the Cummins' factory training center. It would appear that Paragraph 8 should be rephrased to enable respondent in its advertising to note such eligibility. Accordingly, Paragraph 8 of our order will be modified to read as follows:

8. That students receive resident shop or on-the-job training unless respondents are able to establish that such training is furnished and unless respondents clearly disclose all of the terms and conditions under which the training is furnished in immediate conjunction with any such representation.

Finally, respondents note that the language contained in our order referring to "Diesel training" and "training in Diesel engine equipment" is technically incorrect since one does not "train in Diesel engine equipment." Accordingly, the prohibitory preamble of our order will be changed to read as follows:

It is ordered, That Conard E. Green and Leon A. Crouch, individually and as copartners trading under the name of Interstate Training Service, or trading under any other trade or partnership name, and their agents, representatives, and employees, directly or indirectly, through any corporate or other device, in connection with the sale, offering for sale or distribution of courses of study and instruction in the operation, maintenance, and repair of Diesel engines, gasoline engines, and heavy equipment in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

An appropriate order will issue.

Order Modifying Cease and Desist Order

By order dated August 5, 1964, the Commission having rescinded its order of July 31, 1964, denying respondents' petition to reopen this proceeding for modification of the Commission's order of December 5, 1950 [47 F.T.C. 680], and

The Commission having granted respondents' request for permission to file an Amended Petition to Set Aside Cease and Desist Order, and

The Commission having considered respondents' Amended Petition to Set Aside Cease and Desist Order filed March 15, 1965, and the answer thereto filed April 14, 1965, by the Acting Director, Bureau of Deceptive Practices, and

The Commission being of the opinion that its order to cease and desist entered in this proceeding on December 5, 1950, should in the public interest be modified,

It is ordered, That the Commission's order of December 5, 1950 [47 F.T.C. 680], be, and it hereby is, modified to read as follows:

> *It is ordered*, That Conard E. Green and Leon A. Crouch, individually and as copartners trading under the name of Interstate Training Service, or trading under any other trade or partnership name, and their agents, representatives, and employees, directly or indirectly, through any corporate or other device, in connection with the sale, offering for sale or distribution of courses of study and instruction in the operation, maintenance, and repair of Diesel engines, gasoline engines, and heavy equipment in commerce, as "commerce" is defined in the Federal Trade

Commission Act, do forthwith cease and desist from representing directly or by implication:

1. That students are selected or accepted on the basis of mechanical aptitude or upon the recommendation of respondents' representatives unless respondents are able to establish that selection is limited to persons having such aptitude or recommendation;

2. That respondents' course of training in the maintenance, repair, and operation of Diesel engines may be completed in any specified time unless respondents are able to establish either that all persons accepted pursuant to Paragraph 1 above may complete the training in the time specified or that in immediate conjunction with said representation respondent has clearly set forth the conditions or assumptions upon which said representation is based;

3. That respondents work closely with or have any other relationship with manufacturers, contractors or others in the Diesel engine field unless respondents are able to establish the existence of such relationship;

4. That students, after completion of respondents' course, are qualified to operate, service, and repair any Diesel equipment, regardless of size or kind, and are able to compile cost estimates;

5. That students are assured or guaranteed employment after completion of respondents' course;

6. That the placement, consultation, and revision services and students' supplies furnished by respondents are free;

7. That the opportunities for employment, improvement, and advancement in the field of Diesel equipment operation are unusual and unlimited for those who take respondents' course without many years of previous practical experience in that field;

8. That students receive resident shop or on-the-job training unless respondents are able to establish that such training is furnished and unless respondents clearly disclose all of the terms and conditions under which the training is furnished in immediate conjunction with any such representation;

9. That respondents' salesmen are vocational advisors or field engineers, or that they are otherwise qualified to give prospective students aptitude tests;

10. That the Western Adjustment Bureau, or any other name used by respondents, or any of them, for the purpose of collecting money due them, is a separate or indepedent organization.

It is further ordered, That Conard E. Green, Leon A. Crouch, and Jacob W. Spatz, individually or as partners, doing business under the name of the American Academy of Applied Science, or any other trade or partnership name, and their agents, representatives and employees, directly or indirectly, through any corporate or other device, in connection with the sale, offering for sale, or distribution of courses of study and instruction in fingerprinting or fingerprinting science, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That the opportunities for employment and advancement in the field of fingerprinting and crime detection are unusual and unlimited for those who take respondents' course;

2. That the demand for men trained merely in courses such as respondents' is great and the supply inadequate;

3. That many fingerprint bureaus are being enlarged and many more planned;

4. That there is a position to suit every preference in the fingerprinting field or something which will appeal to every aptitude;

5. That salaries in the fingerprinting field are considerably above the average;

6. That fingerprinting work is filled with excitement and intrigue or packed with thrills, color, or romance;

7. That students are selected by respondents on the basis of aptitude and personality, or that the training is limited to those applicants who can qualify by nature or disposition for the work;

8. That the placement service or the equipment furnished by respondents is free to those taking the course;

9. That the United States Government is in need of those who take respondents' course;

10. That respondents employ "field representatives" or "division chiefs" other than salesmen.

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to respondent Interstate Training Service, an Oregon corporation, and as to respondents Conard E. Green and Leon A. Crouch solely in their capacities as officers of said corporation.

It is further ordered, That Paragraph 8 of said complaint be, and it hereby is, dismissed as to all the respondents.

IN THE MATTER OF

THE SUPER MART TRADING AS SUPER YARN MARKETS, ETC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-899. Complaint, May 21, 1965—Decision, May 21, 1965

Consent order requiring Los Angeles, Calif., retailers of wool yarn and other wool products to cease misrepresenting the fiber content of its wool yarn by falsely labeling and advertising certain yarns as composed of 100% Mohair when such yarns contained less Mohair than represented and other woolen fibers, and failing to disclose the total fiber weight of its wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that The Super Mart, a corporation, trading as Super Yarn Markets, Super Yarn & Fabric Markets, and Super Yarn Mart, and Irving Hershey Gold, individually and as an officer of the Super Mart, hereinafter referred to as respondents, have violated the provisions of the said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Super Mart, is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, and trades as Super Yarn Markets, Super Yarn & Fabric Markets, and Super Yarn Mart. Its office and principal place of business is located at 1233 South San Pedro Street, Los Angeles, California.

Individual respondent Irving Hershey Gold, is an officer of said corporate respondent and formulates, directs and controls the acts, policies and practices of said corporation. His address is the same as that of said corporation.

Respondents are retailers of wool products and maintain thirteen (13) branch outlets in addition to the above stated principal office.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce as "commence" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain yarns stamped, tagged or labeled as containing 100% Mohair, whereas in truth and in fact, said yarns contained substantially less Mohair than represented and in addition contained a substantial amount of other woolen fibers.

PAR. 4. Certain of said wool products were further misbranded in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain yarns with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; and (3) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The respective common generic names of fibers present in wool products were not used in naming such fibers in required information, in violation of Rule 8(a) of the aforesaid Rules and Regulations.

Among such misbranded wool products, but not limited thereto, were certain yarns with labels on or affixed thereto which described a portion of the fiber content as "Orlon" without using the common generic name of said fiber, "acrylic."

(b) The term "mohair" was used in lieu of the word "wool" in setting forth the required fiber content information on labels affixed to wool products when certain of the fibers so described were not entitled to such designation, in violation of Rule 19 of the aforesaid Rules and Regulations.

PAR. 6. The acts and practices of the respondents as set forth above were in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of textile products to the general public. In the course and conduct of their business respondents now cause and have caused their said textile products to be offered for sale in issues of the Los Angeles Times, a newspaper published in the city of Los Angeles, State of California and distributed in interstate commerce, which advertisements are intended to induce the sale of said yarn, and have maintained a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. Among and typical of the statements and representations contained in the aforesaid newspaper advertisements, but not all inclusive thereof, is the following:

100% Italian Mohair Yarn.

PAR. 9. By and through the use of the aforesaid statements and representations of respondents, respondents represented directly or by implication, that the aforesaid yarn was composed of 100% Mohair, whereas in truth and in fact the yarn contained fibers other than Mohair fibers.

Therefore, the statements and representations as set forth in Paragraphs Seven and Eight, were and are false, misleading and deceptive.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Decision and Order

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent The Super Mart is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, and trades as Super Yarn Markets, Super Yarn & Fabric Markets, and Super Yarn Mart, with its office and principal place of business located at 1233 South San Pedro Street, Los Angeles, California.

Respondent Irving Hershey Gold is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents The Super Mart, a corporation, trading as Super Yarn Markets, Super Yarn & Fabric Markets, and Super Yarn Mart, or under any other trade name or names, and its officers and Irving Hershey Gold, individually and as an officer of The Super Mart, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing into commerce, or offering for sale, selling, transporting, distributing or delivering for shipment in commerce, wool yarn or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939:

1. Which are falsely or deceptively stamped, tagged, labeled or otherwise identified as to the character or amount of the constituent fibers contained therein.

2. Unless such product has securely affixed thereto or placed thereon a stamp, tag, label or other means of identification;

(a) Correctly showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

(b) Setting forth the common generic name of fibers in the required information on labels, tags or other means of identification attached to wool products.

3. Which has affixed thereto a label which uses the term "mohair" in lieu of the word "wool" in setting forth the required information on labels affixed to wool products unless the fibers described as mohair are entitled to such designation and are present in at least the amount stated.

It is further ordered, That respondents The Super Mart, a corporation, trading as Super Yarn Markets, Super Yarn & Fabric Markets, and Super Yarn Mart, or under any other trade name or names, and its officers, and Irving Hershey Gold, individually and as an officer of The Super Mart, and respondents' representatives, agents and employees directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of yarn or any other textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in yarn or any other textile products in advertisements applicable thereto or in any other manner.

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

IN THE MATTER OF

WHITEHILL SYSTEMS, INC., ET AL.

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

Docket C-900. Complaint, May 26, 1965—Decision, May 26, 1965

Consent order requiring New York City sellers of business record keeping systems and tax services for small businesses through franchised distributors, to cease misrepresenting in advertisements in newspapers and in brochures, to induce the purchase of distributorships, the earnings and profits, permanency of ownerships, recovery of initial investment, training expenses, and the nature of business opportunity being offered.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Whitehill Systems, Inc., a corporation, and Louis Weisberg, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Whitehill Systems, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 71 Fifth Avenue, New York 3, New York.

Respondent Louis Weisberg is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution through franchised distributors, of a bookkeeping system and tax service for small businesses. The record keeping system consists of a loose leaf binder called "Whitehill Taxkeeping Systems" which contains forms and instructions for keeping records of the business. The tax service undertakes to furnish purchasers with income tax bulletins, answers their inquiries regarding income taxes and, upon request, prepares the purchaser's income tax return at the end of the year from a summary of figures furnished by him. The bookkeeping system and tax service is for a two-year period and sells for $119.50.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products and services, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products and services in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business, at all times mentioned herein, respondents have been and are in substantial competition in commerce with corporations, firms and individuals in the sale of products and services of the same general kind and nature as those sold by respondents.

PAR. 5. In the furtherance of the sale of their products and services, respondents grant to distributors the exclusive right to sell such products and services in an exclusive territory for an initial term of two years in consideration of the purchase by distributors, covering the first year, of an inventory consisting of said bookkeeping systems and various supplies for the amount of $7500, and the purchase each year thereafter of at least 25 Taxkeeping Systems during each calendar quarter. The agreement states that it shall be automatically extended for two year terms provided after the initial period the undertakings assumed by the distributor are faithfully performed. For the purpose of inducing the purchase of said distributorships, respondents have made various statements in advertisements in newspapers of national circulation and in brochures respecting prospective earnings from said distributorships, the permanency of ownership of said distributorships and the association with respondents, the recovery of the initial investment, the training of the distributor at the respondents' expense, and the nature of the opportunity being offered.

Typical, but not all inclusive, of such statements and representations are the following:

> Here's what a Whitehill franchise could mean * * * [See attached "Schedule of Cost and Potential Profit"]
> Figure it out for yourself any way you want to!
> No matter how you figure, this is a sound, highly profitable business.
> * * * investment * * * secured by inventory
> * * * investment * * * guaranteed by inventory
> * * * a lifetime of security * * *.
> * * * for a man who wants a lifetime business of his own
> We train you * * * at our own expense

Schedule of cost and potential profit

	Cost to distributor	Cost to dealer	Cost to user
Whitehill taxkeeping system	$44. 50	$59. 50	$99. 50
The following will give you some idea of the potential income with dealers including yourself:			
Just covering the territory by yourself and making an average of 4 sales per week, at a profit of $55.00 per sale (weekly total)		220. 00	
Yearly total			11, 440. 00
1 Subdistributor (your salesman or dealer), making 3 sales per week, at your override of $15.00 each		45. 00	
Plus your personal sales of 4 sales per week, at a profit of $55.00 per sale		220. 00	
Weekly total		265. 00	
Yearly total			13, 780. 00
2 Subdistributors (your salesmen or dealers), each making 3 sales per week, or a total of 6 sales per week at your override of $15.00 each		90. 00	
Plus your personal sales of 4 sales per week, at a profit of $55.00 per sale		220. 00	
Weekly total		310. 00	
Yearly total			16, 120. 00

ON YOUR OWN BUT NOT ALONE!

Would you like to reap the benefits of self-employment? Do you want a business of your own—with the backing of a 20-year established National company? Complete N.Y. home office and field training provided, if you qualify.

$7500 investment required provides inventory requiring $12,000 plus COMPANY FINANCING AVAILABLE. You will own a business which has been endorsed by thousands of small businessmen and featured in trade journals throughout the country. Scores of men, with little or no experience in our field—Business Management Controls—have achieved success. Investment usually recovered in less than a year plus a substantial profit. No royalty fees. For complete information write today, including brief resume, phone number, and territory preference.

Box 000, Wall Street Journal, 44 Broad St., New York 4, N.Y.

PAR. 6. Through the use of the aforesaid statements and representations set out in Paragraph Five, above, respondents have represented directly or by implication:

1. That distributors generally realize annual net profits solely from the sale of respondents' record keeping system of from $11,000

to $12,000, if working alone, or of from $13,000 to $14,000, if they employ the services of one sub-distributor or of from $16,000 to $17,000 if they employ the services of two sub-distributors and that all prospective franchise purchasers could expect to realize equally high net profits.

2. That the majority of distributors develop businesses which require the employment of one or more sub-distributors and that a majority of prospective distributors could expect to develop businesses of such size as to require the employment of one or more sub-distributors.

3. That distributors generally will be able to recover their investment in less than one year and in addition thereto make a substantial profit.

4. That the initial investment of distributors is secured or guaranteed by the inventory.

5. That distributors acquire a permanent, lifetime business.

6. That distributors are trained wholly at respondents' expense.

7. That respondents are affording the opportunity of investing in and managing a business engaged primarily in the installation of business record systems.

PAR. 7. In truth and in fact:

1. Distributors do not generally realize annual net profits solely from the sale of respondents' record keeping system of from $11,000 to $12,000, if working alone, or of from $13,000 to $14,000 if they employ the services of one sub-distributor or of from $16,000 to $17,000, if they employ two sub-distributors and prospective distributors could not expect to realize equally high net profits.

2. The majority of distributors do not develop businesses which require the employment of one or more sub-distributors nor could the majority of prospective distributors expect to develop businesses of such size as to require the employment of one or more sub-distributors.

3. Distributors will rarely, if ever, be able to recover their investment in less than one year and in addition thereto make a substantial profit.

4. The initial investment of distributors is not secured or guaranteed by the inventory. Distributors who discontinue the business can liquidate their inventory only at a fraction of the original investment.

5. Distributors do not acquire a permanent lifetime business. The continuance of such business is dependent upon the distributor's conformance with the terms and conditions of the franchise agreement.

6. Distributors are not trained wholly at respondents' expense. Part of the distributor's initial investment is used for training costs.

7. Respondents are not affording the opportunity of investing in and managing a business engaged primarily in the installation of business record systems. Such business opportunity as may be afforded is exclusively that of direct selling of a bookkeeping system to small businesses.

Therefore the statements and representations referred to in Paragraphs Five and Six hereof were and are false, misleading and deceptive.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent Whitehill Systems, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 71 Fifth Avenue, in the city of New York, State of New York.

Respondent Louis Weisberg, is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Whitehill Systems, Inc., a corporation, and its officers, and Louis Weisberg, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of business record keeping systems and tax services or any other products or services in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, that distributors or prospective distributors of respondents' bookkeeping system generally realize or may expect to realize annual net profit solely from the sale of said systems of from $11,000 to $12,000 if working alone, or of from $13,000 to $14,000 if they employ one sub-distributor, or of from $16,000 to $17,000 if they employ two sub-distributors, or that distributors or prospective distributors realize or may expect to realize net profits from the sale of said systems in excess of the profit for a given period realized by a majority of respondents' distributors.

2. Misrepresenting in any manner the profits or other benefits which are realized by respondents' distributors or which may be expected to be realized by prospective distributors.

3. Representing, directly or indirectly, that the majority of distributors or prospective distributors develop, or may expect to develop, businesses which require the employment of one or more sub-distributors.

4. Representing, directly or indirectly, that distributors will be able to recover their investment and in addition earn a substan-

tial profit in less than one year; or misrepresenting in any manner the time within which distributors will be able to recover their investment or earn a substantial profit.

5. Representing, directly or indirectly, that the distributor's initial investment is secured or guaranteed by inventory; or representing in any other manner that there is no risk or loss of the distributor's investment.

6. Using the words permanent, lifetime, or any other words of similar import or meaning in reference to the business to be acquired by distributors without clearly and conspicuously revealing in immediate connection therewith that the continuation of the business is dependent upon conformance with the franchise agreement entered into by and between respondents and the distributor.

7. Representing, directly or indirectly, that distributors are trained wholly at respondents' expense or misrepresenting in any manner the amount or kind of contribution made by respondents to the training of distributors.

8. Representing, directly or indirectly, that the business opportunity afforded by respondents is that of investing in and managing a business engaged primarily in the installation of business record systems; or misrepresenting in any manner the type of business for which franchises are being offered.

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

IN THE MATTER OF

FRUEHAUF TRAILER COMPANY

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 6608. Complaint, Aug. 17, 1956—Decision, May 28, 1965***

Order requiring the Nation's dominate manufacturer of truck trailers located in Detroit, Mich., to divest itself within a period of one year of two major competitors which it acquired: (1) Hobbs Manufacturing Co., Fort Worth, Texas, and Hobbs Trailer and Equipment Co., Dallas, Texas, acquired November 1, 1955, and (2) The Strick Co., Philadelphia, Pa., and Strick

*Reported as amended by order of Hearing Examiner dated Aug. 22, 1958, by adding subparagraph No. (6) to Paragraph Five of Count I, which paragraph is also incorporated by reference in Count II.

**Petition for reconsideration denied, July 15, 1965.

Plastic Corp., Perkasie, Pa., acquired January 1, 1956, and requiring the two acquired firms be recreated as effective competitors in the truck-trailer industry.

Complaint

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18) and the provisions of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45) and it appearing to the Commission that a proceeding by it in respect thereof would be to the interest of the public, hereby issues its complaint pursuant to its authority thereunder and charging as follows:

COUNT I

PARAGRAPH 1. Respondent Fruehauf Trailer Company (hereinafter referred to as Fruehauf) is a corporation organized and existing under the laws of the State of Michigan, with principal office located at 10940 Harper Avenue, Detroit 32, Michigan. Fruehauf is now and at all times relevant herein has been engaged in the manufacture, sale and distribution of truck-trailers, truck bodies, accessories and service parts in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

Fruehauf, prior to and following the acquisitions hereinafter set forth, was and is the world's largest and the Nation's dominant truck-trailer manufacturing, sales and service organization. Fruehauf produces, services and sells, numerous different types of truck-trailers of various body and chassis designs and varying load capacities, including van, refrigeration, platform, tank, cable dump and heavy-duty flat deck or carryall trailers. Van-type trailers produced include lines of stainless steel and aluminum construction, as well as the standard steel models.

In addition to foreign plant and branch operations and in conjunction with its principal manufacturing facilities widely located within the United States, Fruehauf maintains factory sales and service branches in some 70 different cities. In addition to these Fruehauf factory sales and service branches, there are some 30 or more distributors selling and servicing Fruehauf's products in various cities throughout the United States. All the sales and service branches of the Fruehauf Trailer Company are equipped to service truck-trailers produced by Fruehauf as well as other manufacturers.

The Fruehauf Trailer Company in 1955 had commercial sales (not including $11,491,119 in government sales and $1,277,605 so-called rent received on trailer leases to customers) of $223,120,789. In 1955 the volume of sales made through Fruehauf branches in the United States of service parts, accessories and service labor alone amounted to approximately $29,000,000.

PAR. 2. The nation's truck-trailer manufacturing industry comprises some 100 odd in number of different manufacturers variously located throughout the United States. With but few exceptions all are comparatively small business concerns of limited capital and credit responsibility, manufacturing and selling their various products on a more or less localized or limited regional basis. Few, if any, manufacture, sell and distribute a full line of the various vehicle types and material constructions made by Fruehauf, and many are able to produce and sell only a small counterpart of the complete Fruehauf line sold, distributed, serviced and financed by Fruehauf on a national basis. The great majority by number of these small manufacturers have been and are now able to account for only a minor percentage of the total annual sales of new truck-trailers by the industry, which for 1955 amounted to $371,413,000.

New truck-trailers are customarily sold by the industry on a 3 to 5 year time-payment basis and used truck-trailers on a lesser basis, with substantial down payments required from the purchaser. The down payment may take the form of cash, the trade-in of a used vehicle, or be otherwise secured usually by the purchaser's ownership in other trailers. Numerous purchasers of trailer equipment are trucking firms or corporations operating fleets of such trailers and an equipment turnover or fleet expansion will in many instances concern transactions involving many thousands of dollars.

The substantial majority of the industry's truck-trailer sales will require these as well as other purchasers of such vehicles to seek financial aid in the transactions. The purchasers may attempt to deal directly with local banking or other lending institutions solely on their own credit responsibility, or may require the vehicle manufacturer or distributor to provide or arrange for the financing necessary to the proposed sales transactions. In these latter situations the amount involved and the extent of the credit responsibility to be allowed the particular vehicle manufacturer or distributor concerned, directly or on a recourse basis, will often determine the bank or lending institution's decision as to the financing of the proposed transactions.

PAR. 3. A matter of major importance to most purchasers of truck-trailers and in many instances governing the purchaser's choice of the competitive vehicle manufacturer or distributor selected, are the financing terms of the proposed sales transactions. Exemplification of this is found in an appreciable segment of the market among others for the industry's sale of truck-trailers, occupied by purchasers engaged in the class 1 motor carrier inter-city transportation of freight. The substantial industry sales made in this particular segment of the market primarily involve van-type trailers. During 1955 the industry sales of new van-type truck-trailers made of steel or aluminum totalled $249,359,000.

Van-type trailers made of aluminum, as opposed to steel, are being increasingly used, partly because State highway laws establishing maximum road-weight allowances place a premium on lighter weight trailers which can carry greater pay-loads within the weight limitations. New aluminum vehicle designs in the industry of increased cubic capacity have also, in company with fleet expansions, tended to accelerate the turnover by the motor carrier of the more or less obsolete older equipment and the purchase of this new equipment. In 1954 the total industry sales of new aluminum van-type truck-trailers amounted to $87,859,000 and by year end 1955 they reached a total of $172,672,000.

The competitive terms of sale and financing extended or able to be provided for by the different manufacturers and distributors in the industry of such trailers with relation to different interest rates, the appraisal values accorded used trade-in trailers, the lesser amounts of down payment required, if any, and the longer length of the loan periods offered, will often dictate the motor carrier's choice of a particular seller or distributor and especially so, under circumstances wherein the motor carrier is in financial difficulties or where its available working capital and banking credit is limited, or otherwise involved or additionally needed for further equipment expansion, terminal improvements or acquisitions, or related purposes.

PAR. 4. The Fruehauf Trailer Company uses its wholly owned corporate subsidiary, the Fruehauf Trailer Finance Company, as both a controlled financing outlet and a major sales aid in the obtaining and holding of customers. Fruehauf has the further advantage of receiving payments for its trailers when its customers' installment notes are sold to its Finance Company without recourse, of having no legal liability thereafter, contingent or otherwise, for collection of the installment notes. The Fruehauf Trailer Company is accordingly not subject to a limitation on its credit responsibility on such basis, as would normally be a competitor trailer manufacturer or its distributor seeking the financing aid of a banking or lending institution with any such contingent debt liabilities outstanding.

The Fruehauf Trailer Finance Company in turn can borrow all necessary monies at commercial banking rates and charge Fruehauf customers competitive retail finance rates, or higher or lower finance rates than the prevailing competitive rates as deemed expedient. Fruehauf nationally advertises to the trade that it has and can make available what is termed the Fruehauf exclusive 7-year finance plan. Approximately 60% of all Fruehauf commercial truck-trailer sales are made on time payment contracts under which the buyer payments are secured by retention of title under conditional sale, lease with option to purchase, or by chattel mortgage. The Fruehauf Trailer Company in 1954 sold $67,576,372 in equipment installment notes to the Fruehauf Trailer Finance Company as compared to $128,176,144 in 1955, an 89.68% increase by Fruehauf in the time financing of sales.

The Fruehauf Trailer Finance Company at year-end 1955 had $162,817,347 installment equipment notes outstanding, $75,277,864 installment equipment notes liquidated, and finance revenue earned during 1955 in the amount of $8,371,589. Said finance company during 1955 paid the parent trailer company dividends and interest in the sum of $1,600,000. In early 1956 the Fruehauf Trailer Finance Company was enabled to negotiate with various financial sources and secure further credit accommodations in the aggregate amount of $235,000,000.

PAR. 5. Fruehauf Trailer Company, acting in commerce as aforedescribed, has been and is now engaged in a pattern of acquisitions of the stock, assets and facilities of other corporations also acting in such commerce and engaged in or in supplying the Nation's truck-trailer manufacturing industry, the effect of which acquisitions, singly or cumulatively by Fruehauf, may be to substantially lessen competition or tend to create a monopoly in the whole or in appreciable parts of the said industry, in the line or lines of commerce in which the said corporations and Fruehauf were and are engaged.

Among other of such corporate acquisitions by Fruehauf are the following:

(1) Carter Manufacturing Company, Inc., and Carter, Inc., Memphis, Tennessee, acquired during 1947. Carter produced an aluminum van-type truck-trailer not at that time included in the Fruehauf line.

(2) Brown Equipment & Manufacturing Company, Westfield, Mass., an eastern producer of aluminum van-type truck-trailers acquired during 1953.

