IN THE MATTER OF

STANDARD MOTOR PRODUCTS, INC.

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

Docket 5721. Complaint, Dec. 20, 1949—Decision, Dec. 27, 1957

Order requiring a seller in Long Island City, N.Y., of automotive replacement parts to jobbers who resold to garages, service stations, fleet owners, and other jobbers, to cease discriminating in price in violation of section 2(a) of the Clayton Act, by means of a retroactive volume rebate plan under which large volume purchasers and members of group buying organizations were granted rebates on their total annual purchases in addition to the customary 2 percent cash discount, with result that they were charged lower prices than their smaller competitors.

Mr. Eldon P. Schrup for the Commission.
Mr. Edward S. St. John, of New York, N.Y., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is based upon a complaint charging that the respondent Standard Motor Products, Inc., a corporation, has discriminated in price between different purchasers of its products in violation of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, sec. 13). The price differentials which are charged to be in violation of the Clayton Act arise from respondent's pricing practices, involving the granting of an annual retroactive volume rebate to its customers, and also in the granting of such retroactive volume rebate to group purchasers on the basis of their aggregate purchases instead of upon the individual purchases of the members. The general system of pricing used by the respondent, as developed by the record, and the variations therefrom in the case of group buyers, is not disputed by the respondent, but was instead defended on the basis that the pricing practices of respondent have not resulted in any injury to competition, and that respondent's prices, discounts and allowances were made to meet competition. No attempt was made by respondent to justify its price differentials on the basis of differences in cost of manufacture, sale, or delivery.

This proceeding is now before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel and oral argument thereon. The hearing examiner has given consideration to the proposed findings as to the facts

and conclusions submitted by both parties and the memoranda and brief in support thereof, and all findings of facts and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith rejected, and the hearing examiner having considered the record herein and being now fully advised in the premises, makes the following findings as to the facts, conclusions drawn therefrom, and order:

1. Respondent Standard Motor Products, Inc., is a corporation organized under the laws of the State of New York with its principal office and place of business located at 37–18 Northern Boulevard, Long Island City, New York, N.Y.

2. Since 1926, the respondent has been engaged in the manufacture and in the sale and distribution in interestate commerce of automotive replacement parts, consisting of ignition parts and automotive wire and cable and related items, in competition with other concerns who were also engaged in the sale and distribution of similar products in interestate commerce.

3. The market in automotive replacement parts is highly competitive. The amount of business transacted by the respondent in the replacement parts field is substantial. Its sales during the year 1949, exclusive of Hygrade products, was in excess of $4 million.

4. The respondent, during the time mentioned herein, has sold its replacement parts to jobbers, who were designated by the respondent as distributors, who resold such products to garages, service stations, fleet owners and other jobbers. From time to time respondent issued its Distributor's Price List, which listed the basic prices used by the respondent in the sale and distribution of its various replacement parts. Any discounts, allowances or rebates were off Distributor's Price List. Respondent also from time to time issued suggested resale price lists for use by distributors and dealers in the resale of respondent's products. The net purchase price paid by distributors for respondent's products is the purchase price paid subject to and following all applicable rebates, discounts and allowances. The automotive replacement parts sold and distributed by respondent were all of one grade and quality. Respondent sold such products of like grade and quality to its distributors at varying net prices. Such distributors of respondent were competitively engaged in the resale of respondent's replacement parts in the various territories and places where such distributors carried on their businesses.

5. On October 15, 1947, respondent acquired Hygrade Products Co., Inc., which became a division of the respondent but was operated as a separate unit. The Hygrade Products line consisted of fuel

pumps and parts therefor. The pricing pratices followed by the respondent in connection with its Hygrade line was substantially the same as those maintained in its regular Standard line. However, for the purpose of expediting this matter and bringing the litigation to a conclusion, the examiner eliminated from consideration in this proceeding all exhibits and testimony pertaining to the Hygrade line of products.

6. The annual volume rebates provided for in respondent's pricing plan were incorporated in, and made a part of, its Distributors Rebate Contract and Master Distributors Rebate Contract. Since June 19, 1936, and prior thereto, respondent has granted a retroactive volume rebate to its various distributors. The retroactive volume rebates as set out in respondent's contracts with its distributors are as follows:

(a) *Distributors Rebate Contract.* Purchasers operating under this contract by the Standard line of products subject to a retroactive rebate on purchase price based upon the following rebatable purchase volume, plus a cash discount of 2 percent on the value of all invoices if paid on the 10th following the month of date of shipment:

"If the net amount of goods purchased is $1,800 per year the rebate is 3%
If the net amount of goods purchased is $2,400 per year the rebate is 5%
If the net amount of goods purchased is $3,600 per year the rebate is 7%
If the net amount of goods purchased is $5,000 per year the rebate is 9%
If the net amount of goods purchased is $6,500 per year the rebate is 11%
If the net amount of goods purchased is $8,000 per year the rebate is 13%
If the net amount of goods purchased is $10,000 per year the rebate is 15%"

(b) *Master Distributors Rebate Contract.* Purchasers operating under this contract and its endorsement, buy the Standard line of products subject to a retroactive rebate on purchase price based upon the following rebatable purchase volume:

"Net purchases of $1,800, rebate is 3% advanced monthly.
Net purchases of $2,400, rebate is 3% advanced monthly plus 2% at end of year.
Net purchases of $3,600, rebate is 3% advanced monthly plus 4% at end of year.
Net purchases of $5,000, rebate is 3% advanced monthly plus 6% at end of year.
Net purchases of $6,500, rebate is 3% advanced monthly plus 8% at end of year.
Net purchases of $8,000, rebate is 3% advanced monthly plus 10% at end of year.

Net purchases of $10,000, rebate is 3% advanced monthly plus 12% at end of year.
Net purchases of $25,000, rebate is 3% advanced monthly plus 13% at end of year.
Net purchases of $50,000, rebate is 3% advanced monthly plus 14% at end of year.
Net purchases of $75,000, rebate is 3% advanced monthly plus 15% at end of year.
Net purchases of $100,000, rebate is 3% advanced monthly plus 17% at end of year."

The Master Distributors Rebate Contract, as distinguished from the Distributors Rebate Contract, provides that "The manufacturer will allow the distributor a monthly discount of 5 percent instead of the usual 2 percent. This 5 percent comprises the usual 2 percent cash discount and 3 percent rebate allowed in advance monthly."

7. Under the retroactive rebate plan, purchasers were granted and received rebates on all their individual purchases according to the rebate bracket applicable to their total annual purchases. Any individual purchase price was retroactively determined by the total of all purchases during the year according to the terms of the retroactive rebate plan.

8. The amounts involved in the granting by respondent of the volume rebates were substantial and reflect the importance which was attached to said rebates by the various purchasers. Respondent has 1,500 or more customers located in numerous cities and towns throughout the United States who are variously operating under the aforedescribed rebate contracts.

9. During the year 1949, respondent sold its products to jobber members of various group buying organizations. Sales were made during 1949 to members of the following group buying organizations:

Name	*Address*
Mid-South Distributors, Inc	Memphis, Tenn.
Warehouse Distributors, Inc	Atlanta, Ga.
Automotive Parts Distributors, Inc. (now National Parts Warehouse).	Athens, Ga.
Ark-La-Tex Warehouse Distributors, Inc	Marshall, Tex.
Automotive Southwest, Inc	Dallas, Tex.
Southwestern Warehouse Distributors, Inc	Dallas, Tex.
Metropolitan Automotive Wholesalers Co-Operative, Inc.	New York, N.Y.

10. The purchasing procedure in a group buying operation provided for the forwarding of merchandise purchase orders by the

individual jobber member to the seller directly or through the group office. Merchandise so ordered was shipped by the respondent direct to the individual jobber member with billing for same being directed to the group office. Monthly settlements were made between respondent and the group office for the aggregate sum of the purchase orders of all the jobber members so received, and each jobber member also settled monthly with the group office for his own individual purchases so made. The annual volume rebate allowed by the respondent was based upon the aggregate purchases of the group members and was paid to the group office, which in turn distributed such volume rebate to the jobber members in proportion to the amount of such jobber's individual purchases. In some instances respondent permitted the buying group to deduct the retroactive discount on making monthly remittances. For example, Mid-South Distributors, Inc., deducted the 20 percent, plus 2 percent cash discount, from its monthly remittances. The rebates and discounts as shown by the tabulations in evidence were granted and allowed by the respondent to each individual member of the said buying groups on the basis of the total purchases of all the members irrespective of whether or not the amount of such individual member's purchases met with the requirements of any particular bracket of respondent's volume rebate schedules set forth in the respondent's rebate contracts. The group buying organization was in reality a bookkeeping device for the collection of rebates, discounts and allowances received from sellers on purchases made by its jobber members. Such jobber members, in fact, purchased their requirements of respondent's products direct from respondent, and at the same time received a more favorable price or higher rebate based upon the combined purchases of all the members.

11. Respondent's gross billings during 1949 in connection with the Standard line products sales to the above group members were in the total aggregate amount of $698,124.48, on which respondent allowed cash discounts of $13,972.50. The rebatable amount on such aggregate purchases was $642,351.93, on which respondent allowed volume discounts of $123,710.35, or an average rebate of 19.26 percent to such buyers.