(3) Hobbs Manufacturing Company, Fort Worth, Texas, and Hobbs Trailer and Equipment Company, Dallas, Texas, acquired in October 1955. Hobbs produced various type truck-trailers including aluminum van-type truck-trailers and a patented dump-truck trailer used in highway construction.

(4) Strick Plastic Corporation, Perkasie, Pennsylvania, and Strick Corporation, Philadelphia, Pennsylvania, acquired in January 1956. Strick, the third largest manufacturer in total amount of annual sales in the Nation's truck-trailer industry, specialized in the production of aluminum van-type truck-trailers sold and distributed on a national basis. Strick was acquired in exchange for 228,028 shares of Fruehauf common stock valued at $10,831,330, which was admittedly $2,000,000 in excess of the fair value of the net assets of Strick (other than goodwill) acquired by Fruehauf.

(5) Independent Metal Products Co., Omaha, Nebr., acquired for $2,780,500 of Fruehauf common stock in April 1956. Assets acquired included a tank-trailer manufacturing plant, machinery, a two-story office building, and a 15-acre site. Independent was a former supplier to Fruehauf of tank shells for mounting on a Fruehauf chassis which then became Fruehauf tank-trailers.

(6) The truck-trailer manufacturing facilities and other assets of the Hyde Corporation located at Cleburne, Texas. This acquisition by Fruehauf Trailer Company occurred on or about May 23, 1958, notwithstanding the pendency of this proceeding.*

PAR. 6. Fruehauf Trailer Company and its Carter, Brown, Hobbs and Strick facilities acquired as aforedescribed, sold $181,053,942 of the industry total of $371,413,000 or 48.75% of the national market for new truck-trailers, based on Bureau of Census, United States Department of Commerce total figures for the year 1955. Comparative data on used truck-trailer sales is not available.

Fruehauf Trailer Company (including Carter) but exclusive of the sales by the other said acquired facilities, sold $138,845,919 of the industry total of $371,413,000 or 37.38% of the said market. The combined Brown, Hobbs and Strick facilities (separate Carter data not available) sold $42,208,023 of the remaining balance of the industry sales of $232,567,081 or 18.15% of the remaining market.

Fruehauf Trailer Company thus increased its share of the national market for new truck-trailer sales from 37.38% to 48.75%, or 11.37%

*Added by amendment of Hearing Examiner's order of August 22, 1958.

as a result of said acquisitions, and thereby also eliminated from the former remaining balance of the seller market, 18.15% of actual and potential competitors' sales. In so doing it thereby also foreclosed to former and potential purchasers from Carter, Brown, Hobbs and Strick, the opportunity of purchasing comparable truck-trailers from said supply sources on a competitive sales basis with those offered for sale by Fruehauf.

Fruehauf Trailer Company and the acquired Brown and Strick facilities (Hobbs sales data not available) in appreciable parts of the industry market, for example, that of the sale of new aluminum constructed van-type insulated, refrigerated, closed (excluding furniture vans), and open top truck-trailers, sold $87,554,456 of the industry total of $171,788,000, or 50.97% of the industry market for 1955.

Fruehauf Trailer Company (including Carter) but exclusive of the sales by the other said acquired facilities, sold $52,355,352 of the industry total of $171,788,000, or 30.48% of the said market. The combined Brown and Strick facilities sold $35,199,104 of the remaining balance of the industry sales of $119,432,648, or 29.47% of the remaining market (not including Hobbs sales).

Fruehauf Trailer Company to such extent increased its share of the total in this appreciable part of the market for new aluminum truck-trailers from 30.48% to 50.97%, or 20.49% as a result of said acquisitions, and thereby also eliminated from the former remaining balance of this particular market, 29.47% of actual and potential competitors' sales of such trailers.

Fruehauf Trailer Company during 1955 sold $2,365,400 of the industry total of $8,757,000, or 27.01% of the industry sales of dump-trailers. The acquired Hobbs facilities sold $1,714,859, or 19.58% of the said industry total. Fruehauf thus increased its market share on this particular item from 27.01% to 46.59% or an increase of 19.58%. In so doing it eliminated $1,714,859 from the former remaining balance of this market of $6,391,600, or 26.83% of actual and potential competitors' sales of such trailers.

PAR. 7. The foregoing acquisitions, acts and practices of respondent, as hereinbefore alleged and set forth, constitute a violation of Section 7 of the Clayton Act (15 U.S.C., Sec. 18).

COUNT II

PAR. 1. Paragraphs One through Six of Count I of this complaint are herewith incorporated by reference and made part of this paragraph of Count II of the complaint as if herein set forth in full text.

PAR. 2. The single or the cumulative acquisitions of the stock, assets or facilities of other corporations so engaged in or in supplying the Nation's truck-trailer manufacturing industry, by Fruehauf Trailer Company, the largest and the dominant manufacturing, sales and service organization engaged in said industry, have been and may be as set forth in Paragraph One above, to the prejudice and injury of the public, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, and any future similar acquisitions by the Fruehauf Trailer Company will further increase its dominant and monopolistic position in the said industry.

PAR. 3. Fruehauf Trailer Company, the largest and the dominant seller in the Nation's truck-trailer manufacturing industry, acting in conjunction with its wholly owned and controlled Fruehauf Trailer Finance Company as hereinbefore and hereinafter described, has been and is now able to exercise a potential monopoly power both to frustrate the sales growth of its small business competitors in the industry and to eliminate their opportunities for business survival.

Fruehauf in the offering for sale and the sale of new and used truck-trailers and related products to the trade, has been and is now employing certain pricing, financing, down payment, leasing and used vehicle purchasing and trade-in methods and practices, including loans or loan commitments to its own and its competitors' actual or potential customers, which have had and now have the capacity, tendency and effect of unduly hindering and lessening competition and unfairly diverting trade to Fruehauf from its competitors, and of creating a monopoly in Fruehauf.

The Fruehauf Trailer Company during 1955 had assets of $188,657,414, working capital of $52,091,782, and net earnings of $8,658,045. It was able to carry and had in inventory $22,658,569 in new trailers, $5,891,595 in used trailers, and $7,603,552 in service parts. It had outstanding $4,915,102 in trailers leased to customers for 1955 as compared to $1,151,146 for 1954. Commercial sales increased from $127,114,324 in 1954 to $223,120,789 in 1955, or 75.53%.

Fruehauf's total assets rose from $118,859,082 in 1954 to $188,657,414 in 1955. At the end of the first quarter, March 31, 1956, they had reached $253,555,800. This represents an increase from December 31, 1954, to March 31, 1956, of 113.32% in total assets. The Fruehauf Trailer Company in 1954 sold $67,576,372 in equipment installment notes to the Fruehauf Trailer Finance Company as compared to

$128,176,144 in 1955, an 89.68% increase in the time financing of sales.

Fruehauf acting in conjunction with the Fruehauf Trailer Finance Company has offered to finance and has financed, the sale of truck-trailers on terms which Fruehauf competitors with more limited resources have been unable to meet, and as a result said competitors have lost potential sales of such vehicles in substantial dollar amounts to Fruehauf. The Fruehauf so-called exclusive 7-year finance plan, for example, is a more advantageous longer-than-normal loan period which Fruehauf's small businessmen competitors are unable to obtain or furnish to prospective customers. This plan will permit Fruehauf customers to pay for Fruehauf equipment as it depreciates and its earnings while working can exceed the cost of the borrowings. Trucking concerns have thus been led to purchase additional Fruehauf equipment in the expectation of increased revenues as a result.

Illustrative of some of the sales, loan and financing methods and practices used by Fruehauf against its competitors, for example, is that in connection with the 1954 reorganization and combination of a group of freight trucking companies, Fruehauf proceeded to guarantee bank loans of $1,100,000 and hold notes of $498,974 subordinate to the bank loans, and nonvoting 5% preferred stock of $500,000. The reorganized company as a result of Fruehauf loan assistance became indebted to Fruehauf Trailer Finance Company on installment equipment notes for the purchase of new trailers from Fruehauf in the approximate amount of $4,775,000.

Fruehauf further entered into an arrangement with another buyer during 1954–55, which provided that Fruehauf would purchase 917 used trailer units at a mutually agreed upon appraisal value of $3,060,000 and in turn would sell the buyer 1,300 new trailer units at a negotiated sales price of $7,532,682. The arrangement provided for a chattel mortgage on the new equipment, a 7-year finance plan, and a down payment by the buyer of 20% or $1,506,536. It was also then provided that the buyer would execute a bill of sale to Fruehauf covering the 1,300 sets of tires on the new vehicles and that the tires in turn would be included in the chattel mortgage and their $1,012,700 value credited towards the buyer's 20% down payment.

The net effect of this arrangement was to furnish the buyer $8,545,382 in new equipment on a 7-year financing plan, with a down payment of but 5.78%, or only $493,836. Further, this down payment of $493,836 in comparison with the $3,060,000 agreed upon purchase price by Fruehauf for the buyer's old equipment, would leave a cash difference of $2,566,164 advanced for the buyer's use.

For another example among others, Fruehauf in late 1955 arranged to purchase 47 used trailers for the agreed upon lump sum appraisal of $127,176.13 and in turn sell the buyer 42 new units for $316,761.32 on a five-year finance plan with a 10% down payment of $31,676.13. The buyer in this transaction could not obtain other than a three-year finance plan from local lending institutions. The sum of $127,176.13 advanced the buyer by Fruehauf on the used trade-in equipment, allowed the buyer to pay off an indebtedness owed on such equipment of approximately $63,000, make the down payment of $31,676.13 to Fruehauf on the new equipment, and still left the buyer with a cash balance sufficient to pay Fruehauf the first six monthly payments of some $32,000 principal and financing charges due on the new equipment.

Fruehauf, in addition to such financing, is also entering into new trailer "leases" as well as extending preferential and more advantageous than normal pricing to some purchasers of its truck trailers to secure and hold their patronage as against its seller competitors. For an example among others, Fruehauf entered into an arrangement during 1953 with a buyer which provided for the purchase from Fruehauf by such buyer of 600 trailers at a specially negotiated sales price of $2,681,611.68 accompanied by an agreement that the buyer would further purchase from Fruehauf at least 80% of its equipment requirements for the ensuing ten-year period, upon condition that Fruehauf would also furnish preferential and specially adjusted factory prices to the buyer on such equipment. Fruehauf also entered into lease arrangements with this buyer which provided that at the end of the so-called rental period, the buyer could exercise the option of purchasing the vehicles for a mere $1 each.

PAR. 4. The Fruehauf Trailer Company's aforedescribed acts and practices as the dominant seller in the nation's truck-trailer manufacturing industry, involving certain truck-trailer pricing, financing, down payment, leasing, and used vehicle purchasing and trade-in methods and practices, employed by it in the offering for sale and the sale of said products to the trade, including its loans or loan commitments to its own and its competitors' actual or potential customers, have been and may be to the prejudice and injury of the public, have the capacity and a dangerous tendency to create a monopoly in respondent, unduly hinder and lessen competition and unfairly divert trade to respondent from its competitors, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 5. The foregoing acquisitions, acts and practices of respondent, as hereinbefore alleged and set forth, constitute a violation of Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45).

Mr. Thomas A. Muntsinger, *Mr. Charles R. Levin* and *Mr. Hugh J. Kelly* for the Commission.

Davies, Richberg, Tydings, Landa & Duff by *Mr. Alfons Landa*, *Mr. James T. Welch*, and *Mr. Shelby Fitze* of Washington, D. C. and *Mr. Ernest L. Rushmer* of Detroit, Mich., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

DECEMBER 20, 1963

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PRELIMINARY STATEMENT

On August 17, 1956, the Federal Trade Commission issued its complaint against Fruehauf Trailer Company, a corporation (hereinafter called Fruehauf), charging Fruehauf with a violation of Section 7 of the Clayton Act, as amended (hereinafter called the Clayton Act), 15 U.S.C. 12, *et seq.*, by reason of five alleged acquisitions, and a violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.*, by reason of said acquisitions and certain alleged financing and competitive practices. Copies of said complaint together with a notice of hearing were duly served on Fruehauf.

Fruehauf appeared by counsel and filed answer admitting the corporate and commerce allegations of the complaint and certain other factual allegations therein, including the acquisitions, but denying all of the alleged violations. The complaint was modified by means of a bill of particulars filed before answer, and was subsequently amended by the addition of another alleged acquisition by Fruehauf in 1958, with appropriate amendment of the answer.

At the conclusion of the case-in-chief, counsel for Fruehauf moved to dismiss the complaint for want of proof and legal insufficiency. After the submission of briefs pro and con, said motion was denied, with the exception of the first acquisition alleged to be in violation of Section 7, which counsel supporting the complaint conceded was not because it was an assets acquisition occurring prior to the 1950 amendment of Section 7. Thereafter the defense and rebuttal were heard. Hearings were held at various times and places throughout the United States, concluding on May 21, 1962.

Both parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, and to file proposed findings of fact, conclusions of law and orders, together with reasons in support thereof. Both parties filed proposed findings of fact, conclusions of law and orders, together with reasons in support thereof and replies thereto.[1]

In conjunction with such proposals, counsel supporting the complaint attached thereto certain appendices, described by them as "exhibits," which consisted of tabulations based upon certain documentary evidence in the record, some of which appendices they submitted *in camera* because certain portions of the documents relied upon had been received *in camera*. Counsel supporting the complaint moved that the tabulations submitted *in camera*, namely, A, B, C, D, F and P, be received in the open record because the *in camera* information incorporated in them was both of a minor nature and not of the type which was the basis for the reception *in camera* of the exhibits, and because of the present age of such information. This motion was opposed by counsel for respondent. This motion is granted with respect to Tabulations A, B, C, D and F, which are tabulations of various trailer shipments and sales for the year 1955, by type and manufacturer, and include minor items of such *in camera* information.

With respect to Tabulation P, which concerns Fruehauf's annual dollar sales of trailers by class of customer for the years 1953 through 1959, no proposed findings were offered in connection therewith, no particular relevancy is apparent (said tabulation as well as several others, such as N, O and Q, apparently relate primarily to Count II, concerning which no proposals were made by counsel supporting the complaint), and all of Fruehauf's total shipments both in units and dollars are contained in the record in open exhibits, *related to uni-*

[1] Counsel supporting the complaint filed proposals which did not include any proposed findings or conclusions upon several of the most substantial issues. For example, they filed no proposals with respect to two of the alleged acquisitions, none with respect to the effect of the largest acquisition (Strick), and none with respect to any of the allegations of Count II, which dealt with unfair methods of competition under Section 5, nor any proposed order. As stated by counsel supporting the complaint in their proposals: "A number of major segments of the proposals, unfinished at the time of this submission, regretfully are absent from the pages that follow. Many portions of what is herewith submitted are unavoidably abbreviated or incomplete."

verse figures also in the record from the Bureau of Census, encompassing the years 1953 through 1961,[2] and considered hereinafter. Accordingly, the motion with respect to the tabulation entitled Exhibit P is denied. All the findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.[3]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. Corporate Organization

Fruehauf is a corporation organized and existing under and by virtue of the laws of the State of Michigan, with its principal office located at 10940 Harper Avenue, Detroit 32, Michigan. (Answer.)

II. Interstate Commerce and Competition

Fruehauf is now and at all times relevant herein has been engaged in the manufacture, sale, installment sales financing, distribution, servicing and repairing of truck-trailers, truck-trailer chassis, truck bodies, and service parts and accessories, and the leasing of truck-trailers, in commerce, as "commerce" is defined in the Act and in the Clayton Act. (Answer.)

Fruehauf, prior to and following the acquisitions involved in this proceeding, was and is the world's largest truck-trailer manufacturing, sales and service organization, having a world-wide network of manufacturing, sales, and service facilities, producing, selling, leasing, financing the sale of, and servicing a wide variety of truck-trailer types having various body and chassis designs and capacities, including steel and aluminum vans, and platform, tank, and dump trailers. (Answer.)

In 1953, Fruehauf had 8 manufacturing plants in the United States and one in Canada, together with 71 factory sales and service branches in the United States and six in Canada (CX 489 and 490).

In 1961, Fruehauf had 16 manufacturing plants and 82 factory branches in the United States, as well as 10 distributors and 76 dealers in strategic locations (CX 493, p. 26; CX 494, p. 25). Respond-

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[2] RX 336, 337 and 339, and CX 473, 474, 465–69, 525–27. The following abbreviations are used throughout this decision: Tr. (transcript); CX (Commission exhibit); RX (Respondent exhibit); C. Tab (Commission tabulation); R. Tab (Respondent tabulation).

[3] The record herein consists of 8,000 pages of transcript and more than 900 exhibits consisting of many thousands of pages. The proposed findings of fact of respondent alone contain 904 separate proposals.

ent's factory branches are fully equipped production units (CX 484, 487, and 489), situated on strategic commercial transportation routes and in cities that serve as important transportation centers. They contribute to Fruehauf's volume in the production of new trailers, in the reconditioning for sale of used trailers, and in promoting new trailer sales (CX 1, pp. 5–6; CX 402, pp. 6–7; CX 489, p. 17; CX 490, p. 36; CX 491, p. 6; CX 494, p. 9). In 1955 their sales in the United States of service parts, accessories and labor alone amounted to approximately $29,000,000 (Answer).

In 1955 Fruehauf's total commercial sales (excluding Government and leases) of all products and service amounted to $223,120,789. Fruehauf sells most of its installment sale or financing paper, generally known as customer paper, to Fruehauf Trailer Finance Company, a wholly owned corporate subsidiary, organized for such purpose (Answer).

III. The Unlawful Practices

A. The Issues

Count I of the complaint, as amended, alleges six acquisitions, five of competitors (horizontal) and one of a supplier (vertical), all of which as hereinafter found were asset rather than stock acquisitions.

Count II of the complaint, as amended, alleges that the aforesaid acquisitions, singly or cumulatively, violate Section 5 of the Act, both as a violation of Section 7 of the Clayton Act and independently thereof, and further alleges that Fruehauf engaged in unfair methods of competition in violation of Section 5 by certain pricing, financing, down payment, leasing, used vehicle purchasing and trade-in, and lending practices in connection with its sale of truck-trailers and related products.

B. Relevant Considerations

The Supreme Court has established that a necessary predicate to a determination of a violation under Section 7 is the ascertainment of the relevant product market (line of commerce) and the relevant geographic market (section of the country), in order to evaluate the probable effect of the acquisition within the area of effective competition.[4] For example, in *Brown Shoe*,[5] the Court held:

> * * * The "area of effective competition" must be determined by reference to a product market (the "line of commerce") and a geographic market (the "section of the country").

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[4] *United States* v. *du Pont* (General Motors), 353 U.S. 586 (1957); *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962); and *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963). See also, *Standard Oil Co.* v. *United States* (*Standard Stations*), 337 U.S. 293 (1949), and *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320 (1961).

[5] Footnote 4, *supra.*

1. Line of Commerce

The Supreme Court has delineated the requisite tests to determine the relevant line of commerce. In the *du Pont* (*General Motors*) case[6] the Court stated:

* * * Substantiality can be determined only in terms of the market affected. The record shows that automobile finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a "line of commerce" within the meaning of the Clayton Act.

In *Tampa Electric*,[7] the Court held:

* * * *First*, the line of commerce, *i.e.*, the type of goods, wares, or merchandise, etc., involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case. * * *

Following these pronouncements, the Court in *Brown Shoe*, *supra*, enumerated seven relevant factors (practical indicia) to ascertain the line of commerce:

The Product Market.

The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. [Footnote omitted.] However, within this broad market well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 593–595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. [Footnote omitted.] Because § 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in *any* line of commerce" [emphasis supplied by the Court], it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed. [Footnote omitted.]

2. Section of the Country

With respect to ascertaining the appropriate section of the country, in *Standard Stations* the Court said:

It is clear, of course, that the "line of commerce" affected need not be nationwide, at least *where the purchasers cannot, as a practical matter, turn to suppliers outside their own area.* * * * Although the effect on competition will be quantitatively the same if a given volume of the industry's business is assumed to be covered, whether or not the affected sources of supply are those of the industry as a whole or only those of a particular region, a purely quantitative measure of this effect is inadequate because the narrower the area of competition, the greater the comparative effect on the area's competitors.

[6] Footnote 4, *supra*.
[7] Footnote 4, *supra*.

Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition. * * * (Emphasis supplied.) *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299, n. 5 (1948).

In *Tampa Electric*, *supra*, the Court stated:

* * * *Second*, the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must be in relation to the market affected. * * *

In *Brown Shoe*, *supra*, the Court said:

* * * The deletion of the word "community" in the original Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an economically significant "section" of the country.[35] * * *

[35] * * * The reference to "trade area" was deleted as redundant, when it became clear that the "section" of the country to which the Act was to apply, referred not to a definite geographic area of the country, but rather the geographic area of effective competition in the relevant line of commerce. See S. Hearings on H.R. 2734, at 38–52, 66–84, 101–102, 132, 133, 144, 145; H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8; S. Rep. No. 1775, 81st Cong., 2d Sess. 4, 5–6. The Senate Report cited with approval the definition of the market employed by the Court in *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 299 n. 5.

The Court further stated in *Brown Shoe:*

The Geographic Market.

We agree with the parties and the District Court that insofar as the vertical aspect of this merger is concerned, the relevant geographic market is the entire Nation. The relationships of product value, bulk, weight and consumer demand enable manufacturers to distribute their shoes on a nationwide basis, as Brown and Kinney, in fact, do. The anticompetitive effects of the merger are to be measured within this range of distribution.

In its most recent pronouncement,[8] the Court cited all three of the above cases:

* * * Therefore, since as we recently said in a related context the "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies*," *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 [emphasis supplied by the Court]; see *Standard Oil Co.* v. *United States*, 337 U.S. 293, 299 and 300, n. 5, the four-county area in which appellees' offices are located would seem to be the relevant geographical market. *Cf. Brown Shoe Co.*, *supra*, at 338–339. * * * [Footnotes omitted.]

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[8] *United States* v. *Philadelphia National Bank*, footnote 4, *supra*.

3. Probable Effect

Having determined the relevant line of commerce and section of the country, *i.e.*, the area of effective competition, the next consideration is to ascertain the probable effect of the acquisition upon competition. In this connection the test is one of reasonable probability, rather than actual effect or, conversely, mere possibility, that the acquisition will substantially lessen competition. In *Brown Shoe*, *supra*, the Court stated:

> * * * Congress used the words "*may* tend substantially to lessen competition" [emphasis supplied by the Court], to indicate that its concern was with probabilities, not certainties. [Footnote omitted.] Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by this Act.

4. Competition, Not Competitors

The Court stated in *Brown Shoe*, *supra:*

> * * * Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition. [Emphasis supplied by the Court.]

In *Philadelphia National Bank*, *supra*, at n. 43, the Court stated:

> [43] * * * The test of a competitive market is not only whether small competitors flourish but also whether consumers are well served. See *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 588, 592 (D.C. S.D. N.Y. 1958). "[C]ongressional concern [was] with the protection of *competition*, not *competitors*." *Brown Shoe Co.*, *supra*, at 321.

5. Industry Condition

In analyzing the probable effect, the Court has made clear that except in *de minimis* or near monopoly situations it is necessary to evaluate the economic condition of the relevant industry rather than only the share of market acquired or foreclosed. In this connection, the Court stated in *Brown Shoe*, *supra:*

> Between these extremes, in cases such as the one before us, in which the foreclosure is neither of monopoly nor *de minimus* proportions, the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive. In such cases, it becomes necessary to undertake an examination of various economic and historical factors in order to determine whether the arrangement under review is of the type Congress sought to proscribe. [Footnote omitted.]

The Court, delineating such economic and historical factors, further stated:

> * * * while providing no definite quantitative or qualitative tests by which enforcement agencies could gauge the effects of a given merger to determine

whether it may "substantially" lessen competition or tend toward monopoly, Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry. [Footnote omitted.] That is, whether the consolidation was to take place in an industry that was fragmented rather than concentrated, that had seen a recent trend toward domination by a few leaders or had remained fairly consistent in its distribution of market shares among the participating companies, that had experienced easy access to markets by suppliers and easy access to suppliers by buyers or had witnessed foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants, all were aspects, varying in importance, with the merger under consideration, which would properly be taken into account.[38]

[38] Subsequent to the adoption of the 1950 amendments, both the Federal Trade Commission and the courts have, in the light of Congress' expressed intent, recognized the relevance and importance of economic data that places any given merger under consideration within an industry framework almost inevitably unique in every case. Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market—its structure, history and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger. * * *

6. Market Substantiality

The market in which the effect is evaluated must be substantial. The Court stated in *du Pont* (*General Motors*), *supra:*

> The market affected must be substantial. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 357. * * *

And again in *Brown Shoe*, *supra*, the Court said:

> * * * Section 7 of the Clayton Act, prior to its amendment, focused upon this aspect of horizontal combinations by proscribing acquisitions which might result in a lessening of competition between the acquiring and the acquired companies. [Footnote omitted.] The 1950 amendments made plain Congress' intent that the validity of such combinations was to be gauged on a broader scale: their effect on competition generally in an *economically significant* market." (Emphasis supplied.)

7. Share of the Market

Necessarily, in view of the statutory requisite that the effect may be to *substantially* lessen competition, the share of the market acquired or foreclosed is an important element in making such a determination.

With respect to share of the market, the Court in *Brown Shoe*, n. 38, *supra*, stated:

> * * * Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; * * *

The Court further said:

Since the diminution of the vigor of competition which may stem from a vertical arrangement results primarily from a foreclosure of a share of the market otherwise open to competitors, an important consideration in determining whether the effect of a vertical arrangement "may be substantially to lessen competition, or to tend to create a monopoly" is the size of the share of the market foreclosed. However, this factor will seldom be determinative. If the share of the market foreclosed is so large that it approaches monopoly proportions, the Clayton Act will, of course, have been violated; but the arrangement will also have run afoul of the Sherman Act. [Footnote omitted.] And the legislative history of § 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act. [Footnote omitted.] On the other hand, foreclosure of a *de minimus* share of the market will not tend "substantially to lessen competition."

And later:

The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market. [Footnote omitted.]

In *Philadelphia National Bank*, *supra*, the Court said:

We noted in *Brown Shoe Co.*, *supra*, at 315, that "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. * * *

8. Future Effect

Having ascertained the economic condition of the industry and share of the market involved, it becomes necessary to ascertain the probable *future* effect of the acquisition. As the Court said in *Brown Shoe*, *supra:*

* * * the very wording of § 7 requires a prognosis of the probable *future* effect of the merger. [Emphasis supplied by the Court; footnote omitted.]

The Court also stated in *Philadelphia National Bank*, *supra:*

Having determined the relevant market, we come to the ultimate question under § 7: whether the effect of the merger "may be substantially to lessen competition" in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their "incipiency." See *Brown Shoe Co., supra*, at 317, 322.

9. Evidence Concerning Lack of Effect

The Court has stated that evidence with respect to lack of adverse effect is relevant. In *Philadelphia National Bank*, *supra*, the Court said:

> * * * Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined *in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.* * * * (Emphasis supplied.)

And again:

> *There is nothing in the record of this case to rebut the inherently anticompetitive tendency* manifested by these percentages. There was, to be sure, testimony by bank officers to the effect that competition among banks in Philadelphia was vigorous and would continue to be vigorous after the merger. We think, however, that the District Court's reliance on such evidence was misplaced. This lay evidence on so complex an economic-legal problem as the substantiality of the effect of this merger upon competition was entitled to little weight, in view of the witnesses' failure to give concrete reasons for their *conclusions.* (Emphasis supplied.) [Footnote omitted.]

10. Certain Acquisitions Not In Violation

The Court has pointed out that certain acquisitions are not in violation of Section 7; for example, the acquisition of a failing company, the merger of two small companies to enable them to compete more effectively with larger corporations, and acquisitions involving a *de minimis* share of the market. In *Brown Shoe*, *supra*, the Court said:

> The importance which Congress attached to economic purpose is further demonstrated by the Senate and House Reports on H.R. 2734, which evince an intention to preserve the "failing company" doctrine of *International Shoe Co. v. Federal Trade Comm'n*, 280 U.S. 291. [Footnote omitted.]
>
> * * * When concern as to the Act's breadth was expressed, supporters of the amendments indicated that it would not impede, for example, a merger between two small companies to enable the combination to compete more effectively with larger corporations dominating the relevant market, nor a merger between a corporation which is financially healthy and a failing one which no longer can be a vital competitive factor in the market. [Footnote omitted.]
>
> * * * the legislative history of § 7 indicates clearly that the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act.

[Footnote omitted.] On the other hand, foreclosure of a *de minimus* share of the market will not tend "substantially to lessen competition."

C. The Industry

1. Description

Truck-trailer manufacturing and the firms and companies engaged therein constitute a separate and distinct industry in the United States. The industry in 1959 was composed of approximately 239 manufacturers (Tr. 5819), as compared with about 150 in 1953 (CX 488, p. 9; 489, p. 10). Seventy-eight of them, who in 1955 accounted for about 95% of the industry's total production and sales, testified in this proceeding (C. Tabs A, B, C, D, E, F; cf. RX 271, p. 4), The industry for the most part is composed of manufacturers producing and selling on a regional, several state, or local basis. Fruehauf, Trailmobile, Brown (Clark), Highway, Dorsey, Gindy, Utility, Great Dane, Kentucky, Heil, Miller, Kingham, American and Martin sell nationally or semi-nationally (manufacturers who have penetrated 25 or more states) (RX 271, p. 9 and RX 276).

2. Extent of Concentration

Fruehauf, the largest manufacturer in the industry, during the period 1953 through 1958 shipped from 34 to 43.4% [9] in units and 32.4 to 46.1% in value of the industry's total shipments of all products [10] (RX 272, p. 107 and R. Tabs 7 and 8, derived from RX 336, 337 and 339 and CX 473, 474, 465-68). During the period 1955 through 1959, Fruehauf's share of total trailer registrations ranged from 34.6 to 47% (RX 271, p. 4).[11] Both its shipments and registrations steadily declined during the post-acquisitions period. The next largest company, Trailmobile, during the period 1953 through 1958 shipped from 13.9 to 16.5% in units and 13.5 to 16.2% in value of

[9] Throughout, all percentage figures are rounded to the nearest 1/10 (.001).

[10] As pointed out by the Bureau of Census, U.S. Department of Commerce, its 1953 figures included sales of 34,891 "other" trailers to the Government (CX 472 B), which made the 1953 figures not comparable with other years (CX 472–A and 473–A). Fruehauf sold 29,357 of these, for $23,394,000, to the Government (CX 481). A pro rata reduction in percentages of units and value for 1953 results in percentages substantially below the above highs.

[11] RX 271 is a group of tabulations prepared from R. L. Polk & Co. data (RX 275, 276 and 277). Polk tabulates all new commercial truck-trailer registrations (as well as automobiles and trucks), from reports from the Motor Vehicle Departments of all 50 States and the District of Columbia, except Maine (Tr. 5951). Such registrations do not include governmental, export, and "off-highway" purchases, because they are not registered (Tr. 6084, 6091). Such Polk data is purchased and relied upon by the industries involved (Tr. 5956, 6044). RX 272 is a group of tabulations prepared from Bureau of Census data covering shipments, in units and in value, by types of trailer, for the industry (CX 465 to 469, inclusive, and 473–74), data from monthly reports to Census of surveyed manufacturers, and data in evidence from Trailmobile and Fruehauf (RX 296, 336, 337, 339). Despite conceptual differences, Polk and Census data reveal substantially similar patterns and results.

said total, and its share of registrations, from 1955 through 1959, ranged from 16.6 to 18.9%, also declining in the latter years. Of the remaining manufacturers who made up the industry no other company shipped in excess of 6.7% in units and 5.1% in value or exceeded 5.5% in registrations during the same periods. After the first 9, no manufacturer accounted for as much as 2% in either value or units (RX 272, p. 107; RX 271, p. 4).

3. Trend in Market Shares

Of the 20 largest manufacturers (based on 1959 registrations, RX 271, p. 5), Fruehauf in 1955 had 39.1% of the overall registrations, Trailmobile 18.8% and the other 18 companies combined 22.6%, leaving 12.6% accounted for by all other manufacturers except Hobbs and Strick. Even though Fruehauf increased its overall percentage 6.9% to a total of 46% at the beginning of 1956, as a result of the Strick and Hobbs acquisitions considered hereinafter, nevertheless in 1959 Fruehauf declined to 34.6%, Trailmobile declined to 17.9%, the other 18 increased their combined share to 32%, and the combined share of all other manufacturers increased to 15.5% (RX 271, pp. 4 and 60).

With the exception of Fruehauf and Trailmobile, all of the twenty largest manufacturers changed rank in 1959, as opposed to 1955, other than Dunham Manufacturing Company, and Timpte Brothers, Inc. Dunham, a newcomer in the business in 1958, rose from twenty-seventh place in 1958, to eighteenth place in 1959; and Timpte rose from forty-sixth place in 1956 to twentieth place in 1959 (RX 271, p. 5).

There was no change in the number of States penetrated by Fruehauf and Trailmobile in 1959, as opposed to 1955. Of the next eighteen largest truck-trailer manufacturers in the industry, fifteen increased the number of States penetrated during that period, and only three showed any decline in the number of States penetrated (RX 271, pp. 8–9). Each of the fifteen companies that showed an increased penetration, as well as one that did not, also showed an increase in market share (RX 271, p. 4).

With respect to overall shipments, based upon Bureau of Census data, a tabulation of 16 of the above 20 manufacturers (including the largest) reveals that in 1955 Fruehauf had 39.1% of the total, Trailmobile 15.8% and the 14 other manufacturers combined 18.6%,[12] leaving 20.3% accounted for by all other manufacturers except Hobbs and Strick. Even though Fruehauf increased its overall percentage 6.2% to a total of 45.3% at the beginning of 1956, as a result of the

[12] This computation assumes Great Dane's 1955 percentage, not available, to have been the same as in 1956, namely, 2%, based upon its substantially identical percentages of registrations for the 2 years (RX 271, p. 4).

Strick and Hobbs acquisitions, nevertheless in 1958 Fruehauf's share declined to 34%, Trailmobile declined to 14.3%, the other 14 increased their combined share to 25.5% and the combined share of all other manufacturers increased to 26.2% (RX 272, p. 107). In addition to the above facts, Fruehauf's share of the overall shipments further declined to 33.5% in 1961, leaving a balance of 66.5% accounted for by the rest of the industry (R. Tab 7, based on RX 336, 337 and 339, CX 465–9, 473–4, 525–7).

The following two tables show the changes in market shares, based on registrations (Polk) from 1955 through 1959, of the 20 largest manufacturers, and based on units shipped (Bureau of Census), from 1953 through 1958, of the 16 of the 20 for whom data is available, together with the shares of all other manufacturers combined. (Strick and Hobbs were acquired by Fruehauf at the end of 1955.)

Market share, units, Polk registrations (RX 271, pp. 4 and 60)

[In percent]

Manufacturer	1955	1956	1957	1958	1959
Fruehauf	39. 1	47	43. 4	38	34. 6
Strick (acquired)	4. 9				
Hobbs (acquired)	2				
	*46				
Trailmobile	18. 8	17. 7	18. 9	16. 6	17. 9
Highway	2	2	1. 7	3. 3	5. 2
Brown (Clark)	2. 6	1. 8	2. 5	3. 5	3. 6
Dorsey	3	3. 2	3. 3	3. 8	3. 6
Gindy	1	1. 8	1. 7	2. 8	3. 4
Utility	2. 6	2. 4	2. 3	3	2. 8
Great Dane	2. 3	2. 4	2. 5	2. 5	2. 5
Kentucky	1	1	. 8	1	1. 4
Lufkin	1. 2	1. 2	1. 3	1. 5	1. 3
Ohio	. 7	. 8	. 7	. 9	1. 1
Heil	1	1. 2	1	1	1. 1
Miller	1	. 8	. 8	. 9	1. 1
Kingham	1. 2	1. 2	1. 2	1. 4	1
Nabors	1. 3	1. 2	. 9	1. 3	. 9
American	. 7	. 6	. 6	. 8	. 8
Wilson	. 5	. 6	. 7	. 9	. 7
Dunham				. 5	. 5
Martin	. 5	. 7	. 6	. 6	. 5
Timpte		. 1	. 5	. 6	. 5
Total, 18 largest after Fruehauf and Trailmobile	22. 6	22. 9	22. 8	30. 2	32
All others	12. 6	12. 4	14. 9	15. 2	15. 5

*Post acquisitions.

Market share, units, census (RX 272, p. 107)

Manufacturer	1953	1954	1955	1956	1957	1958
Fruehauf	[13] 54	38.3	39.1	43.4	36.9	34
Strick	NA	3.4	4.1			
Hobbs	.8	2.1	2.1			
			*45.3			
Trailmobile	NA	13.9	15.8	16.5	15.6	14.3
Dorsey	NA	2.4	3.1	3.9	6.7	5.5
Highway	2.4	1.3	1.8	1.9	1.8	3.1
Brown (Clark)	NA	NA	2.4	NA	2.4	2.9
Great Dane	NA	NA	[14] 2	2	2.3	2.6
Gindy	.4	.6	.9	1.6	1.6	2.5
Kingham	NA	NA	1.3	1.4	1.5	1.7
Utility	.8	1.3	1.4	1.4	1.4	1.6
Lufkin	.6	1.3	1.1	1.3	1.3	1.4
Nabors	1	1.7	1.3	1.3	1.2	1.3
Kentucky	1.2	.9	1.2	1.3	.9	1.1
Heil	.6	1.7	.9	1.1	1	1
American	.3	.5	.5	.6	.6	.7
Miller	.1	.3	.7	.5	.5	.6
Timpte	NA	NA	NA	.3	.5	.5
Total, 14 companies (data available) from prior table			18.6		23.7	25.5
All others			20.3		23.8	26.2

[13] See footnote 10, supra.
[14] See footnote 12, supra.
*Post acquisitions.
NA=Not available.

4. Access to Suppliers and Buyers.

The manufacturer of trailers basically consists of the assembly of many separate and distinct component parts, either as purchased or after varying degrees of fabrication prior to assembly, at the choice of each manufacturer (Tr. 3037, 3102, 5606 and 5837).

Substantially all of the component parts which make up the various types of trailers manufactured by the industry are readily available from numerous suppliers thereof. Many trailer manufacturers testified to this effect (Tr. 901, 2746, 3102, 3870, 4816, 5564, 5598, 7714 and 7731). In addition, the record reveals that there are at least several hundred available suppliers of component parts (RX 232 and 312). This was further corroborated by a survey of manufacturers of component parts, which manufacturers were derived from Thomas' Register of American Manufacturers, Moody's Industrial Manual, Truck Trailer Manufacturers Association Directory, and suppliers to Fruehauf (RX 271, pp. 86–96), as well as by the availability of all aluminum parts and components from Alcoa, Kaiser and Reynolds (Tr. 2745, RX 309, 310, 311, 352 and 354).

The record amply demonstrates the ready access to purchasers by trailer manufacturers. The steadily increasing number of manufacturers in the industry, as found hereinabove under Part C–1, plus their steadily expanding share of the market, demonstrated in the tables set forth above in Part C–3, evidence an easy access to markets by suppliers. The record contains no evidence of any exclusive dealing, requirements, tying or other unreasonable vertical arrangements between either suppliers and manufacturers or manufacturers and purchasers.

5. Ease of Entry

As found hereinabove, the number of manufacturers in the industry increased from approximately 150 in 1955 to about 239 in 1959. In addition, using 1955 as a point of reference, Polk registrations reveal a cumulative total of 104 new companies entering the industry during the 1956–1959 period. In 1959 these 104 new companies accounted for 4.6% of the national total of all units registered (RX 271, pp. 78–82), a not insubstantial share of the market.

Some recent new entrants have become among the largest manfacturers in the industry. Dunham, a new entry in 1957 which manufactures only dump trailers (Tr. 5301), showed great increases in sales, 352 units in 1958 and 449 units in 1959 (RX 216), becoming in 1958 the second largest seller of dump trailers in the country (RX 272, p. 114), and, although only manufacturing one type of trailer, ranking eighteenth in national production of all units in 1959 (Polk table, *supra*). Clement-Braswell, which began manufacturing dump trailers in 1951 (Tr. 1707), by 1958 became the third largest seller of dump trailers in the Nation (RX 272, p. 114), with Dunham, not shown on said table, ranked as number two. Gindy, a new entrant in 1948 or 1949 (Tr. 3735) and primarily a manufacturer of aluminum vans (Tr. 362), by 1958 ranked seventh nationally in production of all units and by 1959, sixth in overall registrations (Polk and Census tables, *supra*).

As found hereinabove, the manufacture of trailers consists basically of the assembly of component parts which are readily available to anyone, and hence requires no extensive know-how, engineering or mechanical skill. No patents are required (Tr. 902, 2831, 3075, 3344, 4178, 5323). No special equipment or specialized labor is required (Tr. 1850, 2993, 3101, 3143, 5168, 7713; 2738, 3036-39, 3145, 4751, 7720). A number of manufacturers testified that readily available metal or mechanical workers can assemble or make any type of trailer, and that only a small amount of capital is needed to start manufacturing (Tr. 1657, 2120, 2860, 3454–58, 3870, 5591, 7713).

6. Conclusions

From the foregoing facts found herein in Part C, it is concluded and found that, while Fruehauf is substantially the largest manufacturer, the industry does not evidence a trend toward or a high degree of concentration but appears to be increasingly fragmented, it has not seen a recent trend toward domination by a few leaders, and it has not only remained fairly consistent in its distribution of market shares among the participating companies, but has experienced a steadily increasing share on the part of the smaller companies and an increasingly diminishing share by Fruehauf.

It is further concluded and found that the industry has experienced easy access to markets by suppliers and easy access to suppliers by buyers rather than foreclosure of business, and has witnessed the ready entry of new competition with no erection of barriers to prospective entrants.

D. The Lines of Commerce

The complaint alleges the relevant product markets or lines of commerce to be (1) all truck-trailers, (2) van trailers, (3) aluminum van trailers, (4) dump trailers, (5) platform trailers, and (6) tank trailers.

1. All Trailer Products

A truck-trailer is a non-automotive property carrying vehicle drawn by a truck-tractor designed for heavy or long distance hauling and having one or more axles with a rating of 10,000 pounds or more per axle (CX 471–A, 472–A, 476–A). A semi-trailer is a truck-trailer having one or more axles with wheels at the rear but none at the front, so designed that the forward end of the trailer rests upon the rear of the tractor by which it is towed (Tr. 5566, 5580). The semi-trailer is used throughout the United States and has substantially replaced the so-called full trailer, which had front wheels and was attached with a tongue and pulled like a wagon (Tr. 5089, 5567, 5580).

Fruehauf originally alleged in its answer that the relevant line of commerce should encompass all equipment used for transporting commodities, including trucks, but in its proposed findings and brief in support thereof, Fruehauf now proposes that the relevant line of commerce be defined as all trailer products manufactured by the industry. In any event, the record establishes that trailers are distinct from trucks and other types of transportation equipment, and that the latter in general are not competitive with trailers, primarily because of the factors of weight and capacity which as a practical matter are dictated by State weight-per-axle laws (Tr. 244, 460, 1712, 2287, 2835, 3273, 5522). Counsel supporting the complaint agree that all trailer products should be one of the relevant lines of commerce. It is concluded and found that all trailer products manufactured by the industry are one of the relevant lines of commerce herein.

2. Van Trailers

Counsel supporting the complaint also contend that aluminum van trailers, steel van trailers, dump trailers, platform trailers, tank trailers and detachable trailer van bodies constitute appropriate submarkets and relevant lines of commerce. The allegations in the complaint made no reference to steel van trailers or detachable trailer van bodies as lines of commerce. In their brief in opposition to the motion to dismiss the complaint at the conclusion of the case-in-chief, counsel supporting the complaint made no reference to any such lines of commerce, nor did the order denying said motion. The complaint, said brief and said order did refer to and the latter found van trailers to be a relevant line of commerce.

Fruehauf contends all trailer products, rather than the different types, are the only relevant product market, because of the cross-elasticity of production facilities, relying upon the concurring opinion of Mr. Justice Harlan in the *Brown Shoe* case, *supra*, and footnote 42 of the majority opinion's definition of the relevant product market. There can be no question but that the record establishes the cross-elasticity of production facilities in this industry. Substantially any manufacturer of any type of trailer is able, with the same machinery, equipment, and personnel, to manufacture any other type of trailer (Tr. 901, 1086, 1502, 2749, 2861, 3037, 3103, 3146).

The Supreme Court in *Brown Shoe*, *supra*, delineated seven practical indicia for determining the relevant product market or markets. They are (1) industry or public recognition of the submarket as a separate economic entity, (2) the products' peculiar characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors. In footnote 42 the Court said: "The cross-elasticity of production facilities may also be an important factor in defining a product market within which a vertical merger is to be viewed." It will be noted that unique production facilities are but one of the seven indicia to be applied. Certainly the other indicia must be considered.

A van trailer is essentially a box on wheels, with a closed or open top, normally designed for hauling dry, general freight requiring protection from the weather (Tr. 126, 403, 1479). It, as all the other types, is a semi-trailer coupled to and hauled by a tractor by means of a so-called fifth wheel (D-1, *supra*). Vans represent by far the largest percentage of all types of trailers manufactured by the industry (CX 465-69).

Applying the seven practical indicia delineated by the Supreme Court, there can be little doubt that vans constitute a line of commerce separate and distinct from the other types of trailers, which cannot be used for the same purposes and are not competitive with vans. There is no interchangeability of use between van and platform, dump and tank trailers in view of the loads carried, the trailer designs and their purposes (CX 403, pp. 19 and 25). Vans are used for carrying enclosed, non-liquid cargo in large quantities over the highway, for which purposes a platform, dump or tank trailer obviously could not be used. Clearly the product has peculiar characteristics and uses.

Carriers engaged in hauling freight cross-country by van clearly recognize that product as a separate economic entity and would not switch to the use of a tank, dump or platform trailer for such purpose (Tr. 3092). Public recognition of the submarket as a separate economic entity is apparent from the fact that the Bureau of Census in its industry reports classifies van trailers separately from all of the other types (CX 465-74). Vans have distinct customers (*supra*), and distinct and different prices from the other types of trailers (CX 465-74). While as found above unique production facilities are not required, specialized vendors are present in the industry. The record establishes that a number of manufacturers produce vans primarily or exclusively (Tr. 362, 696, 2186, 3887). It is concluded and found that van trailers constitute a relevant line of commerce herein.

3. Aluminum Van Trailers

An aluminum van trailer is a van trailer having a body normally constructed entirely of aluminum, although its undercarriage may be constructed entirely or principally of steel (Tr. 403, 457, 1090, 1517, 1675, 1935). On the other hand a steel van trailer, the other type, is normally constructed entirely of steel, although minor parts, such as wheels or the floor, may occasionally be made of aluminum (CX 30, pp. J-1, K-1, L-1, N-1; Tr. 1364). In addition to contending that the only relevant market should be all trailer products, Fruehauf also contends that aluminum van trailers cannot be a product market distinct from steel van trailers, primarily because of the presence of some steel in the aluminum van trailer and some discrepancies by manufacturers in the reporting of the two types to the Bureau of Census. However, on the contrary respondent proposes numerous findings which include the specific delineation of aluminum vans as distinct from steel vans (*e.g.*, RPF 198, 222, 345, 721, 875, 878, etc.).

The record establishes that aluminum vans have substantially replaced steel vans for long distance hauling, primarily because of the factors of weight, payload and State weight-per-axle laws (Tr. 750, 789, 818, 834, 860, 861, 1019, 1169, 1364, 1480, 1518). They represent by far the largest percentage of vans manufactured by the industry, increasing from 49.4% of all vans in 1952 to 74.3% in 1961 (CX 473, 527). Aluminum vans command a substantially higher price than steel vans (CX 465–74), yet the carriers are willing to pay this higher price because of the factors of weight and payload (Tr. 834, 861, 1019, 1363, 2235).

In addition, for a number of years the Bureau of Census has recognized the two categories and required the reporting of aluminum vans and steel vans separately (CX 465–74). A number of the manufacturers in the industry make aluminum vans either exclusively or primarily (Tr. 119, 124, 362, 696). Thus, although no unique production facilities are needed to make aluminum vans as distinguished from steel vans, the factors of industry and public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, distinct customers, distinct prices and specialized vendors are present. It is concluded and found that aluminum van trailers constitute a relevant line of commerce herein.

Although counsel supporting the complaint urges a separate line of commerce for steel van trailers, inasmuch as the complaint alleges van trailers as a separate relevant market, which has been found hereinabove, and aluminum vans have been found as a distinct submarket, no particular purpose would appear to be served by also delineating steel vans as a relevant line of commerce. The acquisitions considered hereinafter concern four companies alleged to have been engaged in the aluminum van market and other markets. No acquired company was alleged to have been engaged in the steel van market. Analysis hereinafter of the overall van market necessarily includes steel vans together with aluminum vans.

4. Dump Trailers

A dump trailer is a heavy, open-topped container with wheels, designed principally to carry loose materials, such as coal, ore and aggregates, generally loaded through the top, and unloaded at the back (the end dump), or through the bottom (the bottom or center dump) (Tr. 1712, 2113, 3071; CX 315). As found hereinabove, the end use of a dump trailer is entirely distinct and different from all other trailers, which are not interchangeable or competitive with it. The Bureau of Census classifies and requires the reporting of dump trailers by the manufacturers as a separate and distinct category (CX 465). The record demonstrates industry and public recognition of the product as a separate economic entity, its peculiar characteristics and uses, and its distinct customers, distinct prices and specialized vendors (Tr. 2108, 2350, 5264, 5287; CX 465–74). It is concluded and found that dump trailers constitute a relevant line of commerce herein.

5. Platform Trailers

The platform trailer is essentially a flat deck or floor on wheels, sometimes equipped with removable sides, designed to carry loads often of concentrated weight, such as bricks, fabricated steel and iron products. Such loads do not have to be enclosed by sides or protected from the weather. Those platform trailers equipped with removable stakes or sides are used to haul grain and cattle (Tr. 126, 845, 887, 1088, 1479, 6072). Platform trailers are the easiest type to manufacture and the least expensive (Tr. 3335; CX 465). As found above, their use is not interchangeable with the other types, and hence they are not competitive with them. The Bureau of Census requires that they be reported as a separate classification (CX 465). Thus there are present the factors of industry and public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, distinct customers and distinct prices. It is concluded and found that platform trailers constitute a relevant line of commerce herein.

6. Tank Trailers

The tank trailer is an enclosed vehicle generally designed to carry bulk liquid freight, either under or not under pressure, such as milk, petroleum products, chemicals and liquified gases (Tr. 4142, 4800; CX 294–310, 471; RX 273–74). A tank trailer is the most expensive of the types and takes the longest time to manufacture (CX 465; Tr. 3235, 3274, 3460). As found above, the other types of trailers are not interchangeable with tank trailers, cannot be used for the same purpose, and are not competitive with them. A number of manufacturers make tank trailers exclusively or primarily (Tr. 2002, 2290, 4123, 4140, 4461, 4658). The Bureau of Census requires their reporting as a separate classification (CX 465). It is concluded and found that tank trailers constitute a relevant line of commerce herein.

7. Detachable Trailer Van Bodies

A detachable trailer van body is a closed, detachable body or box designed to be used with a trailer chassis, which may be detached and carried separately on rail cars, planes or ships (CX 471–A; Tr. 2787–99, 3139). They are also referred to in the record as cargo containers. While neither the complaint, the brief in opposition to the motion to dismiss after the case-in-chief, nor the order denying said motion made any reference to detachable van bodies either as a line of commerce or in any other respect, counsel supporting the complaint now propose that they be so found in connection with the Strick acquisition. As a matter of fact they were practically nonexistent at that time, which was January 1, 1956. Fruehauf did not make them, nor did any other manufacturer except Strick (Tr. 128), which in 1955, out of 3,207 units, made 25 detachable van bodies (roll-offs) (CX 29). The Bureau of Census did not recognize their existence until 1958, when for the first time they were designated as a separate category of trailer data (Cf. CX 467 and 468). The Supreme Court has held that the market affected must be substantial and economically significant (*supra*). Such a market was neither substantial nor economically significant, nor was there any area of effective competition. It is concluded and found that detachable trailer van bodies do not constitute a relevant line of commerce herein.

E. The Section of the Country

The complaint alleges and the answer admits the relevant section of the country to be nationwide with respect to the various acquisitions and lines of commerce alleged. With respect to the Strick acquisition, the parties agree that the relevant geographic market is the continental United States. However, with respect to the Brown, Hobbs, and Hyde acquisitions, counsel supporting the complaint now urge various sectional areas where such companies sold the majority of their products. With respect to Brown, counsel refers to the "northeastern regional market," not defined or in the record. With respect to Hobbs, counsel refers to the "southwest regional market." The record establishes that Hobbs sold nationally, in 43 states, the same number as Strick (RX 276). With respect to Hyde, counsel refers to Texas, New Mexico, Oklahoma and Louisiana.