12. Illustrative of the monetary benefits derived by the individual jobber member of such group buying organization, as opposed to those individual purchasers buying without the benefits of such group consolidation of purchases is the following tabulation taken from Commission's exhibit 330, dealing with the transactions between respondent and Mid-South Distributors, Inc.:

AUTOMOTIVE JOBBER "GROUP BUYING" METHOD OF PURCHASING

Manufacturer's published rebate schedule to trade		1	2	3	4	5	6
Net purchases	Rebate	Actual net rebatable purchases each member jobber	Manufacturer's schedule rebate rate applicable	Manufacturer's schedule rebate amount due	Manufacturer's "group" rebate rate	Manufacturer's "group" rebate amount paid	Actual price difference
	Percent		*Percent*		*Percent*		
		1. $10,926.64	15	$1,639.00	20	$2,185.33	$546.33
		2. 4,883.52	7	341.85	20	976.70	634.85
		3. 19,813.71	15	2,972.06	20	3,962.72	990.66
Under $1,800	None	4. 34,902.59	16	5,584.41	20	6,980.50	1,396.09
$1,800-$2,400	3	5. 2,107.24	3	63.22	20	421.45	358.23
$2,400-$3,600	5	6. 34,578.28	16	5.532.52	20	6,915.65	1,383.13
$3,600-5,000	7	7. 2,432.54	5	121.63	20	486.54	364.91
$5,000-$6,500	9	8. 263.35	None	----------	20	52.67	52.67
$6,500-$8,000	11	9. 44.940.96	16	7,190.55	20	8,988.15	1,797.60
$8,000-$10,000	13	10. 8,312.32	13	1,080.60	20	1.662.47	581.87
$10,000-$25,000	15	11. 13.933.59	15	2,090.04	20	2,786.70	696.66
$25,000-$50,000	16	12. 4,500.89	7	315.06	20	899.99	584.93
$50,000-$75,000	17	13. 11,386.24	15	1,707.94	20	2,277.43	569.49
$75,000-$100,000	18	14. 17,050.24	15	2.557.54	20	3,410.06	852.52
$100,000 and over	20	15. 31,821.79	16	5,091.49	20	6,364.36	1,272.87
		16. 16,638.77	15	2,495.82	20	3,327.75	831.93
		17. 5.803.64	9	522.33	20	1,160.75	638.42
		18. 17.307.94	15	2,596.19	20	3,461.61	865.42
Totals		281,604.25	----------	41,902.25	----------	56,320.83	14,418.58

13. In following the pricing practices hereinabove described, respondent has discriminated in price by means of rebates allowed by it in the sale of its various automotive products and related items as between respondent's competing distributors and also between respondent's distributors and competing group buying jobbers, and the effect of such discrimination may be to substantially lessen, injure or prevent competition between respondent's customers receiving the benefit of such discriminations and the customers who do not receive the benefit of such discriminations.

14. The respondent did not grant exclusive territory to any of its customers and has had more than one distributor in various trade areas who were, in fact, in competition with each other and also in competition with group buying jobbers, who sold respondent's replacement parts to dealers and other purchasers in their respective trade areas. Substantial differences in the net purchase prices paid by competing purchasers of respondent's product lines have resulted from the aforesaid pricing practices of respondent. The record contains a number of tabulations prepared from respondent's accounts and records showing details of respondent's sales to jobber purchasers in a number of different trading areas. These tabulations reflect price differences between such purchasers in the same trading area of varying amounts or percentages, with some net purchase price differences amounting to as much as 20 percent.

15. The record, based upon the tabulations in evidence in this proceeding, disclosed substantial differences in the net purchase prices paid by competing purchasers of respondent's products for resale. The substantiality of the amount represented by such price differences with relation to the purchaser's net profit margin is conclusively shown when compared with the competitive effect of the amount represented by the 2 percent cash discount. Distributors of respondent, who testified in this proceeding, stated that they invariably took advantage of the 2 percent cash discount as being essential in the conduct of their respective businesses, and that such discount reduced the cost of acquisition of respondent's products. This 2-percent reduction in cost of acquisition is substantial and may account for a substantial portion of the margin of profit. Several jobbers of respondent testified that the overall net profit of their companies after taxes ran from 2 to 4 percent. By the very nature of the businesses operated by the various jobber customers of respondent, their profit was necessarily based upon an accumulation of small margins of profit on many items. Some of the witnesses handled from 50 to 150 lines, involving an aggregate of thousands of items. Practically all of respondent's jobber customers extend the same cash discount they receive to their customers, however, on a mark-up of acquisition cost, the discount actually given by such customer to its purchaser on resale will be greater than the 2 percent cash discount.