The record establishes, as found above, that all types of trailers are sold nationally by a number of manufacturers (Part C-1, *supra*). In addition, there has been a steady expansion into new and additional states by many of the other manufacturers (Part C-3, *supra*). The Supreme Court, in *Philadelphia National Bank*, *Brown Shoe*, *Tampa Electric* and *Standard Stations*, *supra*, has held that the relevant section of the country, or geographic market, must be charted by careful selection of the market area in which the sellers operate and "to which the purchaser can practicably turn for supplies." It is concluded and found that the continental United States is the relevant section of the country with respect to all of the lines of commerce herein.

F. The Acquisitions, Share of Market Acquired, and Effect

1. Carter

On February 28, 1947, Fruehauf acquired certain trailer manufacturing assets from Carter Manufacturing Company, Inc., and Carter, Inc. for 24,286 shares of Fruehauf stock (CX 3). Carter was engaged in commerce within the meaning of the Clayton Act and the Act (Answer). At the conclusion of the case-in-chief, counsel supporting the complaint conceded that this acquisition was not in violation of Section 7, because it was an assets acquisition occurring prior to the amendment of Section 7 in 1950, at which time such acquisitions were not prohibited thereby.[15] Accordingly the motion to dismiss such allegation was granted at the conclusion of the case-in-chief.

2. Brown

On April 1, 1953, Fruehauf acquired certain trailer manufacturing assets from Brown Equipment & Manufacturing Company, a wholly owned subsidiary of Associated Transport, Inc., a large interstate carrier, for $1,300,000 plus certain additional amounts for inventory. The assets acquired included Brown's plant at Westfield, Massachusetts, and certain unspecified machinery, tools, dies and patterns required for trailer production (CX 6). Brown was engaged in commerce within the meaning of the Clayton Act and the Act (Answer). Brown manufactured only aluminum van trailers (CX 172-176) and was never a substantial factor in that product market because

[15] *F.T.C. v. Western Meat Co.*, 272 U.S. 554 (1926); *Arrow-Hart & Hegeman Co. v. F.T.C.*, 291 U.S. 587 (1934).

of its limited production, nearly half of which it sold to its parent company, Associated (CX 177).

Brown was also engaged in the business of repairing the transportation equipment of its parent, Associated, and of distributing automotive parts, and continued in such businesses subsequent to the acquisition (Tr. 1256, 1279). Associated wanted to dispose of Brown's trailer manufacturing assets because Associated in effect had become a captive purchaser, since it had to take all of the trailers which Brown could not sell, until it "had trailers sticking out of our ears that we don't need." (Tr. 1268, 1281).

Immediately after the acquisition Fruehauf in April 1953 sold the real estate acquired from Brown to the Mutual Benefit Life Insurance Company of Newark, New Jersey, with a lease-back for a 25-year period beginning July 1, 1953 (Tr. 6263). In 1959 Fruehauf assigned such lease-hold rights and benefits to Savage Arms Company and Fruehauf has not occupied any portion of the plant since that date (Tr. 6264).

The total national sales of aluminum van trailers in 1952, the year preceding the acquisition, were 12,194 (CX 472). In 1952 in eleven months Brown sold 342 aluminum vans, 152 of which went to Associated (CX 177). Projecting such sales to twelve months, Brown sold 373 aluminum vans, 166 to Associated and 207 to other purchasers. Brown's total projected sales to the public (non-captive purchasers) for that year amounted to 1.7% of the national sales. Counsel supporting the complaint offered no proof with respect to Fruehauf's share of the market in aluminum vans in 1952. In 1953 Fruehauf's share of the national market in aluminum vans was 23.9% (RX 336). In a market evidencing increased competition and lack of concentration, Brown's percentage would not appear substantial. In addition, for the reasons discussed more fully hereinafter in connection with the Strick acquisition, six years of post-acquisition data thereafter reveal a steadily declining share on the part of Fruehauf and a correspondingly increasing share on the part of all other manufacturers. It is concluded and found that there is no reasonable probability of a substantial lessening of competition [15a] in the relevant line of commerce, aluminum van trailers, as a result of the Brown acquisition.

3. Hobbs

On November 1, 1955, Fruehauf acquired certain trailer manufacturing assets from Hobbs Manufacturing Company and Hobbs Trailer and Equipment Company, Texas corporations (hereinafter col-

[15a] Throughout this decision, the phrase "substantial lessening of competition" includes "or tendency toward monopoly."

lectively called Hobbs), for $4,872,898 (CX 2, p. 8). Hobbs was engaged in commerce within the meaning of the Clayton Act and the Act (Answer). The assets acquired included Hobbs' manufacturing plant at Fort Worth, Texas, five factory branches in Texas, an organization of 40 distributors located throughout the United States, and machinery, equipment, inventory designs and patents (CX 1, pp. 5 and 28, 2, p. 10, 11, 12, 249; Tr. 2585, 6268, 6286). The patents were of no particular value. No patents were necessary to manufacture any kind of trailer (Part C-5, *supra*). They included a certain type of cable dump trailer, but the record establishes that hydraulic dump trailers are superior to and are replacing cable dump trailers (Tr. 5281). Included in the acquisition was the transfer of certain key personnel to Fruehauf (CX 1, p. 5; 10-C and 12-C).

Hobbs was engaged primarily in the manufacture of dump and platform trailers and to a limited degree in the manufacture of van trailers and aluminum van trailers (CX 26, 27 and 32). In 1955 Hobbs' total van production represented only .5% and its total aluminum van production only .2% of the national totals (R. Tab 7 and RX 337; CX 465 and RX 337). As found hereinabove, Hobbs sold nationally.

With respect to the relevant line of commerce consisting of all trailer products, in 1955 Hobbs had 2.1% of all units shipped and ranked sixth nationally, and had 2% of national registrations, ranking eighth. In both units shipped and registrations, Fruehauf ranked No. 1 and had 39.1% of the national market (corroborating the similar results of Polk and Census data) (Polk and Census Tables, Part C-3, *supra*).

In 1955 Hobbs had 22.2% of the national market for dump trailers and ranked number two. Fruehauf had 28.7% and ranked number one. As a result of the acquisition Fruehauf increased its share of the national market to 50.9%. As noted hereinabove, the record contains market share data for the various lines of commerce through 1961 (R. Tab 7 and 9; RX 272, pp. 107-114). The following table illustrates the share of the dump trailer market acquired from Hobbs in 1955, and the share of the market possessed by Fruehauf in 1955 and each year thereafter through 1961:

[In percent]

	1955	1956	1957	1958	1959	1960	1961
Fruehauf	28.7	44.4	36.5	31.5	24.5	21.5	30.8
Hobbs	22.2						
Total	50.9						

While Fruehauf's share of the dump trailer market declined substantially (20.1 less percent) from its post-acquisition share, it will be noted that in 1961 Fruehauf still held a greater share of the market than it had prior to the acquisition. Clearly the acquisition of 22.2% of a market by the number one company resulting in a total exceeding 50% of the market brought about a very substantial degree of concentration in that market.

In 1955 Hobbs shipped 778 platform trailers accounting for 7.3% of the national market and ranking fourth. Fruehauf accounted for 28.8% and ranked first (R. Tab 9, C. Tab D and RX 272, pp. 112–113). As a result of this acquisition (and .4% acquired from Strick, next considered), Fruehauf increased its share of the national market to 36.5%. The following table illustrates the share of the platform trailer market acquired from Hobbs in 1955 and the share of the market possessed by Fruehauf in 1955 and in each year thereafter through 1961 (R. Tab 9, RX 272, pp. 112–113):

[In percent]

	1955	1956	1957	1958	1959	1960	1961
Fruehauf	28. 8	41	30. 2	30. 2	35	33	35. 6
Hobbs	7. 3						
Strick	. 4						
Total	36. 5						

It will be noted that in 1961 Fruehauf still held a substantially greater share of the platform trailer market than it had prior to the acquisition and that its share had declined only slightly, .9%, from its total post-acquisition share.

It is concluded and found that the record demonstrates a reasonable probability of a substantial lessening of competition in violation of Section 7 in the relevant lines of commerce, dump trailers and platform trailers, as a result of the Hobbs acquisition.

4. Strick

On January 1, 1956, Fruehauf acquired certain trailer manufacturing assets from The Strick Company and Strick Plastics Corporation, Pennsylvania corporations (hereinafter collectively called Strick), in exchange for Fruehauf common stock valued at $10,831,300 (CX 2, p. 36). Strick was engaged in commerce within the meaning of the Clayton Act and the Act (Answer). The assets acquired included all of Strick's trailer manufacturing facilities, including plants in Philadelphia, Chicago and two smaller Pennsylvania plants, goodwill and the transfer of certain personnel (CX 1, pp. 5, 15).

Strick sold nationally, was the third largest manufacturer in the industry, and was engaged primarily in the manufacture of aluminum van trailers (Answer). It made a few platform trailers, accounting for, as noted above, .4% of that market in 1955 (RX 272, p. 112, C. Tab D).

With respect to the relevant line of commerce consisting of all trailer products, in 1955 Strick had 4.1% of all units shipped and 4.9% of national registrations, ranking third in both. Fruehauf ranked number one and had 39.1% of both (Polk and Census tables, Part C–3, *supra*).

In 1955 Strick had 10.1% of the national market for aluminum van trailers, in which market it also ranked third. Fruehauf, number one in all product markets, had 42.3%, and as a result of the acquisition (plus .2% from Hobbs, *supra*) increased its share of the national market to 52.6% (C. Tab A, RX 336, 339, CX 465). In 1955 Fruehauf had 46.8% of the national market for van trailers and Strick had 6.7% (R. Tab 7, RX 339, RX 272, p. 111). As a result of the acquisition (plus .5% acquired from Hobbs, *supra*), Fruehauf increased its share of the national market to 54%.

In all of these relevant product markets, in terms of registrations, shipments and dollar value, Fruehauf's share declined substantially in the years following the Strick and Hobbs acquisitions, in each instance to the point where Fruehauf's share of the market was substantially less than not only its total share as a result of such acquisitions but its share of the market prior to both acquisitions. In national registrations, Fruehauf's share was 39.1% before the acquisitions and 46% as a result of them (Polk table, Part C–3, *supra*). By 1959, Fruehauf's share of such registrations had declined to 34.6% (RX 271, pp. 4 and 60). In overall national shipments, Fruehauf's share of 45.3% as a result of the acquisitions (Census table, Part C–3, supra) declined to 33.5% in 1961, as against its pre-acquisition share of 39.1% in 1955 (R. Tab 7). In share measured by dollar value, the same shipments declined from a 41.6% pre-acquisition share in 1955 to 32.1% in 1961 (R. Tab 8).

With respect to van trailers Fruehauf's share declined to 35.3% in 1961, substantially less than its pre-acquisition share of 46.8% in 1955 and its share of 54% as a result of such acquisitions (R. Tab 7). Measured in value, Fruehauf's share of the van market likewise declined substantially from its pre-acquisition share of 49% in 1955 to 35.4% in 1961 (R. Tab 8). In the aluminum van trailer market, Fruehauf's share of 52.6% as a result of the acquisition declined to

36.6% in 1961, substantially less than its pre-acquisition percentage of 42.3% in 1955 (RX 336, 337, 339; CX 465–69, 527, 529–C).

Thus, although at the time of the Strick acquisition Fruehauf acquired what might be considered a substantial share of the relevant product markets, particularly with respect to aluminum van trailers, the record establishes that Fruehauf's share of such markets declined steadily and substantially during the six years following the acquisition, to the point where Fruehauf had a substantially smaller share of the respective markets than it had prior to the acquisition. As found hereinabove, this share lost by Fruehauf has been acquired by, on the one hand, the group made up of the 18 next largest trailer manufacturers in the industry after Fruehauf and Trailmobile, and on the other hand, by the group made up of all of the other and smaller manufacturers. The six post-acquisition years reveal enhanced competition and less concentration in the relevant product lines in the industry.

The Supreme Court stated in the *Brown Shoe* case, *supra*, that: "The very wording of § 7 requires a prognosis of the probable *future* effect of the merger." The Court further observed in this regard in its subsequent *Philadelphia National Bank* decision, *supra:* "It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future." The Court there further stated:

> Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined *in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.* (Emphasis supplied.)

In this same connection the Court also stated: "There is nothing in the record of this case to rebut the inherently anticompetitive tendency manifested by these percentages."

It is concluded and found that the record herein does not demonstrate a reasonable probability of a substantial lessening of competition in the relevant lines of commerce as a result of the Strick acquisition.

5. Independent Metal Products

On April 19, 1956, Fruehauf acquired certain tank (not trailer) manufacturing assets from Independent Metal Products Company for $3,387,442 (CX 285–87). The assets acquired included a tank manufacturing plant, machinery, a two-story office building and a 15-acre site (Answer). Independent was engaged in the manufacture of tanks for trucks, storage and trailers and with respect to the latter, Fruehauf was its only customer for many years, although Fruehauf bought such tanks from other suppliers (Tr. 2060 and 2085). Fruehauf took delivery of the tanks from Independent at its plant and assembled them with chassis made by Fruehauf to produce tank trailers (Tr. 2060–65). Independent was a supplier to Fruehauf and not a competing manufacturer of trailers, and hence this was a vertical rather than a horizontal acquisition.

Because Fruehauf took delivery of the tanks at Independent's plant in Omaha, none of these sales to Fruehauf were in interstate commerce. However, Independent did sell truck tanks in interstate commerce (Tr. 2060), and thus was engaged in commerce within the meaning of the Clayton Act and the Act. Fruehauf contends that this acquisition does not fall within the purview of Section 7, because the tanks made by Independent and bought by Fruehauf were not sold in interstate commerce and the relevant line of commerce here concerned is tank trailers. The Commission has held to the contrary in its *Foremost* decision, finding that it is not necessary that the acquired corporation be engaged in interstate commerce in the same line of commerce as that affected by the acquisition.[16]

From 1940 to 1956, Independent was primarily engaged in the manufacture of trailer tanks, with Fruehauf being its sole customer for such tanks since 1935 (Tr. 2101–03). There is no evidence in the record that Carter, Brown, Hobbs or Strick ever manufactured any tank trailers. Independent has continued to supply tanks for trucks to the one customer which it had prior to the acquisition (Tr. 2087, 4318). The record reveals that there are many manufacturers of tanks for trailers available, and also that many manufacturers of tank trailers make their own tanks (Tr. 2002, 4534, 4598, 5083, 5611). The record reveals no shortage or difficulty of procurement of tanks. The acquisition of Independent could have had no effect upon the available supply of tanks for other tank trailer manufacturers, because Fruehauf had been Independent's sole customer for such tanks for more than twenty years (Tr. 2101). There are no patents involved in the manufacture of tank trailers and any manufacturer could build one if he so desired (Tr. 5323).

There is no evidence that the acquisition of the tank manufacturing facilities of Independent by Fruehauf had any effect upon other manufacturers of tank trailers. In 1955, Fruehauf had 33.9% of the national tank trailer market. By 1961, Fruehauf's share of the tank

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[16] *Foremost Dairies, Inc.*, 60 F.T.C. 944, Docket No. 6495 (1962), at p. 36 [p. 1077, 1078].

trailer market had declined to 32.1% (C. Tab F; R. Tab 9). It is concluded and found that there is no reasonable probability of a substantial lessening of competition in the relevant line of commerce, tank trailers, as a result of the Independent acquisition.

6. Hyde

On May 23, 1958, during the pendency of this proceeding, Fruehauf acquired certain truck body (not trailer) manufacturing assets from Hyde Corporation and Hyde Realty Company, Texas corporations (hereinafter collectively called Hyde), for $112,501 (CX 420). The assets acquired included a manufacturing plant at Cleburne, Texas, a 30-year lease interest in the land on which it was located, and the machinery, equipment and inventory used in the plant to manufacture "Hydepak" garbage disposal bodies for mounting on trucks (CX 420); (RX 237–38). The lease and plant were acquired from Hyde Realty Company, which was not engaged in interstate commerce (Tr. 5459), whereas the materials, equipment and other assets transferred were sold by Hyde Corporation (CX 420), which was engaged in interstate commerce (Tr. 5429). However, both corporations were substantially owned and controlled by Mr. Hyde (Tr. 5459–79). It is concluded and found that Hyde was engaged in commerce within the meaning of the Clayton Act and the Act.

The complaint herein was amended shortly after the acquisition. Contrary to counsel supporting the complaint's contention, no truck trailer manufacturing facilities were acquired from Hyde. The facilities acquired had nothing to do with any of the relevant product markets involved in this proceeding. An attorney's memorandum of the first negotiations stated, with respect to the assets to be acquired by Fruehauf: "No trailer parts, no trailers, no trailer accessories, fixtures, jigs, dies, etc." (Tr. 5502). The contract between Fruehauf and Hyde specifically lists the Hydepak truck body manufacturing facilities sold to Fruehauf, and also states: "It is the intention hereof that Hyde is not agreeing to sell, and Fruehauf is not agreeing to buy any trailers, semi-trailers, vans or wagons, or parts or raw material or work in process applicable to or involving trailers, semi-trailers, vans or wagons, this agreement being limited expressly to the properties elsewhere defined herein." (CX 420, p. 5; RX 237–38.) Other than common hardware items which can be used in many types of manufacture, none of the items specifically listed in the agreement can be used in the manufacture of trailers (Tr. 5489).

Hyde was also engaged in the manufacture of trailers, primarily platform and van trailers, both prior to and after the acquisition (Tr.

5429–30). It formerly had manufactured trailers at its Cleburne plant, but had discontinued manufacturing them there on March 1, 1958, prior to any discussion with Fruehauf of the acquisition (Tr. 5435). Hyde had manufactured trailers at another plant in Fort Worth for over thirty years, and continued to manufacture them there in quantities as great as or greater than its total production was at the time of the acquisition herein (Tr. 5429–30). While it might be considered that Hyde's trailer production capacity had been reduced by the sale of the Cleburne plant, even though Hyde had discontinued the manufacture of trailers there prior to initiating this sale to Fruehauf, nevertheless Hyde continued to produce as many or more trailers overall as it did in the year prior to the acquisition.

Hyde manufactured the Hydepak garbage disposal truck bodies at the Cleburne plant under a patent license from one Balbi (Tr. 5454–57). In the latter part of 1955 Hyde was sued by one Huffines for infringement of his patent covering the Hydepak type of refuse body (Tr. 5454). Huffines won the suit and after all appeals were exhausted, including denial of a petition for certiorari by the Supreme Court, secured a permanent injunction against Hyde together with damages amounting to about $50,000 (Tr. 5478).

Hyde was in other financial difficulties. It owed an insurance company $250,000, secured by real estate including the Cleburne plant, and a bank more than $200,000 on an open note. The bank was pressing for payment (Tr. 5463–68). Mr. Hyde was in ill health (he died in 1959) and wanted to liquidate, particularly because of having been enjoined from manufacturing Hydepak bodies (Tr. 5517). Hyde contacted Fruehauf with respect to the sale of its facilities, including its Fort Worth plant and its trailer manufacturing facilities (Tr. 5516). Fruehauf advised Hyde that it would not discuss the Fort Worth property or any trailer facilities, but was willing to discuss the Hydepak facilities if the patent problems could be resolved (Tr. 5517). A release was obtained from Huffines and licenses secured from Huffines and Balbi to manufacture Hydepak bodies under their patents (Tr. 5502). Subsequent to the acquisition, in addition to manufacturing Hydepak bodies for trucks, Fruehauf later developed a Hydepak dump trailer (Tr. 5493–95).

The relevant market alleged here is platform trailers, which constituted the major portion of Hyde's trailer production. Complaint counsel offered no evidence with respect to Hyde's trailer production in 1957 or 1958. The record does contain an exhibit showing that Hyde manufactured 258 trailer units in 1955, almost three years before the acquisition, but it is not broken down according to types (CX 254). Even assuming the relevancy of such data, it would amount to only .3% of the total national production of trailer products (CX 465). Moreover the acquisition price, compared with those of the other acquisitions considered herein, reveals the *de minimis* nature of the transaction.

As found above, Fruehauf acquired no trailer manufacturing facilities or equipment from Hyde. Clearly this acquisition could have no effect upon any of the relevant product markets found herein. In addition, the acquisition of the Cleburne plant could well be considered as coming within the failing company doctrine established by the Supreme Court,[17] inasmuch as Hyde had been permanently enjoined from manufacturing the Hydepak bodies, was in serious financial difficulties and ill health, and hence was compelled to dispose of the Cleburne facilities. It is concluded and found that there is no reasonable probability of a substantial lessening of competition in any relevant line of commerce as a result of the Hyde acquisition.

G. Alleged Unfair Methods of Competition

1. The Acquisitions

Count II of the complaint alleged that the acquisitions considered above, singly or cumulatively, are unfair methods of competition in violation of Section 5 of the Act, both as violations of Section 7 and independently thereof. It is of course well settled that violations of the Clayton Act are unfair methods of competition in violation of Section 5,[18] and accordingly, it is concluded and found that the Hobbs acquisition discussed above is in violation of Section 5 of the Act. It has been found that the record demonstrates no reasonable probability of adverse competitive effects with respect to the other acquisitions. The Commission in its *Foremost* decision held that an acquisition could not be found in violation of Section 5 because it was one of a cumulative series, when the particular acquisition under consideration did not have the adverse effect on competition required by Section 7.[19] The Supreme Court in *Brown Shoe*, *supra*, stated: "It is true, of course, that the statute prohibits a given merger only if the effect of *that* merger may be substantially to lessen competition." It is concluded and found that the above acquisitions other than Hobbs were not in violation of Section 5 of the Act.

[17] *International Shoe Company* v. *F.T.C.*, 280 U.S. 291 (1930); and *Brown Shoe, supra*.
[18] *F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948).
[19] *Foremost Dairies, Inc.*, 60 F.T.C. 944, Docket No. 6495 (1962), at p. 52 [p. 1091].

2. Competitive Sale Practices

Count II of the complaint further alleged that Fruehauf engaged in unfair methods of competition in violation of Section 5 by certain pricing, financing, down payment, leasing, used vehicle purchasing and trade-in, and lending practices, which its competitors were unable to meet and which had the capacity, tendency and effect of unduly lessening competition, diverting trade to Fruehauf and creating a monopoly. As alleged therein and not disputed, the relevant market in connection with this charge is the national sale of all trailer products.

Fruehauf's answer, while admitting certain specific factual examples of sale and financing arrangements, denied that its competitors were unable to meet its terms of sale, as well as denying any adverse competitive effects as a result of any of the alleged competitive selling practices and any unfair methods of competition.

a. Financing

The complaint alleged that Fruehauf and its finance company financed the sale of trailer products, upon more advantageous terms than its competitors were able to grant, by giving customers seven years time to pay installments under their sales contracts. Fruehauf admitted that it granted seven year terms of payout to some customers, alleging such to be in accord with sound financing practice (Answer). The complaint then alleged that "this plan will permit Fruehauf's customers to pay for Fruehauf equipment as it depreciates and its earnings while working can exceed the cost of the borrowings. Trucking concerns have thus been led to purchase additional Fruehauf equipment in the expectation of increased revenues as a result." Fruehauf not only admitted this but espoused it, logically pointing out that if a purchaser was not able to pay for equipment as it depreciated and earn more than the cost of the borrowings, such purchase would be financially unsound (Answer). The record establishes that seven year terms would be competitively and economically unsound if the purchaser could *not* earn enough to exceed the cost of the borrowings and the equipment as it depreciates (Tr. 3602, 3494–95, 3928).

Only a small percentage of Fruehauf's loans are for seven years, the great majority, 97 to 99%, maturing in five years or less (RX 316; Tr. 6364). Fruehauf finances more than 95% of its time sale contracts and leases through its Fruehauf Trailer Finance Company. The finance company in turn borrows substantial sums of money for the purpose of financing the installment sales of Fruehauf. The finance company's loan agreements with the Metropolitan, Prudential, and Aetna insurance companies, entered into in 1956, all provide that it may not use funds borrowed from them to finance installment paper, if the aggregate of all installments of contracts held by it falling due beyond 61 months at any one time exceeds 7½% of all the money borrowed by the finance company for such purpose (RX 322, 323, 332–35). Under its prior loan agreement with The National Bank of Detroit, superseded by the above, the limitation as to installment sales contracts beyond 61 months was 1½% of the aggregate principal amount owing at any time on all installments sales contracts purchased from Fruehauf (RX 321).

These contracts contained other substantial limitations upon the use of such borrowed funds, including requirements that net earnings available for fixed charges must average yearly not less than 1½ times Fruehauf's average annual fixed charges, that installment sales contracts for used trailers be limited to 25% of the total outstanding, that the time of payment of any installment could not be extended more than three months, with one such extension per year and no more than two during the entire period of the contract, not to aggregate more than three months, that loans with respect to leases be limited to $15,000,000 and leases of no more than 61 months, and that the total amount owing by any one customer and his affiliates under installment sales contracts and leases not exceed 2% of the principal amount of all outstanding contracts and leases (RX 321–23).

The trucking industry has been faced with the problem of financing its new equipment requirements at least since 1944 (Tr. 79). The time of payment then was from 18 to 36 months (Tr. 80). By 1956 the time of payment had been extended to about five years (Tr. 105). In 1956 the American Trucking Association and responsible members of the financial community concluded that financing the purchase of trailers on an 8-year basis was appropriate and desirable (Tr. 95).

Prior to 1950, the financial institutions of America were not interested in financing the purchase of equipment by motor carriers (Tr. 3595). From 1954 through 1960 financing by financial institutions, such as banks, grew at a tremendous rate (RX 48; Tr. 3641, 3470–75, 3498). The policy of The First National City Bank of New York with respect to financing the purchase of trailer equipment is related to the period over which the cost of the equipment may be recaptured by depreciation, which in the case of truck trailers is about eight years (Tr. 3600). The bank follows the recommendation of the Interstate Commerce Commission as to a useful life of trailers of eight years (Tr. 3619). Trailers have a useful life substantially in excess of an eight-year depreciation (Tr. 784, 4084, 4086). The outstanding loans of The First National City Bank of New York, as of May 31, 1960, to credit worthy truck-trailer operators involved loans with terms ranging from five to eight years on a revolving basis (RX 46 and 47; Tr. 3611, 3626–27).

The First National Bank of Boston is another of the large financial institutions interested, on a nation-wide basis, in financing the equipment requirements of transportation companies (Tr. 3470). Since 1952 the bank's term of payout has grown from three to five years, and with respect to better credit risks, equipment will be financed for such periods as are determined by the book depreciation of the equipment. If the borrowing arrangement is terminated, a 60-month payment of the then existing balance becomes applicable (Tr. 3478–80). Thus, the financing of equipment may be for an initial five-year term plus five years with respect to any unpaid balance following termination of the borrowing arrangement or the depreciable life of the equipment, whichever period is shorter. The earning power of the equipment is significant in determining whether the bank will undertake such financing (Tr. 3493). Such financing has been extended by the bank and participating banks throughout the United States, including all makes of trailer equipment, and is available to all competitors of Fruehauf (Tr. 3515 and 3523). The bank also finances the purchase of trailers for lease purposes, generally for a period of 60 months (Tr. 3550–53).

The experience of financial institutions throughout America has been similar to that of The First National City Bank of New York and The First National Bank of Boston. In the early 1950's relatively long-term financing of such transportation equipment was not available. In the later 1950's, 100% financing of trailers up to 60-month periods of time became standard (Tr. 3913 and 3917), and was available to all manufacturers and users (Tr. 3917–24). The credit criterion used is applicable to individual as well as fleet operators of trailers and applies to any make of trailer (Tr. 3939). The same general financing terms existed among financial institutions in the Philadelphia area (Tr. 3654–58), in the mid-West generally (Tr. 4221), and in the Denver area (Tr. 4403). On the West Coast bank financing has been available on the basis of 72-month terms (Tr. 4721–38).

Financing the purchase of trailers by banks is to be distinguished from such financing by manufacturers. The bank's objective is to receive a fair rate of return, whereas manufacturers have an additional incentive in their margin of profit on the product sold and financed (Tr. 3607). The financing of trailers by manufacturers as distinguished from financial institutions for a period of as much as seven years is sound practice (Tr. 3928). While the record establishes that most other manufacturers do not grant seven-year payout terms, it also establishes that some of them do and that others could do so if they chose. Other manufacturers also operate their own finance companies (RX 288, p. 5, RX 272, p. 129, RX 293–94; Tr. 567, 5016, 3709, 1942, 2014, 3054). Both parties concede that many common carriers are under capitalized and short of cash. Thus, they are necessarily interested in the financing terms they can secure. On the other hand, there are many carriers and other purchasers who purchase for cash, are not interested in financing, and buy what they consider the best equipment at the best prices (Tr. 417, 477, 760, 771, 1054, 1145, 3562).

There can be no doubt but that the record establishes that Fruehauf grants seven-year terms more frequently than most of the other manufacturers but, as found hereinabove, as a result of the loan agreements between Fruehauf's finance company and its lenders, such terms are limited to a small percentage of all of Fruehauf's financing. The vast majority of all installment financing engaged in by Fruehauf during the period 1954 through 1959 involved maturities with 60 months or less (Tr. 6350, 6361, 6364 and RX 316). The loss experience ratio is one of the most significant factors used to measure good management of installment sales finance companies. Such ratio is the actual experienced loss in collecting time payments expressed as a percentage of the total liquidations (Tr. 4921). Fruehauf's loss to liquidation ratio during the period 1954 through 1960 ranged from .36% to 1.53%, with an average of .9% (RX 318). This was better than the composite experience of the major installment sales finance companies in America for the same period of time, whose loss to liquidation ratio ranged from 1.18% to 1.71% (RX 181, pp. 22 and 25), and constituted fine performance in the opinion of the vice president of The First National Bank of Chicago (Tr. 4936). This loss experience was also superior to that of Fruehauf's major competitor, Trailmobile, which experienced an average loss ratio of 1.29% during the period 1954 through 1958, as against Fruehauf's .91% (RX 307, 318). It was also better than the experience of the finance company of Brown (Clark) for the period 1958 through 1960 (the only available data, RX 191). Evaluated from the viewpoint of delinquent payments, Fruehauf's installment collection experience also was excellent. From 1954 through 1959, the percentage of installments which were more than 60 days past due ranged from only .16% to .42% (RX 320).

It is concluded and found that Fruehauf's financing terms of payout were not more advantageous than its competitors were able to meet, and in any event, were in accordance with sound financing practices.

b. Down Payments

The complaint also made reference to Fruehauf accepting more advantageous, *i.e.*, lower, down payments than its competitors. In this connection the record establishes that Fruehauf and the other manufacturers had varying requirements for down payments and in many instances, depending upon the credit of the borrower, required no down payment (RX 272, p. 128; RX 293–95; Tr. 668, 5587). In the earlier years of financing prior to 1950, down payments were usually 33⅓% (Tr. 80). By 1956 the American Trucking Association was able to obtain financing of trailers for its members with better credit ratings with no down payment required (Tr. 105). The financing developed by The First National City Bank of New York and The First National Bank of Boston resulted in 100% financing of new trailer equipment (Tr. 3550, 3611–15, 3917–24). The net worth of the equipment determined by depreciation and the credit standing of the purchaser were the relevant factors in extending such credit (Tr. 3914, 3932). As found hereinabove, many of the other manufacturers also had their own finance companies.

During the years 1956 through 1959, Fruehauf required down payments of 20% or more with respect to 58% of its contracts in 1956 and 1957, 64% in 1958 and 69% in 1959. Installment sales with down payments of 10% or less for the year 1956 were 7%, for the year 1957, 5%, and for the years 1958 and 1959, 4%, of all contracts (RX 317; Tr. 6376). It is concluded and found that Fruehauf's down payment requirements were not more advantageous than its competitors were able to meet and were in accordance with sound financing practices.

c. Trade-ins and Used Vehicle Purchasing

The complaint alleged that on some occasions Fruehauf bought its purchasers' used trailers for cash instead of crediting such amount as a trade-in against the new purchases, and in connection therewith collected a down payment on the new trailers from the purchaser of less than the amount paid to the purchaser for his used equipment.

As found hereinabove, those carriers which were undercapitalized necessarily were interested in securing the best terms available, including down payment, length of payout time, and purchase of their used equipment instead of treating it as a trade-in. This was a common practice in the industry. Many manufacturers purchased such used equipment from their purchasers at a total price exceeding the down payment required on the new trailers (Tr. 470, 1196, 1359, 2750, 2926, 4469–71).

Such practice was regarded as quite sound by financial institutions (Tr. 3939). Many purchasers preferred to have the manufacturer purchase the used equipment from them rather than taking it as a trade-in on the new equipment, because such sales of used equipment are treated as capital gains for tax purposes, whereas a trade-in offset is not and in addition reduces the purchase price of the new trailer for depreciation purposes (Tr. 5646 and 5662). The larger carriers who order large numbers of trailers of necessity must dispose of their used equipment, and for both reasons they can trade only with the larger manufacturers, who can handle the amount of used equipment involved and make delivery on the large number of new trailers required (Tr. 773, 1038). There is nothing inherently illegal or unfair about Fruehauf's practice, common to the industry, of purchasing used equipment in connection with the sale of new trailers.

d. Pricing

While Count II of the complaint refers in general to Fruehauf's pricing practices, there is no evidence in the record that Fruehauf's pricing was any different than the rest of the industry. The record establishes that there are no published or established prices for trailers, but instead they are negotiated in connection with each transaction (Tr. 409, 566, 900, 1119, 1127, 2749, 2754, 2859, 2934, 3110). Price-wise, the trailers produced by all manufacturers were competitive (Tr. 409, 1055–62, 1403, 5688). Clearly this is a fundamental area of competition.

e. Leasing

Count II makes reference to the admitted fact that Fruehauf leases trailers with an option to purchase at the end of the rental period for an insignificant amount of money, such as $1 (Answer). This practice also is common to the industry, and amounts in effect to a conditional sales contract, the "rental" for the period being equal to the amount of the purchase price of the trailers (Tr. 1817, 1541, 2179, 2453, 2764, 4186, 5134; RX 193).

f. Loans

Count II makes reference to the fact that upon occasion Fruehauf entered into purchase arrangements which included loans to its purchasers. One of the methods by which this was accomplished consisted of what is known in the industry as an "over-lay," which consists of allowing more for the used trailers than their market value and correspondingly increasing the price of the new trailers. If the price of the used equipment exceeds the required down payment, this results in the purchaser receiving more cash than he would have otherwise, which of course is repaid with interest under the financing contract. It results in a tax saving to the purchaser inasmuch as the sale of the used equipment is a capital gain with a maximum tax of 25%, while the depreciation of the new equipment is a deduction from corporate income which has a tax rate of 52%. Such over-lays are a general practice in the industry (Tr. 1359, 1369, 2754 and 2922).

g. Conclusions

The examples of sale and financing arrangements set forth in Count II of the complaint constituted unusual exceptions. Such financing arrangements comprised less than 1% of all the installment financing engaged in by Fruehauf for the period under review, and hence was neither substantial nor frequent (RX 317; Tr. 6376). In addition, during the relevant period, the total amount of sales financed by Fruehauf declined from approximately 60% to 50% (RX 316 and CX 494, p. 24). It is concluded and found that the terms and conditions offered by Fruehauf in connection with the sale of its trailers were available to and offered by other manufacturers, were not more advantageous than its competitors were able to meet, and that Fruehauf's financing was in accordance with sound business and financial practices.

In addition to the foregoing facts, Fruehauf's share of the relevant market, all trailer products, declined substantially during the relevant period, as found hereinabove (Polk and Census Tables, Part C–3, *supra*, and R. Tab 7). It is apparent that Fruehauf's competitive sales practices or terms had no adverse effect upon competition during all of the years encompassed by the record, including six years after the issuance of the complaint, because the rest of the industry captured the share of the market lost by Fruehauf, correspondingly increasing their share of the market.

Even assuming, contrary to the facts found herein, that Fruehauf's financing, down payment, pricing, leasing, trade-in and used vehicle purchasing, and lending practices were more advantageous to purchasers than its competitors and resulted in increased sales by Fruehauf, as alleged in the complaint, they constituted terms of sale just as do price and quality, and as such constitute competition which the antitrust laws are designed to encourage and protect.

Competition has been defined by the Supreme Court as a conflict for advantage.[20] As the court in *United States* v. *Alcoa* stated, competition is the endeavor of two or more persons to obtain the business of others "by means of various appeals including the offer of more attractive terms or superior merchandise."[21] Necessarily only one seller can make a particular sale. The Court of Appeals stated in the *Sinclair* case: "Competition * * * is a battle for something that only one can get; one competitor must necessarily lose."[22]

Clearly the competitive sales practices or terms of sale engaged in herein by Fruehauf were not contrary to good morals because characterized by deception, bad faith, fraud or oppression, nor were they accompanied by any purpose or power to acquire unlawful monopoly. The Supreme Court stated in its *Sinclair* decision:[23]

> Certainly the practice is not opposed to good morals because characterized by deception, bad faith, fraud, or oppression. *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 427. It has been openly adopted by many competing concerns. * * * No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice will be unduly to lessen competition * * *.
>
> The powers of the Commission are limited by the statutes. It has no general authority to compel competitors to a common level, to interfere with ordinary business methods, or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill, and capital should have large freedom of action in the conduct of their own affairs.

It is concluded and found that Fruehauf's terms of sale, or competitive selling practices, as alleged in Count II and hereinabove found, are not unfair methods of competition in violation of Section 5 of the Act.

CONCLUSIONS OF LAW

1. The acquisition of assets by Fruehauf from Hobbs was in violation of Section 7 of the Clayton Act, and was an unfair method of competition in violation of Section 5 of the Act.

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[20] *F.T.C.* v. *Sinclair Refining Company*, 261 U.S. 463 (1923).
[21] *United States* v. *Aluminum Company of America*, 91 F. Supp. 333 (S.D. N.Y. 1950).
[22] *Sinclair Refining Company* v. *F.T.C.*, 276 F. 686 (C.A. 7 1921).
[23] Footnote 20, *supra*.

2. The acquisitions of assets by Fruehauf from Carter, Brown, Strick, Independent Metals, and Hyde were not in violation of Section 7 of the Clayton Act or Section 5 of the Act.

3. Other than the acquisition from Hobbs, Fruehauf has not engaged in unfair methods of competition in violation of Section 5 of the Act, as alleged in Count II of the complaint.

ORDER

It is ordered, That respondent, Fruehauf Trailer Company, a corporation, and its officers, directors, agents, representatives, and employees, shall, within one (1) year from the date this order becomes final, divest itself absolutely, in good faith, of all assets, properties, rights and privileges, tangible and intangible, including but not limited to all plants, machinery, equipment, contract rights, patents, licenses, trade names, trademarks and good will acquired by said respondent as a result of its acquisition of assets from Hobbs Manufacturing Company and Hobbs Trailer and Equipment Company (hereinafter called Hobbs), together with so much of the plants, machinery, buildings, improvements, equipment, and other property of whatever description which have been added to the property of Hobbs as may be necessary to restore Hobbs as a going concern in all the lines of commerce in which it was engaged, and in substantially the basic operating form in which it existed, at and immediately prior to the time of the acquisition by respondent.

Pending divestiture, Fruehauf Trailer Company shall not make any changes in any of the above-mentioned plants, machinery, buildings, equipment or other property of whatever description, which shall impair their present rated production capacity or their market value, unless said capacity or value is restored prior to divestiture.

It is further ordered, That in such divestiture no property above mentioned to be divested shall be sold or transferred, directly or indirectly, to anyone who at the time of the divestiture is a stockholder, officer, director, representative, employee, or agent of, or otherwise directly or indirectly connected with or under the control or direction of, respondent or any of respondent's subsidiary or affiliated companies, or to anyone who is not approved as a purchaser in advance by the Federal Trade Commission.

It is further ordered, That the allegations of the complaint with respect to the Carter, Brown, Strick, Independent Metals, and Hyde acquisitions and the allegations with respect to unfair methods of competition, other than the acquisition of Hobbs, be and hereby are dismissed.

It is further ordered, That respondent Fruehauf Trailer Company shall, within such time as may be fixed by order of the Federal Trade Commission, submit in writing for the consideration and approval of the Commission, its plan for compliance with this order.

OPINION OF THE COMMISSION

MAY 28, 1965

BY ELMAN, *Commissioner:*

I

This matter is before the Commission on cross-appeals from the hearing examiner's initial decision. Complaint counsel have appealed from the examiner's finding that respondent's acquisition in 1956 of The Strick Company did not violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, which proscribes mergers and other corporate acquisitions where "the effect * * * may be substantially to lessen competition, or to tend to create a monopoly."[1] Respondent has appealed from the examiner's finding that its acquisition in 1955 of Hobbs Manufacturing Company did violate the statute.

Merger cases often involve difficult and novel issues. This one does not. The mergers at issue here are conventional "horizontal" mergers, *i.e.*, mergers between firms which prior to the merger were in competition with each other. The law as to such mergers is now well settled, as a result of a number of Supreme Court decisions in recent years, and our only task in this case is to apply established principles to the particular facts. On its facts, the case presents a clear violation of Section 7; it is not even close to the borderline of legality.

II

From the earliest days of the truck-trailer industry, fifty years ago, to 1961, the last year for which there is evidence in this record, respondent has at all times been the nation's leading manufacturer of truck trailers, and by a substantial margin. In no year in the period (1953–1961) for which detailed statistics may be found in this record has respondent accounted for less than 30% of the indus-

[1] Complaint counsel have also appealed from the examiner's finding that respondent's 1953 acquisition of Brown Equipment & Manufacturing Company was not unlawful. However, since complaint counsel seek no relief with respect to that acquisition, we do not need to decide its lawfulness.

try's total sales. With one other large firm, Trailmobile, it has consistently accounted for more than one-half of the industry's sales; and the remaining sellers are all very much smaller than either respondent or Trailmobile.

At the time of the acquisitions in question, Strick and Hobbs were both healthy and strong competitors of respondent. Strick was the third largest seller of truck trailers, with 4–5% of the industry's total sales, and Hobbs was the sixth largest, with 2%. These percentages, however, understate the competitive position of the acquired firms. Strick was very strong in the important aluminum-van submarket,[2] with 12% of total sales. Strick, indeed, had pioneered the development of the aluminum van, and its vans were widely considered by customers the finest made. Hobbs was the second largest producer of dump trailers, with 22% of that submarket, and a leading producer of platform trailers, with 7%. Hobbs was a particularly well-managed firm; sometime after the merger with respondent, an officer of the pre-acquisition Hobbs became president of respondent. Respondent was at all times for which there is evidence in the record the largest seller in each of these submarkets (aluminum vans, dump trailers, and platform trailers), just as it was the largest seller in the overall truck-trailer market.

Conditions in the truck-trailer industry strongly favor the large seller over the small. While the manufacture of truck trailers basically involves no more than the assembly of parts produced by other manufacturers, and while it may be true, as respondent asserts, that anyone with mechanical skill can fabricate a truck trailer in his back yard, there is far more to becoming a significant competitor than the assembly of parts. The most important customers for truck trailers are the large motor common carriers. They typically order in bulk—50, 200, even 1200 units at a time; and to fill such orders a sizable plant is required. That is why the large common carriers usually accept bids from only a handful of large firms. Moreover, to compete for these fleet accounts a seller must be able to accept the trade-ins of old truck trailers offered by these purchasers when they place an order, and few producers have the facilities for refitting and reselling these trade-ins. So, too, to operate effectively in this industry requires maintaining elaborate servicing facilities.

For these and other reasons, despite what respondent claims is a complete absence of barriers to entry, a handful of large firms,

[2] The hearing examiner, applying the test declared by the Supreme Court in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325, correctly found that aluminum vans, platform trailers, and dump trailers, among others, were appropriate product markets in which to appraise the competitive effects of the acquisitions, as well as truck trailers generally.

led by respondent, have managed to obtain the vast bulk of the truck-trailer business, relegating the remaining producers to a strictly marginal role. In 1959, for example, the eight largest producers had a combined market share of about 74%, and the balance was divided among some 230 other producers, only six of whom had as much as a 1% market share. That large firms have definite competitive advantages in this industry is also suggested by the large number of mergers which have taken place in recent years, at least one of which (Brown Trailers-Clark Equipment) was avowedly intended to strengthen the merging firms vis-a-vis their larger competitors.

III

Respondent's principal argument on this appeal is that irrespective of whether its acquisitions appeared to be illegal in 1955 and 1956, actual market events since these acquisitions conclusively demonstrate that in fact they did not have the effect of substantially lessening competition or tending to create a monopoly. In support of this argument, respondent points to the fact that between 1955 (the year in which it made the Hobbs acquisition) and 1961 its share of the overall truck-trailer market declined from 39.1% to 33.5%, and its share of the aluminum-van market, in which Strick was an important factor, declined from 42.2% to 36.4%. In the dump-trailer market, in which Hobbs was a significant factor, respondent argues that while it and Hobbs' combined 1961 market share was no less than that they enjoyed prior to the acquisition (28.7%), it was significantly less than their combined market share just after the acquisition of Hobbs, since there was a decline from 44.4% in 1956 to 30.8% in 1961. Finally, respondent argues that the absence of any anticompetitive effects from its acquisitions is further demonstrated by the fact that some 104 new companies entered the industry after it acquired Hobbs and Strick.

Respondent's arguments fail to refute, and indeed do not even come to grips with, the basic anticompetitive features of the challenged acquisitions. As pointed out above, respondent is and always has been the single dominant firm in the truck-trailer industry as a whole and in each of its submarkets. The fact that respondent's market share in the overall market as well as in the submarkets declined during the 1955–1961 period in no way affected either its absolute dominant industry position, or its relative position of dominance vis-a-vis its nearest competitors in these markets. Thus, both prior to and after the acquisitions, respondent remained the leader not only in the overall truck-trailer markets but in both the dump-trailer and aluminum-van markets, accounting for more than 30% of truck-trailer sales and 30.8% and 36.6%, respectively, of dump-trailer and aluminum-van sales in 1961.

In the overall truck-trailer industry, Trailmobile, respondent's nearest competitor, in the relevant period narrowed somewhat the gap that previously existed between its share of the market and that of Fruehauf; but Trailmobile's market share was still less than half that of Fruehauf in 1958. The balance of that market continued in 1958 (the last year for which data are complete), as in 1955, to be divided among more than 200 smaller producers, only 11 of which accounted for more than 1% of the market, with but one of these having more than a 5% market share (Appendix A, p. 937, *infra*). Thus, the entry into the market of 104 new companies after the acquisitions in no way altered the basic market structure, which remained as totally dominated by respondent as it has been prior to the acquisitions. The total market share captured by these 104 companies amounted to only 4.6% of the market in 1959, with no one of them having more than .5% of the market.

The new entrants have not replaced the substantial competition represented by the larger, and more aggressive, Hobbs and Strick. None of them was able to tap that segment of the buyers' industry which could, practically speaking, look only to Fruehauf and the other larger industry members to fill its requirements; in no sense could these new entrants be assumed to be able to offer effective competition to Fruehauf in serving the large and important common-carrier customers. None was able to challenge in any meaningful way the dominant position of Fruehauf and their entrance into the market did not offset the anticompetitive effects of the challenged acquisitions.

IV

Under the standards laid down by the Supreme Court, the Strick and Hobbs acquisitions are clearly unlawful. The Court has stated that "[w]here * * * the merging companies are major competitive factors in a relevant market, the elimination of significant competition between them constitutes a violation of § 1 of the Sherman Act," *United States* v. *First National Bank & Trust Co. of Lexington*, 376 U.S. 665, 672–73,[3] "without reference to the strength or weakness of whatever competition remain[s]." *Id.*, at 670.[4]

[3] And, *a fortiori*, a violation of Section 7 of the amended Clayton Act. *Cf. United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 170–71.

[4] For example, if General Motors were to acquire Ford, the elimination of competition between the merging firms would not be offset by the fact that Chrysler continued to offer competition to the merged entity.

The acquiring and acquired firms in this case were "major competitive factors" in the relevant markets. The Court has noted the importance, in a concentrated market, of preserving the independence of even a 1% factor. *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280–81. Strick and Hobbs were considerably more than that. The importance of their competition is enhanced by the fact that, as pointed out earlier, there are so few producers capable of offering real competition to respondent for the patronage of the very important fleet buyers. In addition, the competition offered respondent by Strick and Hobbs was qualitatively as well as quantitatively important. They were aggressive, well-managed, successful, and growing companies—"prototype[s] of the small [only by comparison with the market leaders, respondent and Trailmobile] independent that Congress aimed to preserve by § 7." *Id.*, at 281.

It is also clear that the acquisitions permanently eliminated all competition between respondent and the acquired firms. We have considered the post-acquisition evidence in the record; but respondent gives it too much weight. Respondent argues that after 1956 its market share declined steeply. We think the evidence is hopelessly equivocal on this score.[5] But even if there was such a decline, it did not restore competition between respondent and the acquired firms—the focus under the *Lexington Bank* test. And, so far as appears, respondent did not lose the business the acquired firms enjoyed; the market share of the Strick Division of respondent, for example, has actually increased since the acquisition.

In addition to eliminating "significant competition" between "major competitive factors," the Strick and Hobbs acquisitions have created a reasonable probability that competition generally in the truck-trailer industry and the relevant submarkets will be lessened substantially. As noted earlier, most truck-trailer producers do not

[5] The point of departure for respondent's argument that its sales declined steeply after 1956 is the very high percentage of *shipments* in the relevant markets it enjoyed in 1955, prior to the Strick and Hobbs acquisitions. However, the 1955 figures are not reliable indicators of market shares because they include intra-company shipments, which were substantial in that year. (For example, respondent shipped 611 dump trailers but sold only 494.) With respect to the Strick acquisition, the record shows that respondent's share of total shipments of aluminum vans was 21.7% in 1953, 42.2% in 1955, 50% in 1956, and 33.4% in 1957. However, in 1955 respondent was building up inventory, and so shipping more than it was selling, while in 1956 and 1957, when respondent was liquidating inventory, its shipments went down. Taking 1953 rather than 1955 as the base year, respondent's sales of aluminum vans increased rather than decreased, reflecting the addition of Strick's market share. The decline between 1955 and 1957 thus may not reflect any actual decline in respondent's sales relative to its competitors. With respect to the Hobbs acquisition, the examiner found that respondent's market share in both platform trailers and dump trailers increased, rather than declined, between 1955 and 1961. Accordingly, what we have said about the so-called decline to respondent's aluminum-van market share applies *a fortiori* to the other relevant submarkets.

have the strength to compete effectively with respondent for the cream of the industry's business—sales to the larger common carrier fleet accounts. The absorption by respondent of two of the handful of substantial firms capable of competing with it for these accounts is surely likely to diminish the vigor of competition in this industry substantially and increase "the likelihood that parallel policies of mutual advantage, not competition, will emerge." *Aluminum Co. of America*, *supra*, at 280.

This probability is not negated by the asserted decline in respondent's market share subsequent to the Strick and Hobbs acquisitions. Assuming such a decline has actually taken place (but see note 5, *supra*), the record affords no basis for inferring therefrom that the structure of the industry is becoming more competitive. The change in respondent's market share, so far as appears, reflects simply a transitory readjustment among the market leaders, for there has been no showing of any substantial infusion of new competitive vigor (see pp. 935–936, *infra*). The downward trend of respondent's market share may already be a thing of the past. The record shows that in 1961 (the last year for which there is evidence) respondent's market share increased over the previous year in some submarkets and, overall, was substantially the same as its 1960 share.

This much, at least, seems clear, and is enough to condemn these acquisitions: The truck-trailer industry and its submarkets would probably be substantially more competitive in structure but for the acquisitions.[6] In 1959, for example, the aluminum-van market was dominated by two firms, respondent and Trailmobile, having 38.3% and 18.4% of total shipments respectively. Had respondent not acquired Strick, it is likely that a market structure would have emerged in which respondent had only a 24.2% share, Trailmobile 18.4%, and Strick 14.1%.[7] The Strick acquisition, thus, whether or not it increased the margin of respondent's dominance, seems to have retarded the emergence of a market structure in which that dominance would have been significantly less and the prospects for competition correspondingly greater.[8] Respondent maintained its dominance after these acquisitions, and thus the fact that its mar-

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[6] See *Scott Paper Co.*, F.T.C. Docket 6559 (Opinion on Remand, Dec. 26, 1963. [63 F.T.C. 2240]. *Cf. United States* v. *Philadelphia National Bank*, 374 U.S. 321, 365, n. 42; *Standard Oil Co.* v. *United States*, 337 U.S. 293, 308–09.

[7] The figure for Strick represents shipments from the Strick facilities of respondent, and gives a general indication of what Strick's market share probably would have been if it had remained independent. Of course, we cannot really know what the fate of the acquired or acquiring firms would have been but for the merger. But we have no reason to doubt that the shipments of respondent's Strick Division approximate the probable market share Strick would have enjoyed but for the acquisition, or that respondent's market share would have been substantially smaller but for the acquisition.

[8] The same judgment is reached with respect to the Hobbs acquisition, there being no basic dissimilarity in the facts.

ket share declined after the acquisitions in no way lessens or eliminates their capacity to lessen competition. See note 6, *supra.* In short, there can be no doubt from the entire record, including the post-acquisition evidence, that the effect of these acquisitions was, and probably will be, "substantially to lessen competition."

Respondent's final contention—that the truck-trailer industry and its submarkets are uniquely immune to the anticompetitive effects of undue concentration, because there are no entry barriers and large firms have no competitive advantage over small—is far-reaching in its implications. If accepted, it would mean that no acquisition of a competitor in this industry could ever be illegal; it would mean that respondent would be free to acquire Trailmobile and, for that matter, all the other leading producers, since by hypothesis the small members of the industry or even new entrants could rapidly grow and replace the absorbed firms. Without pausing to explore the many problems raised by this theory (see *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), p. 6 [65 F.T.C. 1163, 1207]), we find it to be without factual support in this record.

As previously noted, competitive conditions in the truck-trailer industry strongly favor the large seller over the small. While many firms may be able to enter the industry on a very small scale, few indeed can attain a position substantial enough to offer a meaningful challenge to respondent. The average market share enjoyed by the new entrants shown on this record is a miniscule 0.04%. So far as appears, only one firm that entered the truck-trailer industry subsequent to the challenged acquisitions has managed to break into the ranks of the 20 largest firms, and it ranks at the very bottom of the top 20 with a market share (1959) of only .5%. Indeed, between 1955 and 1959, only one firm not among the top 20 (apart from the new entrant just mentioned) managed to break into the top 20, and it too ranks at the very bottom with a .5% market share. The record also shows that while it may theoretically be possible for small firms to compete with large, the fact is that in all years for which evidence was introduced the vast bulk of the truck-trailer industry was controlled by a very small number of large firms. The eight largest firms had virtually the same combined market share in 1959 as they had had in 1955—nearly 75%. And fully half of the industry's total sales has consistently been accounted for by the same two very large firms, Fruehauf and Trailmobile.

V

Lest there be any misunderstanding, we repeat that the post-acquisition evidence of record in this case has been fully considered by the Commission and given the probative weight due it. See *F.T.C.* v. *Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965). As the Supreme Court has stated, such evidence should not be "given conclusive weight or * * * allowed to override all probabilities." *Cf. United States* v. *Continental Can Co.*, 378 U.S. 441, 463. The Court in *Consolidated Foods*, 380 U.S. at 599, quoted approvingly the following language from the Commission's opinion in that case:

"If reciprocal buying creates for Gentry a protected market, which others cannot penetrate despite superiority of price, quality, or service, competition is lessened whether or not Gentry can expand its market share. * * * It is for this reason that we reject respondent's argument that the decline in its share of the garlic market proves the ineffectiveness of reciprocity. We do not know that its share would not have fallen still farther, had it not been for the influence of reciprocal buying. This loss of sales fails to refute the likelihood that Consolidated's reciprocity power, which it has shown a willingness to exploit to the full, will not immunize a substantial segment of the garlic market from normal quality, price and service competition." 62 F.T.C. 959, 960.[4]

[4] The last three sentences were a footnote to the first sentence.

This reasoning is applicable to the facts of the present case. Here, too, "We do not know that * * * [respondent's] share would not have fallen still farther," had respondent not acquired two of its largest competitors. And here, too, nothing in the limited post-acquisition history of the relevant markets (including such loss of respondent's sales as the record reflects) "refute[s] the likelihood" that the mergers eliminated competition between the industry's dominant seller and two major competitors.

Indeed, the post-acquisition history confirms our judgment that the probable effect of the Strick and Hobbs acquisitions will be to lessen competition substantially. It indicates that respondent, despite fluctuations in its market share, is likely for the foreseeable future to retain its position as the largest seller in a highly concentrated market and that the truck-trailer industry and its submarkets are likely to remain substantially as concentrated as at the time of the challenged acquisitions, despite some new entry and some market-share increases by smaller firms. The post-acquisition history affords no basis for rejecting the conclusion, compelled by the entire record, that in this industry and its submarkets the elimination of substantial and important independent competitors such as Strick and Hobbs did, and probably will, substantially lessen competition.

On the record as a whole, and with due consideration for all of the evidence for the entire period covered, we conclude that the Strick and Hobbs acquisitions were made in violation of Section

7, and that divestiture, which as a general rule is necessary and appropriate to remedy such violations (see *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316), is required here.

APPENDIX A

Manufacturer	Market Share 1955	Market Share 1958
	Percent	*Percent*
Fruehauf	39.1	34.0
Strick	4.1	45.3
Hobbs	2.1	
Trailmobile	15.8	14.3
Dorsey	3.1	5.5
Highway	1.8	3.1
Brown (Clark)	2.4	2.9
Great Dane	2.0	2.6
Gindy	.9	2.5
Kingham	1.3	1.7
Utility	1.4	1.6
Lufkin	1.1	1.4
Nabors	1.3	1.3
Kentucky	1.2	1.1
Heil	.9	1.0

FINDINGS OF FACT; CONCLUSIONS; FINAL ORDER

FINDINGS OF FACT

The Commission adopts the findings of fact contained in pp. 889–910 (with the exception of the paragraphs on p. 904 captioned "6. Conclusions"), 911 (beginning "3. Hobbs") to 914 (not including the last two paragraphs on p. 914) of the hearing examiner's initial decision as its own findings of fact. The Commission's other findings of fact are set forth in the accompanying opinion.*

CONCLUSIONS

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

2. Section 7 of the Clayton Act, as amended, prohibits any merger or corporate acquisition where the effect in any line of commerce in any section of the country may be substantially to lessen competition or to tend to create a monopoly.

*No findings have been made with respect to those charges of the complaint that the examiner dismissed as to which complaint counsel did not appeal. We intimate no view on the correctness of the examiner's findings with respect to those charges.

3. The effect of the acquisition of the assets of the Strick Company and Strick Plastics Corporation by Fruehauf Trailer Company may be substantially to lessen competition in the domestic production and sale of truck trailers and of aluminum vans in violation of Section 7 of the Clayton Act, as amended.

4. The effect of the acquisition of the assets of the Hobbs Manufacturing Company and Hobbs Trailer and Equipment Company may be substantially to lessen competition in the domestic production and sale of truck trailers, dump trailers and platform trailers in violation of Section 7 of the Clayton Act, as amended.

5. Divestiture of the acquired assets is necessary and appropriate to remedy the anticompetitive effects of the unlawful acquisitions.

FINAL ORDER

It is ordered, That:

I

(A) Respondent Fruehauf Trailer Company, a corporation, and its officers, directors, agents, representatives, and employees, shall, within one (1) year from the date this order becomes final, divest itself absolutely, in good faith, of all assets acquired by said respondent from Hobbs Manufacturing Company and Hobbs Trailer and Equipment Company (hereinafter called Hobbs), together with so much of the plants, machinery, buildings, improvements, equipment, and other property of whatever description that have been added to or placed upon the premises formerly owned by Hobbs, as may be necessary to restore Hobbs as a going concern and effective competitor in all the lines of commerce in which it was engaged immediately prior to its acquisition by respondent.

As used in this order, "assets" shall include any properties, rights and privileges, tangible and intangible, including but not limited to all plants, machinery, equipment, contract rights, patents, licenses, trade names, trademarks, and good will of whatever description.

(B) Pending divestiture, Fruehauf Trailer Company shall not make any changes in any of the above-mentioned assets which impair their present capacity for the production, distribution, sale or financing of truck trailers, or impair their market value, unless said capacity or value is restored prior to divestiture.

(C) Respondent in such divestiture shall not sell or transfer, directly or indirectly, any of the assets to be divested to anyone who at the time of the divestiture is a stockholder, officer, director, representative, employee, or agent of, or under the control or direction of, respondent or any of respondent's subsidiary or affiliated companies, or to anyone who is not approved as a purchaser in advance by the Federal Trade Commission.

(D) If respondent divests the assets, properties, rights and privileges, described in paragraph A of this order, to a new corporation or corporations, the stock of each of which is wholly owned by Fruehauf Trailer Company, and if respondent then distributes all of the stock in said corporation or corporations to the stockholders of Fruehauf Trailer Company, in proportion to their holdings of Fruehauf Trailer Company stock, then paragraph (C) of this order shall be inapplicable, and the following paragraphs (E) and (F) shall take force and effect in its stead.

(E) No person who is an officer, director or executive employee of Fruehauf Trailer Company, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of Fruehauf Trailer Company, shall be an officer, director or executive employee of any new corporation or corporations described in paragraph (D) or shall own or control, directly or indirectly, more than one (1) percent of the stock of any new corporation or corporations described in paragraph (D).

(F) Any person who must sell or dispose of a stock interest in Fruehauf Trailer Company or the new corporation or corporations described in paragraph (D) in order to comply with paragraph (E) of this order may do so within six (6) months after the date on which distribution of the stock of the said corporation or corporations is made to stockholders of Fruehauf Trailer Company.

II

(A) Respondent, Fruehauf Trailer Company, a corporation, and its officers, directors, agents, representatives, and employees shall, within one (1) year from the date this order becomes final, divest itself absolutely, in good faith, of all assets of its Strick Trailers Division and such other assets as may be necessary to restore The Strick Company and Strick Plastics Corporation as a going concern and effective competitor in all the lines of commerce in which it was engaged immediately prior to its acquisition by respondent.

As used in this order, "assets" shall include any properties, rights and privileges, tangible and intangible, including but not limited to all plants, machinery, equipment, contract rights, patents, licenses, trade names, trademarks, and good will of whatever description.

(B) Pending divestiture, respondent shall not make any changes in any of the above-mentioned assets which impair their present capacity for the production, distribution, sale or financing of truck-trailers, or impair their market value, unless such capacity or value is restored prior to divestiture.

(C) Respondent in such divestiture shall not sell or transfer, directly or indirectly, any of the assets to be divested to anyone who at the time of divestiture is a stockholder, officer, director, representative, employee or agent of, or under the control, influence or direction of respondent or any of respondent's subsidiary or affiliated companies, or to anyone who is not approved in advance by the Federal Trade Commission.

(D) If respondent divests the assets, properties, rights and privileges, described in paragraph A of this order, to a new corporation or corporations, the stock of each of which is wholly owned by Fruehauf Trailer Company, and if respondent then distributes all of the stock in said corporation or corporations to the stockholders of Fruehauf Trailer Company, in proportion to their holding of Fruehauf Trailer Company stock, then paragraph (C) of this order shall be inapplicable, and the following paragraphs (E) and (F) shall take force and effect in its stead.

(E) No person who is an officer, director or executive employee of Fruehauf Trailer Company, or who owns or controls, directly or indirectly, more than one (1) percent of the stock of Fruehauf Trailer Company, shall be an officer, director or executive employee of any new corporation or corporations described in paragraph (D) or shall own or control, directly or indirectly, more than one (1) percent of the stock of any new corporation or corporations described in paragraph (D).

(F) Any person who must sell or dispose of a stock interest in Fruehauf Trailer Company or the new corporation or corporations described in paragraph (D) in order to comply with paragraph (E) of this order may do so within six (6) months after the date on which distribution of the stock of the said corporation or corporations is made to stockholders of Fruehauf Trailer Company.

III

Respondent Fruehauf shall, within sixty (60) days from the date this order shall become final, and every ninety (90) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the provisions of this order.

It is further ordered, That the charges of Count I of the complaint with respect to the Carter, Brown, Independent Metals, and Hyde acquisitions and the charges of Count II of the complaint be, and they hereby are, dismissed.

IN THE MATTER OF

HUMBLE OIL & REFINING COMPANY

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

Docket 8544. Complaint, Nov. 5, 1962—Decision, May 28, 1965

Order dismissing complaint charging a Texas oil and refining company with illegally discriminating in price between competing resellers of its gasoline in certain areas of New York and South Carolina.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent named in the caption hereof, and more particularly designated and described hereinafter, has violated and is now violating the provisions of Section 2(a) of the Clayton Act (U.S.C., Title 15, Section 13), as amended, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Humble Oil & Refining Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1216 Main Street, Houston, Texas.

PAR. 2. Respondent is now, and for several years last past has been, among other things, engaged in the offering for sale, sale and distribution of gasoline and various other petroleum products throughout some forty-five States of the United States and the District of Columbia.

PAR. 3. The Respondent Humble Oil & Refining Company, in the marketing of its gasoline and other petroleum products, operates through Central, Eastern Esso, Southwest and Southeast Esso Regions and sells within each of the areas of said regions gasoline under brand names carrying the designation "Esso," "Humble" or "Enco." Specifically, for example, in the eastern parts of the country, the respondent operates through the Eastern Esso Region and Southeast Esso Region and sells its gasoline under the brand designated "Esso." Respondent markets its gasoline and other petroleum products in the aforementioned forty-five State area and the District of Columbia through its own company-owned and operated stations, as well as under contracts with independent dealers and independent lessee—dealer stations. In the latter two categories, respondent has entered into dealer contracts now in force and effect with service station dealers, pursuant to the provisions of which respondent sells and delivers to such dealers their respective requirements of respondent's brands of gasoline during the terms of such contracts.

PAR. 4. For the purpose of supplying said customers, and in making delivery thereto, respondent ships or otherwise transports, or causes to be shipped or otherwise transported, gasolines from its own refineries, located in various States across State lines to bulk stations and other distributing points within the forty-five State area, and the District of Columbia, in which it does business, from which said gasolines thence are sold and distributed to dealers selling the gasolines at retail under the Esso, Humble or Enco brand names. There is now and has been at all times mentioned herein a continuous stream of trade and commerce, as "commerce" is defined in the Clayton Act, of said gasolines between respondent's terminals, bulk stations, or other distribution centers and said retail dealers purchasing said gasoline in the forty-five States and the District of Columbia. All of said purchases by said retail dealers and sales by respondent to such dealers are and have been in the course of such commerce. Said gasolines, after transportation and delivery into the forty-five State area and the District of Columbia, are then offered for resale to motorists and others in the aforementioned area.

PAR. 5. In the course and conduct of its said business in commerce, respondent Humble Oil & Refining Company has sold, and now sells, its gasolines and various other petroleum products to purchasers thereof, some of whom have been and now are in competition with each other in the resale and distribution of such products.

PAR. 6. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its gasoline of like grade and quality by selling such gasolines to certain of its customers at higher prices than it did to other of its customers. Commencing on or about May 1960, respondent has sold and is continuing to sell gasolines to certain dealers located within the area of the Southeast Esso Region, among others, at prices lower than the prices charged by the respondent to its other retail purchasers for gasolines of the same grade and quality in the same competitive market area. For example, certain dealers located in Morven and Rockingham, North Carolina; Chesterfield, Ruby, and Pageland, South Carolina, within the Southeast Esso Region, were charged a lower price by the respondent than was charged to competing purchasers of gasolines of the same grade and quality.

PAR. 7. The effect of the aforesaid discriminations, or any appreciable part thereof, has been or may be substantially to lessen competition or to destroy or prevent competition with those retail dealers of respondent's gasolines who received the lower prices, in the resale of such gasolines at retail in the States of North Carolina and South Carolina and other areas.

PAR. 8. The discriminations in price as hereinbefore alleged are in violation of the provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Rufus E. Wilson, *Mr. Anthony Zabiegalski, Jr.*, *Mr. Harold Brandt*, and *Mr. John F. Reilly* supporting the complaint.

Mr. William Simon, *Mr. J. Wallace Adair*, and *Mr. A. Duncan Whitaker*, of *Howrey, Simon, Baker & Murchison*, Washington, D.C., *Mr. Carleton H. Endemann* and *Mr. Robert T. Tate*, New York, N.Y., and *Mr. Robert B. Jennings*, New Orleans, La., for the respondent.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

FILED MARCH 31, 1965

STATEMENT OF THE CASE

The complaint in this proceeding, issued November 5, 1962, charged that respondent sold gasoline to certain dealers located within the area of the Southeast Esso Region, among others, beginning on or about May 1960, at prices lower than it charged other competing retail purchasers in violation of Section 2(a) of the amended Clayton Act (15 U.S.C. Section 13(a)). In the months that followed the issuance of the complaint, pretrial procedures resulted in the disclosure of specific incidents of alleged price discrimination in five separate areas, three in the Carolinas and two in New York.

Hearings were held in New York City and Charlotte, North Carolina, and concluded on November 2, 1964. Briefs were submitted by the parties, as well as proposed findings. To the extent that the findings below are inconsistent with those proposed by counsel, such proposed findings are deemed rejected as not supported by the record, or immaterial. Both parties have moved to strike certain evidence and/or reinstate rejected evidence. These motions are denied.

During the trial of the case, the five areas of alleged price discrimination were reduced to four. The State Line Grocery-Pageland case involved alleged price discrimination at various times in 1961 between "favored" State Line Grocery, purchasing gasoline not from respondent but from a jobber-customer of respondent, and two "disfavored" Esso stations in Pageland, South Carolina. Respondent moved to strike evidence offered by complaint counsel in support of this portion of the price discrimination suit on the ground that State Line Grocery was not a purchaser from respondent within the meaning of Section 2(a) of the Robinson-Patman Act. The hearing examiner's Opinion and Order of October 3, 1963, upheld the position of the respondent in this respect.[1] Consequently, the four price discrimination cases for disposition at this time are:

1. The Cheraw-Bennettsville case, alleging price discrimination during the last half of 1961 between certain "favored" Esso dealers in Chesterfield and Cheraw, South Carolina, and certain "disfavored" Esso dealers in Bennettsville, South Carolina.

2. The Rock Hill-York case, alleging price discrimination during the same period between certain "favored" Esso dealers in Rock Hill, South Carolina, and certain "disfavored" Esso dealers in York, Hickory Grove, and Blacksburg, South Carolina.

3. The Fromberg case, alleging price discrimination during 1960 and 1961 between "favored" Esso dealer Fromberg and certain "disfavored" Esso dealers on Long Island, New York.

4. The Merry Twins case, alleging price discrimination between May 1960 and June 1962 between "favored" Esso dealer Merry Twins and certain "disfavored" Esso dealers in Queens, New York City.

FINDINGS OF FACT

I. The Respondent

1. Respondent Humble Oil & Refining Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 800 Bell Avenue, Houston, Texas (Admitted in Answer at p. 1).

2. From January 1, 1960, to the date of the complaint, respondent engaged in the distribution, offering for sale, and sale of gasoline in the District of Columbia and various States of the United States.

[1] Complaint counsel's request for reconsideration of the hearing examiner's ruling on this issue is denied.

With the opening in 1960 of service stations in Ohio, Oklahoma, Utah, Nevada, and California, respondent was marketing its gasoline in 40 States (CX 3, at pp. 15, 16). In 1961, respondent entered the five southeastern States of Georgia, Alabama, Mississippi, Florida, and Kentucky (CX 4, at p. 3; Stipulation, Tr. 36) and thus expanded its gasoline retail marketing operations into 45 States of the United States and the District of Columbia (CX 4, p. 7; CX 5, p. 8).

3. Respondent, in the marketing of its gasoline and other petroleum products, operates through Eastern Esso, Southeast Esso, Central, and Southwest regions and sells within each of the areas of said regions gasoline under the Esso or Enco brand names. In addition to selling its gasoline under the Esso and Enco brand names, respondent sold gasoline in certain States of the United States under the Humble, Carter, Oklahoma, and Pate brand names (Stipulation, Tr. 36, 37).

4. Service stations selling products of respondent have identification signs using the word Humble (Answer to Complaint, p. 2).

5. Respondent markets its gasoline and other petroleum products in the aforementioned forty-five State area and the District of Columbia through company-owned and operated stations (Admitted, not denied in Answer) as well as dealers and lessee-dealers. Respondent utilizes various types of agreements with its customers including equipment leases (CX 9 A, B; CX 18 A, B), motor fuel sales contracts (CX 10), and leases (CX 11 A, B, C, D; CX 12 A, B, C, D; CX 19 A, B, C; CX 281 A–E; and CX 283 A, B, C).

6. Respondent sells motor fuel of like grade and quality to its customers in the areas where it markets its motor fuels (Answer, p. 4; Response to Request for Admissions, dated June 10, 1963, pp. 1–3; Respondent's Response to Request for Admissions, dated August 5, 1963, pp. 1–2).

7. Respondent produces motor gasoline at its refineries located in Baton Rouge, Louisiana; Everett, Massachusetts; Billings, Montana; Bayway, New Jersey; and Baytown, Texas (Stipulation, Tr. 36). Respondent ships or otherwise transports, or causes to be shipped or otherwise transported, gasoline from its refineries across State lines to terminals, bulk stations, and other distributing points (Answer to Complaint, p. 3). From its terminals, bulk stations, and other distributing points located in the States within which it does business, including New York, North Carolina, and South Carolina, respondent distributes and sells said gasolines at retail under the Esso brand along the eastern seaboard and the southeast, including the States of New York, North Carolina, and South Carolina (Answer to Complaint, p. 3; Stipulation, Tr. 36–37). Said gasolines, after transporta-

tion and delivery into the forty-five State area and the District of Columbia, are offered for resale to motorists and others in the forty-five State area and the District of Columbia (CX 5, p. 8) including the States of New York, North Carolina, and South Carolina (Answer to Complaint, p. 3).

II. The Chesterfield-Cheraw-Bennettsville Case

8. From May 10, 1960, to July 14, 1961, the respondent charged the same prices and granted the same allowances to its dealers located in Chesterfield, Cheraw, and Bennettsville, South Carolina. During the last half of 1961, the Esso dealers in Chesterfield and Cheraw purchased gasoline from respondent at lower prices than the respondent's dealers in Bennettsville.

The following table shows the allowances in effect to respondent's dealers in these towns. To arrive at the dealer's cost, the specified allowance in effect at a particular date is deducted from his tank-wagon cost of 15.8 cent per gallon, exclusive of taxes.

TABLE I.—*Allowances in effect to respondent's dealers in named towns*

Period	Days	Chester-field	Cheraw	Bennetts-ville	Chesterfield dealers favored over Bennettsville dealers	Cheraw dealers favored over Bennettsville dealers
June 15–19, 1961	5	1. 6	1. 6	0	1. 6	1. 6
June 20–21, 1961	2	3. 3	3. 3	1. 6	1. 7	1. 7
June 30, 1961	1	1. 6	0	0	1. 6	0
July 1–3, 1961	3	1. 6	1. 6	0	1. 6	1. 6
July 4–19, 1961	16	5. 3	3. 3	1. 6	3. 7	1. 7
Oct. 3–4, 1961	2	5. 3	5. 3	0	5. 3	5. 3
Nov. 18–24, 1961	7	2. 4	0	0	2. 4	0
Nov. 25–27, 1961	3	3. 3	1. 6	1. 6	1. 7	0
Nov. 28, 1961	1	3. 3	7. 1	1. 6	1. 7	5. 5
Nov. 29–30, 1961	2	8. 0	8. 0	1. 6	6. 4	6. 4
Dec. 1, 1961	1	8. 9	10. 9	1. 6	7. 3	9. 3
Dec. 2–5, 1961	4	8. 9	10. 9	7. 1	1. 8	3. 8
Dec. 6–27, 1961	22	9. 9	10. 9	7. 1	2. 8	3. 8
Total	69					

(CX 1)

9. Generally speaking, when the gasoline dealers in Chesterfield, Cheraw, and Bennettsville received an allowance they would drop their "posted" (retail) price at their pumps. Thus, with a 3.3 cent

allowance, the dealer would usually reduce his pump price by four cents (Tr. 424–25, 453, 482, 510–11, 576).

10. Chesterfield, Cheraw, and Bennettsville are located on State Highway SC 9. Bennettsville is approximately 15 miles east of Cheraw. Chesterfield is approximately 12 miles west of Cheraw. SC 9 originates in the western part of South Carolina, travels east to Bennettsville, then southeast to the Atlantic coast (CX 21, 1464 B; Tr. 435, 454, 483).

11. According to the United States Census for 1960, the population of Cheraw is 5,171; of Chesterfield, 1,532; and of Bennettsville, 6,963.

12. The J. P. Stevens Company's Delta Finishing Plant in Cheraw employs about a thousand people, several hundred of which live in or around Bennettsville and Chesterfield. This plant is located two or three miles northeast of Cheraw, at the intersection of US 1 and SC 9. The Esso stations in the Cheraw area are located in downtown Cheraw or west of town, at least three miles from the Delta plant and in the opposite direction from Bennettsville. Commuters from Bennettsville to the Delta plant would not pass any "favored" Esso station in Cheraw unless they went out of their way (Tr. 515). There were a number of stations selling other brands of gasoline along the normal commuting route of such travelers (Tr. 4285, 4287, 4553, 4558). It was unlikely for such commuters to drive from the plant to downtown Cheraw before or after work for the sole purpose of buying gasoline because of the congested traffic crossing the only bridge connecting the two areas (Tr. 4755).

13. The only other large employer in Cheraw was the James Fabrics plant employing about 500 people in 1961 (Tr. 480). This plant was located west of Cheraw on SC 9. Bennettsville commuters would pass the Hurst and Kimrey Esso stations (Tr. 451, 481).

14. Cheppell Hurst, a "favored" dealer in Cheraw, testified that 70 percent of his business was transient, originating from Bennettsville, Chesterfield, Pageland, New York, and "on up there in the North" (Tr. 451). Similarly, Leon Chestnut, another "favored" dealer in Cheraw, testified that 50 percent of his business is transient (Tr. 421). B. B. Sanders III, a "disfavored" dealer in Bennettsville, testified that 25 percent of his business is transient, but that during the summer 40 percent is transient. B. B. Sanders, Jr., the other "disfavored" Esso dealer in Bennettsville, stated that 35 to 40 percent of his business was with transients (Tr. 502, 558).

15. According to Mr. Hurst, if Bennettsville dealers posted retail prices of four cents below his price in Cheraw, it would "be beginning

to tell on us" (Tr. 471). But his posted prices were lower than those of Bennettsville dealers. He admitted that he noted no difference in the number of his Bennettsville customers when *his* posted prices were lower than the Bennettsville prices (Tr. 457). Mr. Chestnut testified that a four-cent differential would necessitate assistance (Tr. 448). Robert Kimrey, another "favored" dealer in Cheraw, thought that a three-cent differential, fifteen miles away in Bennettsville, would have "very little" effect, that "Maybe five cents, maybe we'd have some reflection, but certainly smaller I don't believe" (Tr. 496).

16. The "iffy," "maybe" testimony of the "favored" dealers has little probative value in determining whether Bennettsville dealers were hurt by the lower prices in Cheraw.

17. Turning to the two "disfavored" dealers in Bennettsville, Sanders III stated that a price differential of more than three cents affected his business (Tr. 510); Sanders Jr. lost gas sales if the difference was more than two cents (Tr. 562). Both claimed to have lost business to Cheraw dealers because of the low price in Cheraw (Tr. 505–07, 560). But between June 15 and November 28, 1961, respondent's allowances to dealers in Cheraw did not exceed those given Bennettsville dealers by more than 1.7 cents, except for two days in October. Between November 28 and December 26, the wholesale price differences between Bennettsville and Cheraw exceeded 3.8 cents on only four days (See Table I, *supra*). Sanders III stated quite positively that he did not know of losing any gasoline sales to *Esso* dealers in Cheraw in 1961 because of lower price (Tr. 505). In fact, he could name only two customers who told him they had *ever* bought *any* brand of gasoline in the *vicinity* of Cheraw because of lower prices. Neither the station nor the year of purchase was identified (Tr. 505). Nor did Sanders Jr. know of a single customer who had purchased gasoline at *any* station in Cheraw because of price in 1961, but only that they "could have" (Tr. 561, 571, 588). Sanders Jr. testified that a Mr. Herndon had bought gasoline in a neighboring town at a lower price. He had shown Sanders his Esso credit card of purchase (Tr. 564). This testimony was contradicted by Mr. Herndon himself who stated that he once bought at an American Oil station and then only 9.5 gallons of gasoline (Tr. 4114). Sanders Jr. also testified that two school teachers bought *some* brand of gasoline from a *nearby* town instead of from him because of lower prices there (Tr. 567). The teachers themselves, however, testified that they

never bought gasoline from any one other than Sanders Jr. except when about to run dry (Tr. 4119–22).

18. The Sanders' testimony of loss of business is further watered down. A witness for the respondent testified that Sanders III bought an average of 8,000 gallons per month during the first 11 months of 1961, but 20,000 gallons in December 1961 (Tr. 4208). Similarly, the average monthly purchases of Sanders Jr. was 3,400 gallons, but during December he purchased 5,899 gallons (Tr. 4208). This testimony was not contradicted.

19. The testimony of these witnesses as to their alleged injury is not strengthened by the rest of their testimony which exhibits a certain unreliability. Thus, Sanders III disclosed that he purchased his gasoline from respondent and two other oil companies. His gasoline sales, however, from an Esso pump, were made without disclosing the fact that the gasoline might not be the Esso brand (Tr. 533). Sanders Jr. stated that he purchased both Esso and Pure gasoline but claimed that his 1961 purchases of Pure gasoline were less than 4,000 gallons (Tr. 612). Pure Oil Company records, however, indicate that his 1961 purchases of Pure gasoline totaled 323,091 gallons (RX 77).

20. The only other evidence possibly indicative of the effect of price differentials upon sales volumes of Cheraw dealers vis-a-vis the Bennettsville dealers is the statement of Mr. Hurst of Cheraw to the effect that his average monthly sales of gasoline in 1961 were only 32,500 gallons (Tr. 458), but his December 1961 purchases were over 50,000 gallons (CX 1). In view of the apparent increase in gallonage experienced by Sanders III and Sanders Jr. in December 1961, it is not reasonable to conclude that the increase experienced by Hurst was at the expense of the "disfavored" dealers in Bennettsville.

21. Nor is complaint counsel's case helped much by Mr. Smith. That witness, called by complaint counsel in rebuttal, was an Esso dealer in Chesterfield. He testified that if he were receiving an allowance of eight cents per gallon as against Bennettsville dealers, 27 miles away, getting 1.6 cents per gallon, he "thought I had an advantage over them . . . that people that was going somewhere, *maybe* they would be looking at prices along the road; *maybe* where they would turn, well, naturally, it would be convenient to pull up at one place where the gas was lower . . . I think I would; *probably in a small way you would probably have some advantage*" (Tr. 4876).

22. Motorists and other retail gasoline customers are price conscious and will take advantage of lower gasoline prices. That, however, is not their only consideration—station facilities, station location, service, and the accident of emergency also contribute to their choice (Tr. 4252–56).

23. It is, therefore, concluded and found that the price differentials imposed upon the respondent's dealers in Cheraw and Bennettsville were intermittent and brief when they were meaningful; that the record is deficient in demonstrating a loss of business on the part of the alleged "disfavored" dealers of Bennettsville, and that the dealers of Cheraw were not in significant competition with the dealers of Bennettsville because of the distance between them, which made trips from Bennettsville to Cheraw solely for the purpose of buying the cheaper gasoline uneconomical and because of the spasmodic nature of the price differentials which made it unlikely that motorists visiting Cheraw for other reasons would purchase gasoline while there. Even Bennettsville residents working in Cheraw did not necessarily find it convenient to deal with the Esso dealers in Cheraw. The traffic between these towns on the part of the motorists going to the beach during the summer, which might account for some significant price shopping, as argued by complaint counsel, carries little weight here since significant price differentials did not develop until November 1961 when obviously there was little beach traffic. Thus, the record is deficient in showing that motorists generally did shift their business to the Cheraw Esso dealers during periods of substantial price differences. The record is similarly deficient in proving that they would have done so.

III. The Rock Hill-Hickory Grove-York case

24. During the period beginning May 10, 1960, through June 15, 1961, the respondent's dealer-customers located in York, Hickory Grove, and Rock Hill, South Carolina, were charged the same prices by the respondent (CX 1465). From July 4, 1961, through December 1961 Humble sold its gasoline to Esso dealers in York and Hickory Grove at substantially higher prices than those charged respondent's customers in Rock Hill.

25. The following table shows the allowances in effect to respondent's dealers in these towns. To arrive at the dealers' cost, the specified allowance in effect at a particular time is deducted from the tankwagon cost of 15.8 cents per gallon, exclusive of taxes.

TABLE II.—*Price allowances (TVA's) in effect during part of 1961 in cities of Rock Hill, York, and Hickory Grove, S.C.*

Period	Days	Rock Hill	York	Hickory Grove	Rock Hill favored over York and Hickory Grove
		Cents	*Cents*	*Cents*	*Cents*
July 4–7, 1961	3	9.3	7.3	7.3	2.0
July 7–13, 1961	6	9.3	9.3	9.3	0
July 13–18, 1961	5	11.3	9.3	9.3	2.0
July 18–19, 1961	2	11.3	11.3	11.3	0
July 27–Aug. 3, 1961	8	2.4	0	0	2.4
Aug. 3–8, 1961	5	2.4	2.4	2.4	0
Aug. 19–22, 1961	4	3.3	0	0	3.3
Aug. 26–30, 1961	4	3.3	0	0	3.3
Aug. 30, 1961	1	3.3	0	0	3.3
Aug. 31–Sept. 6, 1961	7	5.3	0	0	5.3
Sept. 13–Oct. 4, 1961	22	3.3	0	0	3.3
Oct. 13–24, 1961	12	3.3	0	0	3.3
Nov. 25–28, 1961	3	*2.4 †4.3	3.3	3.3	1.0
Nov. 28–30, 1961	2	8.9	3.3	3.3	5.6
Nov. 30–Dec. 7, 1961	8	8.9	4.3	4.3	4.6
Dec. 7–27, 1961	20	8.9	5.3	5.3	3.6
Total	112				

*City.
†Outside.
No TVA's in effect in above areas during balance December 1961.
[All information taken from CX 1.]

26. Generally speaking, when the gasoline dealers in York, Rock Hill, and Hickory Grove received an allowance they would drop their "posted" (retail) price at their pumps. Thus, with a 3.3 cent allowance the dealer would usually reduce his pump price by four cents (Tr. 79, 127, 150, 1115).

27. Rock Hill, South Carolina, is an industrial city with a population of more than 29,000 (RX 49). The largest single employer there is Rock Hill Printing and Finishing Co., employing three to four thousand persons during 1961 (Tr. 41, 103, 4270). Many residents of York and Hickory Grove are employed in Rock Hill (Tr. 116, 1109, 4901).

28. York, South Carolina, is thirteen miles west of Rock Hill via State Highway 5 (Tr. 64, 104, 1103, CX 21). Its population in 1961 was 4,700 (RX 49).

29. Hickory Grove, South Carolina, is 25 miles west of Rock Hill, via State Highways 5, 49, and 211 (Tr. 115). Its population in 1961 was between two and three hundred persons (Tr. 130; RX 49).

30. Sewell Brown was an Esso station operator in York during the last half of 1961 (Tr. 1087). His employee, Carl M. Green, testified that customers of that station worked and shopped in Rock Hill during 1961 (Tr. 4901). Mr. Green also stated that travelers from York to Rock Hill "would naturally buy their gas there in Rock Hill" (Tr. 4902). At no point, however, did he indicate that such customers patronized any Esso station in Rock Hill. In fact, the stations in Rock Hill most frequently patronized by Green's customers working at the printing plant were Sinclair and Texaco stations which customarily posted prices below the prevailing Rock Hill retail prices (Tr. 4919–22). Moreover, Esso prices were usually last to go down and first to go up (Tr. 4923). Mr. Brown himself was not asked whether he lost gasoline customers in 1961 because of lower prices in Rock Hill. He could not recall whether any customer even told him that his prices were higher (Tr. 1111). When asked specifically about 1961, he "was not paying attention to the prices of gasoline then" (Tr. 1135); he "might" have requested price assistance once during the last half of 1961, and if he did, he received it within a day or two (Tr. 1112, 1115). Nor did Mr. Brown notice any decline in his gasoline sales during the last half of 1961 other than the normal fluctuation from month to month (Tr. 1111).

31. In sum, therefore, it cannot be found that Brown's station in York suffered competitive injury by the loss of business to Rock Hill Esso stations purchasing gasoline at a lower cost from the respondent.

32. Leon Bratton, an allegedly "disfavored" Esso dealer in Hickory Grove, testified that about 100 of his regular customers worked in Rock Hill and that some of them complained to him during 1961 because his prices were substantially higher than those in Rock Hill (Tr. 116, 138); some of his customers would be attracted to Rock Hill if the price differential were four cents or over (Tr. 125); some of his customers would be attracted to grocery stores selling gasoline and located between York and Rock Hill if the differential were only two cents (Tr. 147). Nevertheless, his gallonage throughout 1961 remained fairly constant at about 11,000 gallons per month—an increase of 500 gallons per month over the last half of 1960 (Tr. 130). He could not, however, identify any customer whose purchases he

lost to Rock Hill Esso dealers in 1961 (Tr. 133), nor did he know that they actually purchased in Rock Hill (Tr. 117, 122, 138), let alone at any Esso station. As he explained, "It could have been many other brands as well" (Tr. 117).

33. Three "favored" dealers in Rock Hill testified. One of them, Clarence E. Treadway, testified that people from York who worked at the printing company stopped at his station and bought gasoline (Tr. 42, 43, 54). He further testified that his lower prices during 1961 were the reason for much of his sales (Tr. 57). His monthly gallonage in 1961, however, averaged between 8 and 9 thousand gallons which he described as a "small volume" (Tr. 50).

34. Specifically, however, Mr. Treadway could not answer whether he attracted gasoline business from York dealers because of his lower prices (Tr. 40, 41). He could recall only one customer from York in all of 1961 even mentioning a retail price difference between York and Rock Hill (Tr. 47).

35. Another "favored" Esso dealer in Rock Hill, Herbert R. Boyd, testified that he could remember "a few" people from York who bought his gasoline because the prices were lower in Rock Hill (Tr. 105). He was not asked about the volume of his gasoline sales in 1961. Eighty percent of his business came from local people living in Rock Hill (Tr. 102, 103). The transient business involved in the other 20 percent included tourists and salesmen who bought from him primarily because they needed gasoline while in his area (Tr. 107).

36. The third "favored" Rock Hill dealer, Harold Elliott, was the one identified by Mr. Green as the station to which he lost gasoline sales during 1961 (Tr. 4915). Mr. Elliott knew that "a lot" of his gasoline customers lived in York and worked in Rock Hill and that he attracted sales from York dealers during 1961 because of his lower prices (Tr. 66, 82). His gallonage which had been declining theretofore continued to decline in 1961. He could not, however, equate the level of his sales with the level of gasoline prices (Tr. 93). During 1961, his gallonage was adversely affected by the termination of his trading stamp program, as well as by the elimination of personal-credit customers who formerly accounted for 25 percent of his business (Tr. 85, 87). The record does not enable one to determine how much, if any, of his sales decline in 1961 could reasonably be considered offset by increased sales due to his lower prices.

37. Mr. Elliott was able to name only one customer (a Mr. Posey) who lived in York and who allegedly bought from Elliott because of Elliott's lower prices. Mr. Elliott did not know, however, whether Mr. Posey bought gasoline at another Esso station. He thought that Mr. Posey traded with a Gulf Oil station (Tr. 67, 71). Mr. Posey, however, stated that he bought gasoline in Rock Hill only if he needed gasoline while there, and did not know whether Elliott's prices were higher or lower (Tr. 4201).

38. It is, therefore, concluded that the record evidence is inadequate to prove that the price difference imposed by the respondent upon the dealers in Rock Hill, as against those dealers in York and Hickory Grove, resulted in competitive injury to the "disfavored" dealers of York and Hickory Grove or competitive advantage of any significance to the allegedly "favored" dealers of Rock Hill. Nor does the record permit a finding of probable competitive injury to the "disfavored" dealers, neither of whom experienced a loss of gallonage during the price war or even exhibited much concern about it.

39. Complaint counsel also offered evidence with respect to price discrimination between respondent's Rock Hill dealers and respondent's dealer in Blacksburg, South Carolina. The Blacksburg dealer, Paul Gaffney, testified that his gasoline sales during 1961 remained constant (Tr. 194). He knew of no customer who purchased gasoline at any Esso station in Rock Hill in 1961 (Tr. 173). Customers, complaining of lower prices "down the road," were referring not to major brands, of which Esso is one, but "They were mostly independents, * * *" (Tr. 173–79). Complaint counsel has not submitted proposed findings with respect to price discrimination practiced against Mr. Gaffney.

IV. The Fromberg Case

40. Leo Fromberg operated a retail gasoline service station at 225–02 Jamaica Avenue on the southeast corner of 225th Street and Jamaica Avenue in Nassau County, New York, just over the county line between Queens and Nassau Counties (Tr. 894–99). Jamaica Avenue becomes Jericho Turnpike as it goes through Nassau County. Between May 1 and November 1, 1960, and between March 1 and December 31, 1961, Fromberg paid the following prices per gallon for gasoline purchased from respondent:

TABLE III

Period	Esso	Extra	Golden
1960:			
May 1–May 17	13.6	16.1	18.1
May 18–May 26	12.9	15.4	17.4
May 27–May 31	11.9	14.4	16.4
June 1–July 26	14.9	17.4	19.4
July 27–Aug. 18	15.6	18.1	20.1
Aug. 19–Oct. 5	13.9	16.4	18.4
Oct. 6–Oct. 31	16.5	19.0	21.0
1961:			
Mar. 1–Apr. 11	13.9	16.4	18.4
Apr. 12–June 1	12.9	15.4	17.4
June 2–July 5	15.9	18.4	20.4
July 6–July 27	14.9	17.4	19.4
July 28–Aug. 8	15.6	18.1	20.1
Aug. 4–Aug. 15	14.9	17.4	19.4
Aug. 16–Sept. 25	13.9	16.4	18.4
Sept. 26–Oct. 3	15.9	18.4	20.4
Oct. 4–Oct. 16	12.9	15.4	17.4
Oct. 17–Oct. 18	13.9	16.4	18.4
Oct. 19–Nov. 9	15.9	18.4	20.4
Nov. 10–Nov. 18	14.9	17.4	19.4
Nov. 19–Dec. 26	13.9	16.4	18.4
Dec. 27–Dec. 31	15.9	18.4	20.4

(Excluding taxes.)
CX 242.

41. During the same 16 months of 1960 and 1961, respondent sold Esso gasoline to three of its dealers in Queens County at 16.2 cents per gallon for regular, 18.7 cents per gallon for Extra, and 20.7 cents per gallon for Golden, all exclusive of taxes (Respondent's Response to Request for Admissions, dated August 5, 1963, page 2). These three dealers, allegedly "disfavored," were the Dellacona station, located at 241–15 Hillside Avenue, less than a mile from Fromberg; the Cohen station, at Hillside Avenue and 218th Street, also less than a mile from Fromberg, and the Haggerty station, at Hillside Avenue and 203d Street, about two miles from Fromberg (Complaint counsel's Second More Definite Statement, dated March 1, 1963; CX 242, 251–54; RX 11).

42. During 1960 and 1961, New York City, which includes Queens County, had in effect a three percent sales tax covering retail gasoline sales. Nassau County had no such tax (Tr. 923–24, 941). The

effect of such tax was to raise the price of gasoline in Queens County by approximately one cent per gallon, everything else being equal.

43. Queens and Nassau Counties are similar in that they both contain some of the most densely populated areas in the United States. The bulk of traffic, which is very heavy, flows from east and west on the main arteries and expressways leading in and out of Manhattan (Tr. 1959–66, 2296, 2301–05, 2317, 2381). In an area approximately seven miles by ten miles there are about 625 service stations (RX 11).

44. Queens dealers' price signs are limited in size by law and are not discernible from even across the street. In many areas of Nassau County, however, signs as large as 10 feet by 12 feet in size advertise the prices at the station (Tr. 947, 968, 973, 1987, 3974, 4012). Moreover, a strong dealer organization exists in Queens, with a stabilizing effect on prices. As a result, the retail prices of gasoline are stabilized relatively high in Queens, with 70 percent of the stations charging between 29.9 and 31.9 cents per gallon (RX 41 A). In Nassau County, 79 percent of the stations posted prices ranging between 27.9 and 29.9 cents per gallon (RX 42 A).

45. According to Mr. Fromberg, low prices originate at four stations, none of them Esso stations, along Lakeville Road just north of the Jericho Turnpike, more than two miles from the Fromberg station (Tr. 927–30). A Sinclair station, a little more than a mile east of Fromberg on the Jericho Turnpike, would also be among the first to lower price. These lower prices would extend west along Jericho Turnpike to Tulip Avenue (Tr. 962, 3977). Only when these lower prices moved west of Tulip Avenue did Fromberg feel any competitive effect (Tr. 963).

46. Fromberg testified that he drew more than 90 percent of his business from an area stretching about seven blocks east and west along Jamaica Avenue, and three to five blocks north and south on the side streets (Tr. 938, 4040). Complaint counsel disputes this statement, citing Tr. 956 where Fromberg stated that lube customers of his bought gasoline at a station 2½ miles away. This testimony, however, is not necessarily evidence that motorists travel long distances to take advantage of low gasoline prices. For all we know, these customers may have lived near the station from which they bought their gasoline and traveled 2½ miles to have the lube work done on their cars by Fromberg.

47. Fromberg considered himself competitive with the gasoline stations on Jamaica Avenue between his station and Tulip Avenue (Tr. 926). He denied that he was in competition with Dellacona (Tr. 940, 972). The two stations are on different arterial highways. There is no main route that connects the Dellacona station directly with the Fromberg station (Tr. 982–84). Dellacona's business is mainly repair work—gasoline is secondary (Tr. 1031, 2244). His 1960 gasoline sales averaged about 30,000 gallons per month, and his average monthly sales in 1961 were about the same as in 1960. During 1961, he closed his station on Sundays, losing about 5,000 gallons per month as a result (Tr. 1026). His sales did not decline until 1962, a year after the relevant time period (Tr. 1016).

48. Moreover, there is considerable doubt of any causal connection between deliveries to Fromberg and Dellacona and their respective purchase prices. Thus, Fromberg's purchase price declined from 13.6 cents in May 1960 to 11.9 cents by June 1960, while Dellacona's deliveries increased, and when Fromberg's purchase price increased during the month of August 1960 to 15.6 cents, Dellacona's deliveries declined (CX 242, 251, 254). Deliveries, in any event, are not a reliable indicator of sales by the station. Deliveries made at the end of one month would exaggerate the sales for that month, since the gasoline delivered would presumably have been sold the following month rather than in the month of deliveries.

49. Although Dellacona knew of Fromberg's lower prices, there is doubt that he believed himself competitively affected. He testified that the great majority of his business came from a five-block radius of his station (Tr. 1009–12), which did not impinge upon the area from which Fromberg drew his business. Moreover, the fact that Dellacona was closed on Sunday would render the calculation of gallonage loss due to competition with Fromberg exceedingly speculative (Tr. 1026, 2244). Dellacona did not claim to have lost any business to Fromberg. Actually, it appears that Dellacona was not too interested in gasoline prices, but was more concerned with his repair business (Tr. 1031, 2243). He was not aware that another Esso dealer in Queens, Haggerty, about two miles west on Hillside Avenue, was posting a price one cent below his and that another, Uneeda, about one mile west of Haggerty but on Jamaica Avenue, was two cents under his price (Tr. 1023–28). The price assistance that Dellacona requested from the respondent in 1960 and 1961 was for the purpose of "boosting" his gallonage in order to "make a better

deal on a new gas contract" and to meet competition from Nassau County stations, but no specific station (Tr. 1008–14).

50. It, therefore, cannot be concluded that Dellacona suffered a loss in gallonage attributable to respondent's lower prices charged Fromberg, or that there was even any significant competition between these two stations.

51. Mr. Cohen, who operated the Esso station at Hillside and 218th Street, testified that his customers told him that prices were lower at Fromberg's (Tr. 1044, 1048–49), and that if his cost were as low as Fromberg's, he could have lowered his retail price and increased his business (Tr. 1051–52). He also testified, however, that Nassau County stations "don't mean anything to us because they are not competition to us" (Tr. 1063), that 75 percent of his gasoline business comes from the "neighborhood" of his station (Tr. 1047–48, 1065–66), and that he did not compete with at least three other stations on Braddock Avenue which were between his station and Fromberg's and which posted lower prices than he (Tr. 1058). Nor did he know of a single customer who ever left his station to go to Fromberg's (Tr. 1055). Although Cohen was one mile closer to the Haggerty and Uneeda stations than Dellacona was, he paid "no attention" to them (Tr. 1054, 1061).

52. Cohen's deliveries between May and October 1960 were 169,319 gallons: for the same period in 1961, his deliveries increased to 193,254 (CX 253). In fact, his sales have increased every year since 1959 (Tr. 1053). Fromberg's gallonage decreased during this period, dropping more than 51,000 gallons in 1961 below that of 1960 for the same six-month period (C–251).

53. It is impossible to conclude from this state of the record that Cohen and Fromberg were in competition with each other, or that, if they were in competition, Cohen suffered competitive injury due to the lower prices charged Fromberg by the respondent.

54. Haggerty, the third "disfavored" dealer in Queens County, did not testify. Commission Exhibit 252 indicates that between March and December 1961, the period of alleged discrimination, Haggerty's deliveries increased from 15,000 gallons to 32,000 gallons per month. Moreover, the Haggerty station is more than two miles from Fromberg, on a different east-west artery, and separated by more than 12 gasoline stations (RX 11, 14). A customer witness, Mr. Rothberg, called by complaint counsel, testified that he had been a regular gasoline customer of Fromberg for many years and that when Haggerty's station opened in 1961, he began purchasing grease and

oil from Haggerty but continued buying gasoline from Fromberg (Tr. 1068–70). Moreover, Mr. Rothberg testified that even if the gasoline prices were the same at Haggerty's and Fromberg's, he would buy from Fromberg because it was closer to him. (Tr. 1082).

55. Here, too, the state of the record does not permit a conclusion of a meaningful competition between Haggerty and Fromberg, or any competitive injury attributable to respondent's lower prices charged Fromberg.

56. It is, therefore, concluded and found that there is inadequate proof of competition between the allegedly "favored" and "disfavored" dealers in the Fromberg case, or of any competitive injury incurred or likely to be incurred by the "disfavored" dealers, or competitive advantage enjoyed or likely to be enjoyed by Fromberg by reason of the lower prices charged Fromberg by Humble. Since the lower prices charged Fromberg were accompanied by equivalent reductions in his selling price (Tr. 943–44), Fromberg's only competitive advantage would arise if his business increased in volume. This conclusion is effectively negated by his record of decreasing, not increasing, gallonage.

V. The Merry Twins Case

57. The Sussman brothers own a gasoline service station known as the Merry Twins, located at 173–12 Horace Harding Boulevard, Flushing, New York. This is in Queens County of New York City, at the corner of Fresh Meadow Lane. Horace Harding is the service road of the Long Island Expressway, and the station is located on the south side of that service road. The station was first opened in 1950, and has always sold products purchased from the respondent (Tr. 1153–55). The Merry Twins station had 24 pumps and storage for 13,000 gallons of gasoline (Tr. 1157). Since New York City limits the size of the gasoline delivery trucks to 3,000 gallons, the Merry Twins station received two to four deliveries of gasoline a day from the respondent during 1960-1962 (Tr. 1158).

58. William Sussman testified that the area from which he draws business is bound on the north by the Long Island Expressway, on the south by 73d Avenue, and on the east by Peck Avenue (Tr. 1164). Although some customers come from as far south as Union Turnpike and some as far west as 167th St., the majority of the customers come from the Fresh Meadows housing development (Tr. 1215). The Fresh Meadows housing development is a large residential

community, owned and operated by the New York Life Insurance Company, and became operational in 1949. It has a population of about 13,000 people, and has stores, banks, and a theater (Tr. 1564–65).

59. Competing with Merry Twins and serving the same trading area, are two Mobil stations, two Shell stations, two Sun stations, and a Chevron station, all clustered within a two block area (Tr. 1227). Sussman testified that these were the only stations with which he competes (Tr. 1228).

60. The closest Esso station to Merry Twins is the Van Poll station at 184th Street and Horace Harding Boulevard (RX 11; Tr. 1167). Although that 184th Street station was named as a "disfavored" dealer in the original More Definite Statement of complaint counsel, no evidence, documentary or otherwise, was offered to show any adverse effect upon it.

61. The next closest Esso station was the Fischler station on Union Turnpike, just east of Utopia Parkway (RX11). Here, too, there is no evidence of any adverse effect.

62. Eight service stations were specified as "disfavored" vis-a-vis Merry Twins in the Second More Definite Statement filed by complaint counsel. Four of these showed increased average monthly gallonage from 1959 through 1962, despite retail prices two to four cents per gallon higher than Merry Twins (RX 44; Tr. 1996–7).

TABLE IV

Dealer	Annual monthly gallonage			
	1959	1960	1961	1962
1. Esposito	24, 331	25, 560	27, 425	27, 915
2. Rocchi	22, 950	25, 694	27, 288	30, 887
3. Brettler*		36, 172	50, 113	55, 462
4. Bayside**	5, 700	10, 650	20, 193	23, 029

*Brettler from February 1960 when he became a customer.
**Bayside from April through July 1959 only, and April 1960 through 1962 (RX 44).

63. As to the fifth of these eight "disfavored" stations, the Bernuzo station at 77–02 Parsons Boulevard, complaint counsel alleged the discriminatory period to be May-September 1960 (More Definite Statement). Commission Exhibit 1506 B, however, shows its average monthly gallonage to have been more than 25,000 for that period compared to an average of less than 24,000 for January

through April 1960. No inference of adverse competitive effect can be drawn simply from this evidence concerning the five stations enumerated above.

64. The sixth of the eight allegedly "disfavored" dealers was the Selzer station at 161–01 Union Turnpike. The only evidence in the record concerning Selzer's experience is in the form of gallonage records which show a maintained increase in gallonage from 1960 through 1963, despite a retail price two cents higher than Merry Twins (See Table V, below) (CX 1507 B; 245). In fact, the Fischler station, less than one mile east of Selzer on the same turnpike, posted a price of 34.9 cents per gallon, five cents higher than Selzer and seven cents higher than Merry Twins, yet its monthly sales averaged 10,000 gallons higher than Selzer's (Tr. 2123–25, 2221).

65. The seventh allegedly "disfavored" dealer was Jenik, operating a station at 42–05 Lawrence Avenue. Here, as in the case of Selzer, the only evidence is a tabulation of Jenik's deliveries (CX 246). Although Jenik posted a price two cents higher than Selzer and four cents higher than Merry Twins, his deliveries declined somewhat during the first half of 1961, but stabilized and rose thereafter in 1961 and 1962 (See Table V, below).

66. The last of the eight allegedly "disfavored" dealers was the Burke & Piras station on 164th Street, just north of the Union Turnpike. Mr. Burke complained about losing business to the Merry Twins station and requested allowances from the respondent during 1960, 1961, and 1962 (Tr. 1367–70, 1363). He described his business area as bounded on the west by Parsons Boulevard, on the east by Utopia Parkway, on the south by Grand Central Parkway and on the north by Long Island Expressway, and testified that 75 to 80 percent of his business came from that area, which would, of course, overlap some of the area from which Merry Twins drew business (Tr. 1370). Between 1959 and 1962, the average monthly gallonage at the Burke & Piras station dropped from 43,000 gallons to 28,000 gallons (RX 45; CX 247). During this time, its posted price for gasoline was 29.9 cents, or two cents higher than the price posted at Merry Twins (See Table V, below). Mr. Burke testified that he and his partner concentrated their efforts primarily on repair work, which accounted for approximately two-thirds of their profits (Tr. 1378). The station employed eight mechanics, but only one front man to pump gasoline (Tr. 1388).

67. In a mailing list order form prepared by the Burke & Piras station, the area selected by that station for circularization of advertisements fell far short of the area of business described by Mr. Burke, extending only for some seven or eight blocks around the station (CX 1480).

68. Moreover, Mr. Burke testified that when his station opened in 1957 his posted price was 30.9 cents, compared to Merry Twins' posted price of 26.9 cents. Despite this four-cent differential at retail, the Burke & Piras gallonage increased significantly from 1958 to 1959 (RX 45, 1374–76), indicating that Merry Twins' lower prices were not hurting Burke & Piras then.

69. Although Burke testified that he lost business to Merry Twins because of the lower price at Merry Twins (*supra*), and his gallonage deliveries corroborate the alleged loss of business (See Table V, below), the loss of business attributable to the difference in price charged these two stations by the respondent (0.8 cent) is doubtful. Mr. Burke testified that now (1963) his price is 27.9 cents, while that of Merry Twins is 26.9 cents, and that "for all practical purposes" he would say that "that's the same" (Tr. 1422). Again, at Tr. 1392, Mr. Burke did not believe that a one-cent price difference between his station and Merry Twins would have any competitive significance on his business.

70. Mr. Burke identified four customers who switched from him to Merry Twins because of lower price (Tr. 1398, 1401). One of them, Mr. Apt, however, testified that he stopped doing business with Burke & Piras because of a dispute on service, not because of price (Tr. 1448). The second of the four customers, a Mr. Rosenblum, testified that he had not switched from Burke & Piras, but had, in fact, switched from Merry Twins to Burke & Piras (Tr. 1471). The third customer was an employee of the Super Glass Company. A tabulation of the Esso credit card purchases by the company shows, however, that this customer did not switch to Merry Twins but to a third station, Selzer, whose prices were the same as Burke & Piras (RX 43). According to Burke the fourth customer, Schneider, was lost in 1959 or 1960 (Tr. 1403). It is doubtful, therefore, that this took place within the period of the complaint. Schneider's credit card purchases do not strengthen Burke's testimony for they show only two $3 purchases in 1960 and none thereafter (RX 55).

71. In addition to the eight allegedly "disfavored" service stations, complaint counsel introduced evidence concerning the business

experiences of Esso gasoline outlets within the Fresh Meadows housing development. Three of these outlets were storage garages owned and operated by the New York Life Insurance Company. The fourth was a garage subleased to a Mr. Nixon. The posted price for gasoline at all four outlets was 31.9 cents—four cents higher than the Merry Twins price.

72. Mr. Nixon testified that his customers told him they purchased gasoline at Merry Twins because the price was lower there (Tr. 1271). The gallonage records corroborate the claimed loss of business between 1958 and 1962 (See Table V, below). The three garages owned and operated by the New York Life Insurance Company ceased selling gasoline in March 1961. Nixon stopped by the end of 1962 (Tr. 1263, 1572). Nixon's business, however, declined from 1961 to 1962 (See Table V, below) even though the business of the three other Esso outlets at Fresh Meadows who were his immediate competitors might logically have been expected to flow to him.

73. When questioned about the effect of a price differential upon his business, Mr. Nixon stated that a reduction by him of one cent per gallon would not bring him more business (Tr. 1293). Mr. Nixon named five customers who complained to him of lower retail prices at Merry Twins. The first, Mr. Warantz, was a customer of Nixon's only rarely: about once a year. His regular supplier was not an Esso station, but a Sonoco station (Tr. 1484). Nor did Mr. Warantz know whether the price at Merry Twins was higher or lower than at other Esso stations (Tr. 1486). Mr. Nixon admitted that the second, Mr. Stern, stopped buying from him because of an outstanding bill (Tr. 1352). Mr. Nixon testified that the third, a Mr. Kahn, became his customer in 1957 when Nixon used him as an insurance broker. No specific time was mentioned when Mr. Kahn bought from Merry Twins. It cannot be inferred from this that Mr. Kahn switched to Merry Twins (Tr. 1349). As to the fourth, a Mr. Sepler, Nixon did not know that Mr. Sepler had bought any gasoline from Merry Twins, or for that matter where Mr. Sepler bought gasoline (Tr. 1350). Finally, the fifth customer, a Mr. Speyer, was not a regular customer of Nixon, and his complaint about lower prices at Merry Twins was years before the complaint period involved here, May 1960–June 1962 (Tr. 1342). Not one of these five customers would have bought more gasoline from Nixon if he had reduced his price by one cent a gallon (Tr. 1345).

74. Shown below are the Esso stations discussed above, with their costs, prices, and gallonage where known (CX 243–50):

TABLE V

	Cost [1]	Price per gallon	Year	Gallonage (in thousands) Average monthly	Total for half year
Merry Twins	25.4	27.9	1958	96	------------
			1959	132	------------
			1960	248	------------
			1961	313	------------
			1962	323	------------
Burke & Piras	26.2	[2] 29.9	1958	40	------------
			1959	43	------------
			1960	38	------------
			1961	32	------------
			1962	28	------------
Nixon	26.2	31.9	1958	19.6	------------
			1959	17.3	------------
			1960	14.6	88
			1961	14.2	+88
					+81
			1962	12.8	77
Selzer	26.2	29.9	1960	40	------------
			1961	42	246
					247
			1962	43	260
Jenik	26.2	31.9	1960	34	------------
			1961	30	------------
				31	------------
			1962	32	------------

			Monthly gallonage 1960 May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	1961 Jan.	Feb.
Fresh	26.2	31.9	6.0	3.9	3.8	1.9	1.6	-----	1.1	1.7	3.1	----
Meadows	26.2	31.9	5.2	3.4	4.0	-----	4.4	2.5	2.8	3.3	3.4	2.7
(3 stations).	26.2	31.9	6.6	4.6	4.1	1.0	2.6	5.8	2.4	2.1	3.2	1.7

[1] Exclusive of month-end allowances.

[2] Except for 1958, when the price per gallon was 30.9

Information from CX 1507 B, 245, 246, 247, 244, 248, 249, 250, 1527 B, 243, 1498 B; Rx 45.

As well be seen from the table above, the price charged Merry Twins by the respondent was .8 cent lower than the price charged other Esso dealers. The price charged by Merry Twins, however, was two to four cents per gallon below the price charged by the other Esso dealers. Merry Twins gallonage increased sharply from 96,000 gallons monthly to 323,000 gallons. The Burke & Piras gallonage, as well as the Nixon and Fresh Meadows gallonage decreased. What is lacking in the record of this proceeding, however, is evidence that such decrease in gallonage was due to the .8 cent lower price charged Merry Twins by the respondent. That the decrease in gallonage was due in part to the two to four cent lower prices charged by Merry Twins is possible and perhaps probable. The record, however, does not show the respondent's responsibility for the two or four cent differential in posted retail price. The only responsibility it would appear resting upon the respondent was that which could reasonably be attributed to the .8 cent per gallon allowance given Merry Twins, which in turn would presumably enable Merry Twins to post a price lower than those other stations by one cent per gallon. Such a difference of one cent per gallon in retail posted price, however, was of no significance to the dealers questioned concerning it (Tr. 1292, 1392, 1422).

75. It is concluded and found, therefore, that the difference in price charged Merry Twins by respondent, amounting to .8 cent per gallon, in effect from 1959 to 1962, was not, and could not be, reasonably causative of any significant or substantial competitive injury to the Esso stations allegedly competitive with Merry Twins in Queens County, New York.

VI. Affirmative Defenses

76. Respondent offered considerable testimony and documentary evidence on several affirmative defenses. Inasmuch as my disposition of this case, based upon complaint counsel's failure to develop *prima facie* evidence of violation of the Robinson-Patman Act, makes a detailed analysis of the affirmative defenses unnecessary, no conclusions will be reached on them in this decision. It is, nevertheless, desirable that some comment be made inasmuch as the issue of affirmative defense is not free from doubt.

A. *The Meeting Competition Defense*

77. In connection with the Merry Twins case, Mr. Sussman, an owner of that station, testified that he was forced to lower his posted

price to meet the lower price posted at a neighboring Shell station, operated by a Mr. Kaplan (Tr. 2180, 1204). Mr. Sussman thereupon requested an allowance from the respondent stating that Mr. Kaplan was receiving an allowance from his supplier, Shell (RX 18). Mr. Sussman further stated that Kaplan had told him that he (Kaplan) had received such an allowance from Shell. An official of the respondent testified that a salesman of the respondent, a Mr. Wilson, overheard Kaplan's conversation with Sussman (Tr. 3047–48) and that, having satisfied himself that Kaplan was in fact receiving such an allowance, the official negotiated the 0.8 cent allowance to Merry Twins (Tr. 2190–94, 2653, 3060).

78. Salesman Wilson did not testify, nor did Mr. Kaplan or any Shell representative, concerning the alleged allowance given Mr. Kaplan.

79. Absent such corroboration, there remains considerable doubt of respondent's claimed good faith in meeting Shell's competitive allowance to Kaplan. Kaplan's lower posted price, in and of itself, was not sufficient to justify such a conclusion since at least one other Humble dealer posted the same price as Kaplan without getting assistance from Humble (Tr. 2659).

80. In connection with the Fromberg case, Mr. Fromberg had complained to the respondent of price cutting in his area (Tr. 3991, 4057, 4093). An official of the respondent testified that it was company policy to obtain proof of assistance granted to a dealer's competitors from their respective suppliers before allowing any assistance to the complaining dealer (Tr. 3994). No documentary proof of such competitive price allowance affecting Fromberg was offered in evidence, nor did respondent call to the stand its salesmen who investigated the competitive situations affecting Fromberg and who were responsible for the conclusion that Fromberg's competitors were receiving assistance.

81. Here, too, the issue is not free from doubt without the corroborating proof that could have been offered.

B. *The Cost Justification Defense*

82. This particular affirmative defense is impossible of analysis and determination without an extensive discussion. The major part of the evidence in this case, both oral and documentary, involves this issue. The Appendix filed by complaint counsel, which details their position in this respect, is actually longer than the proposed findings, conclusions, order, and reply to respondent's proposed findings combined. In view of the limited time available to me for the writing of this decision, and in view of the superfluity of a determina-

tion of this defense, only a mention of certain doubts in connection with this cost justification defense will be made.

83. Mr. Field, a partner in the accounting firm of Price Waterhouse & Co., was retained by the respondent to make a cost study to determine the savings in cost incurred by the respondent in its sales to Merry Twins, as against the Burke & Piras station and eleven other Humble stations in the general area, which had been named by complaint counsel as "disfavored" customers (Tr. 1802, 3329). Three categories of expense were identified: (1) loaned delivery equipment expense, which includes depreciation as well as maintenance and repairs on delivery equipment; (2) district sales expense, which includes salaries and expenses of salesmen concerned with service station activities, and (3) area marketing expense which includes salaries and expenses of personnel at the area office level who supervise the activities of the District sales office. Respondent's Exhibit 56 A found these costs to be:

	Merry Twins	12 Dealers	Burke & Piras
		Dollars per gallon	
Loaned delivery equipment expense	$0. 0010	$0. 0042	$0. 0048
District sales expense	. 0002	. 0021	. 0020
Area marketing expense	. 0001	. 0007	. 0007
Total	. 0013	. 0070	. 0075

84. Subsequently, RX 56 B was offered, supplanting RX 56 A by reducing the loaned delivery equipment expense for the 12 dealers from $.0042 to $.0041, thus lowering the total for such 12 dealers from $.0070 to $.0069 (Tr. 3906–08). Thereafter, respondent offered RX 56 C, supplanting RX 56 B. Respondent Exhibit 56 C was received in evidence, and RX 56 B was then rejected (Tr. 3909–10).

85. In RX 56 C, the total cost for Merry Twins, the 12 dealers, and Burke & Piras remain at $.0013, $.0069, and $.0075, respectively, as stated in RX 56 B. The total Burke & Piras cost of $.0075, however, is increased by $.0040 for sales expense and by $.0008 for delivery expense, for a total of $.0123. The total 12-station cost of $.0069 is increased by $.0016 for delivery expense, for a total of $.0085. These last additions in costs for the 12 stations, as well as for Burke & Piras, were added to RX 56 C by Mr. Field, based upon the testimony of Mr. Courtney concerning additional savings. These additional savings, however, were not reflected in the respondent's books and records. Mr. Courtney simply testified that such savings

accrued in their normal operations and because of the difference in effort and time expended with these stations in these respects (Tr. 3685–89). At another point, however, Mr. Field stated, "If I had no evidence of a cost differential from the original books and records, it would be my conclusion that they should not be inserted into this cost study as a differential" (Tr. 3881).

86. There is, therefore, considerable doubt that the cost differentials added to RX 56 C by Mr. Field and based upon the testimony of Mr. Courtney can be accepted.

87. There is also some doubt that RX 56 C, even exclusive of the Courtney-added differentials, is acceptable.

88. The 12 stations used in the cost study and whose costs were averaged in RX 56 C varied greatly in their sales volume, as well as their total expense. The sales volume ranged from a low of 13,320 gallons to a high of 1,148,000 gallons. The expenses ranged from a low of .43 cent per gallon to a high of 5.69 cents per gallon. Respondent Exhibit 56 C merely shows the total of 6,381,282 gallons, at an average cost of .69 cent per gallon (CX 971 A–1). Such averaging of gallonage and costs may be questionable when employed for dealers having such extreme differing experiences (See *U.S.* v. *Borden Co.*, 370 U.S. 460 (1962)).

89. Respondent Exhibit 56 C also mingles actual costs with average costs. The Burke & Piras equipment depreciation is actual since such company-owned station costs are maintained on that basis by Humble. The Merry Twins station and ten of the 12 stations in RX 56 C, however, are noncompany-owned stations. For such stations, Mr. Field used equipment depreciation calculated on an average unit cost of both new and used loaned delivery equipment. Mr. Field admitted this cost to be lower than the actual cost which was used for the company-owned stations (Tr. 3331–2, 3340–41, 3356, 3370, 3375, 3378–80, 3633, 3889, 3891). Since Merry Twins was not a company-owned station, but some of the 12 stations (including Burke & Piras) were, this would have the effect of raising depreciation costs for the 12.

90. Although the Merry Twins station was engaged in the sale of gasoline almost to the exclusion of all other business, the Burke & Piras station, as well as the 11 others in the study, differed in that they derived a substantial part of their business from activities other than the sale of gasoline. As a consequence, these stations had loaned equipment from respondent such as lifts, compressors, lube and kerosene outfits, and Flannery systems, on which equipment depreciation was charged which entered into respondent's cost of doing

business with such stations. The Merry Twins station had no such equipment, but was nevertheless an admittedly highly successful gas station. As the basic comparison between Merry Twins and the 12 "disfavored" stations concerns respondent's cost of selling gasoline to these stations (not oil, kerosene, or lubricating services), there may be some doubt that the equipment which Merry Twins found unnecessary to its successful sale of gasoline should be included in a comparison of costs. Eliminating the depreciation of such equipment which was charged to the 12 "disfavored" stations, would, of course, substantially minimize the higher cost of selling to them.

91. Included in the respondent's cost of doing business with the 12 "disfavored" stations was the cost of dismantling and removing equipment at the three Fresh Meadows garages which went out of business during the period of study involved. There is considerable doubt that such extraordinary and nonrecurring costs are properly includable for purposes of determining the respondent's cost of selling gasoline. Excluding such costs would have reduced the respondent's cost of doing business with these three stations by about 50 percent (CX 971 A–1, E, E–15, and E–17).

92. With respect to the district sales expense and area marketing expense categories of cost, it appears that certain allocations and assignments in arriving at the figures allocable to each of the stations involved were determined on the basis of a so-called Binn survey. Mr. Binn, an employee of the respondent, not otherwise identified, made a study of four of the seven salesmen involved and the time spent by them in their various activities in 1957. Whether these four were sufficiently representative of all is unknown. Mr. Binn did not testify, although he is still employed by the respondent. The basis for his selection is unknown. Without such background information, it is impossible to assess the validity of the Binn survey used by Mr. Field (Tr. 4968–73).

93. Finally, the period used by respondent for the cost study may be questionable. Mr. Field used the 24-month period starting July 1, 1960. The .8 cent allowance by the respondent to Merry Twins commenced nine months earlier, on October 1, 1959. Between October 1959 and July 1962, the gallonage at Burke & Piras declined significantly while that of Merry Twins skyrocketed dramatically (Table V, *supra*). Since the total cost of doing business with each of these stations was divided by its gallonage volume to arrive at a total cost per gallon for each, the net effect of using the 24-month period, ending July 1962, was to diminish the cost of doing business with Merry Twins. Thus, although the additional cost of doing busi-

ness with Burke & Piras during the selected 24-month period amounted to .62 cent per gallon according to RX 56 C, the difference would have been only .26 cent had only the year 1959 been used, or .464 cent per gallon had the 24-month period ending July 1961 been used (See Table XIII of Complaint Counsel's Proposed Findings). It could be argued that the use of the 24-month period ending July 1962 tends to justify the alleged discrimination by the fruits of the discrimination—that is, the change in gallonage brought about by the difference in price.

C. *Commission Precedent*

Perhaps the most persuasive "affirmative defense" argued by the respondent is the attitude of the Commission as publicly declared in *American Oil Company* v. *Federal Trade Commission*, 325 F. 2d 101 (7th Cir. 1963) *cert. den.* 377 U.S. 954 (1964), and the four oil cases, *Pure Oil Company*, Docket No. 6640 [66 F.T.C. 1336], *The Texas Company*, Docket No. 6898 [66 F.T.C. 1336], *Standard Oil Company (Indiana)*, Docket No. 7567 [66 F.T.C. 1336], and *Shell Oil Company*, Docket No. 8537 [66 F.T.C. 1336]. In these four oil cases, the Commission dismissed the respective complaints that had been issued. Although the reasons for the dismissals are not necessarily apropos, the conclusion of the Commission in these four cases may be. The Commission held [66 F.T.C. 1488]:

> The Commission has this date announced the initiation of a broad inquiry into the problems of competition in the marketing of gasoline. Orders to cease and desist entered against a few oil companies—orders which would probably not become final, if at all, until completion of lengthy review proceedings in the Federal Courts of Appeals and the Supreme Court—could not provide complete or effective solution to the competitive problems of the gasoline industry. It would appear to be more desirable, from the standpoint of effective administration of the law, that the Commission concentrate its necessarily limited resources on a comprehensive industry-wide approach to the problems of competition in the marketing of gasoline.

In the *American Oil Company* case, *supra*, the Commission had issued a cease and desist order, Commissioner Elman dissenting. On appeal, the 7th Circuit Court of Appeals reversed. The Commission then petitioned for a writ of certiorari. In the petition, the Commission listed the instant case as pending before the hearing examiner and as one of several cases "involving price discriminations growing out of retail gasoline price wars currently * * * a major part of the Commission's enforcement activities under Section 2(a) of the Clayton Act." The Commission identified three such "formal cases," one being the instant proceeding and the other two being the *Texas* and *Shell* cases referred to above. It declared that these cases are "all based on the same theory of injury to competition that is involved in the present case [the *American Oil* case]." It pointed out that these "respondents * * * all do business in the Seventh Circuit," that "Review of any orders the Commission may enter in those cases is almost certain to be sought in the Seventh Circuit," that "that court, following its decision in the present case [American Oil], would undoubtedly set aside any orders," and that "The decision below, if allowed to stand, will become the definitive judicial ruling."

With the denial of the petition for writ of certiorari, it would appear that the Commission has confessed its inability to issue a cease and desist order in these cases. Indeed, as pointed out above, the two other cases, mentioned by name in the petition, have already been dismissed by the Commission.

The hearing examiner recognizes that a dismissal upon these grounds is more appropriately within the jurisdiction of the Commission than of the hearing examiner. No opinion, therefore, is expressed with respect to the propriety of such action here.

THE APPLICABLE LAW

The Robinson-Patman Act makes it unlawful for any person to discriminate in price between competing purchasers of like goods where the effect of such discrimination may be to lessen competition substantially or tend to create a monopoly in any line of commerce (15 U.S. Section 13(a)). To establish a *prima facie* violation of law in this proceeding, involving a secondary line (buyer) injury, it is necessary to prove: (1) sales by respondent of gasoline of like grade and quality to two or more competing dealer customers at different prices, (2) actual or probable substantial adverse effect upon competition, and (3) the price differences were the cause of the adverse competitive effect.

Complaint counsel stress the language of *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948):

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition are adequately supported by evidence.

If, however, the *American Oil* decision, *supra*, is, as Commission counsel have stated, "the definitive judicial ruling," a reassessment of the *Morton Salt* language in the light of the *American Oil* decision is warranted. In the *American Oil* case the Court of Appeals quoted *Anheuser-Busch Inc.* v. *Federal Trade Commission*, 289 F. 2d 835 (7th Cir., 1961), where the court ruled that price discrimination does not, per se, constitute a violation of Section 2(a). The price discrimination, even if substantial, must be capable of raising a reasonable probability of substantially lessening the ability to compete. The court in the *American Oil* case went on to point out that the *Morton Salt* decision involved a discriminatory pricing system which gave buyers of large quantities a "built-in, routine and permanent price advantage over smaller rivals." The court concluded that "there must be something more than an essentially temporary minimal impact on competition and probative analysis must reveal a causal relation between the price discrimination and an actual or resonably probable injury to competition in the context of the factual situation involved."

In the Carolinas, the price differences created by the respondent among its dealers, assuming they were competitive, were not part of a continuing discriminatory system, but were intermittent and usually of insignificant proportions. Under these circumstances, it was not sufficient to prove a *prima facie* violation of Section 2(a) to merely show that a price difference existed. Competitive injury could not be inferred from that fact alone. The additional facts brought out in connection with the Carolina dealers negated any reasonable probability of competitive injury.

In New York, the situation appears to be somewhat different. In the case of Fromberg, the price differentials were during much longer and uninterrupted periods of time than in the Carolinas. In the case of Merry Twins, the price differences were continuous for more than two years. For these New York stations, it appears reasonable to apply the rulings of *Morton Salt*. But even here, the bare price difference is insufficient. The court in that case found that the manufacturer's price discrimination resulted in "price differentials between competing purchasers *sufficient to influence their resale price.*" In Merry Twins, however, the price difference of .8 cent per gallon was not shown to be the cause of the Merry Twins' resale price, which was two to four cents per gallon lower than their competitors. Indeed, the .8 cent cost difference could be, presumably, the cause of a one cent differential in retail price. But such a retail price differential was not deemed sufficient to affect competition, according to those very dealers who were allegedly hurt. Nor did the difference in retail price divert business from the Merry Twins' competitors as far as this record indicates.

Similarly, in the Fromberg case, no anticompetitive effects were shown. In fact, the record established during the case-in-chief demonstrates the contrary, with Fromberg's sales declining and those of its competitors rising.

Nor can it be argued that the allegedly "favored" dealers profited by the price differences. Since the "favored" dealer received the preference in price only to enable him to lower his posted price, he was no better off with the receipt of such preferential price than he was without. In fact, his margin per gallon was usually less under the preferential price treatment since an .8 cent preference resulted in a one cent reduction in his posted price, and a 3.3 cent preference resulted in a four cent reduction in his posted price. The only benefit that the recipient of such preferential price treatment could possibly have would be as a result of increased gallonage due to his lowered posted price. This, however, did not occur in the Fromberg case. Although it did occur in the Merry Twins case, the evidence is lacking that it came at the expense of the "disfavored" Esso dealers, or that it was due to the .8 cent price preference as distinguished from the two to four cent pump price differential in effect.

ORDER

It is ordered, That the complaint be, and the same hereby is, dismissed.

Decision of the Commission

The hearing examiner, on March 31, 1965, filed his initial decision and order dismissing the complaint. The effective date of the initial decision was stayed by the Commission's order of April 30, 1965. The Commission has now considered the matter and determined that the initial decision should be modified and adopted as amended.

Accordingly, *It is ordered*, That the initial decision be modified by striking therefrom that section on page 965 beginning with the phrase "As will be seen" and ending with the phrase "to the dealers questioned concerning it (Tr. 1292, 1392, 1422)" and that portion of the initial decision beginning on page 970 with the heading "C. *Commission Precedent*" and ending on page 973 with the phrase "differential in effect."

It is further ordered, That the initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.