16. The substantiality of the total dollar volume amounts in lost rebates to respondent's nonfavored customers by not being allowed the higher rebate percentages on purchase price granted respondent's favored customers, is well illustrated by the following comparison based on Commission's exhibits 340 and 350D. The substantiality of respondent's price discriminations between its various favored and nonfavored customers becomes most apparent when the dollar amount of the cash discounts, normally taken as a matter of business necessity by these nonfavored customers, is contrasted with the dollar amount in total rebates actually lost to such nonfavored customers because of respondent's following less favorable rebate percentages:

1949 Standard line sales to customers in certain trading areas, from Commission exhibit Nos. 340 and 350–D

1	2	3	4	5	6	7	8	9
Customer and location	Member of buying group	Gross billing	Cash discount	Rebate-able amount	Rebate		Comparison of—	
					Amount	Percent	Rebate lost	Cash discount taken
Selma, Ala.:								
Selma Parts Service	Automotive Parts	$507.74	$10.56	$434.49	$46.67	10.74		
Auto Parts Co	do	2,026.31	40.53	1,770.36	53.46	3.02	$136.67	$40.53
Charlotte, N.C.:								
Southern Bearings & Parts	Warehouse Distributors, Inc	3,678.01	70.89	3,387.00	677.40	20.00		
Wholesale Auto Parts	do	41,772.67	835.45	38,377.49	5,822.89	15.17	1,853.63	835.45
Burlington, N.C.:								
Motor Bearings & Parts Co	do	1,193.55	23.01	1,129.81	225.96	20.00		
Norton Russ Automotive Co	do	1,831.76	15.13	1,625.94			325.19	15.13
High Point, N.C.:								
Southern Bearings & Parts	do	855.23	16.48	778.91	155.78	20.00		
Collins Auto Supply Co	do	826.26	16.52	778.61	22.99	2.95	132.75	16.52
Statesville, N.C.:								
Southern Bearings & Parts	do	1,199.31	23.12	1,098.57	219.72	20.00		
Auto Parts & Electric Co	do	10,131.08	202.62	9,614.56	1,373.55	14.29	548.99	202.62
Rockingham, N.C.:								
Southern Bearings & Parts	do	1,100.99	21.22	975.66	195.13	20.00		
Smith Auto Parts	do	2,126.43	42.53	1,997.90	48.82	2.44	350.83	42.53
Winston-Salem, N.C.:								
Southern Bearings & Parts	do	1,099.45	21.19	981.76	196.55	20.00		
Motor Parts Co	do	3,725.80	74.52	3,410.97	231.54	6.79	450.59	74.52
Columbus, Ga.:								
C&B Parts Service Co	Automotive Parts Distributors, Inc	19.44	.41	6.24	.95	15.22		
Benning Auto Parts Co	do	2,952.47	59.05	2,740.94	132.36	4.83	284.78	59.05
Satlof Auto Parts	do	2,314.97	46.30	2,231.17	65.45	2.93	274.21	46.30
Jackson, Miss.:								
Robinson Brothers	Mid-South Distributors, Inc	12,113.54	242.27	11,386.24	2,277.43	20.00		
Ryan Supply Co	do	10,222.33	204.45	9,614.81	1,369.79	14.25	552.85	204.45
Weatherall Auto Supply	do	3,051.94	61.04	2,867.78	139.57	4.87	433.90	61.04
Meridian, Miss.:								
Motor Supply Co	do	8,807.64	176.15	8,312.32	1,662.47	20.00		
Adams Supply Co	do	5,274.06	105.48	4,953.02	426.17	8.60	425.96	105.48
Charleston, S.C.:								
H. Steenken & Co	Warehouse Distributors, Inc	9,103.26	175.47	8,381.04	1,676.21	20.00		
C. D. Franke & Co., Inc	do	2,468.24	49.36	2,256.18	109.27	4.84	342.04	49.36
Greenville, S.C.:								
Scurry & Nixon	do	8,713.80	167.96	8,189.42	1,637.88	20.00		
Kaufman Brothers	do	8,693.21	173.86	8,326.82	1,031.12	12.38	634.50	173.86
Knoxville, Tenn.:								
Tenn. Mill & Mine Supply	Mid-South Distributors, Inc	18,479.72	369.60	17,050.24	3,410.06	20.00		
Service Auto Parts Co	do	24,154.00	483.08	22,385.46	3,401.58	15.20	1,074.50	483.08

17. In the course of this proceeding it was the contention of the respondent that no injury to competition exised by reason of respondent's pricing practices because its customers generally followed the suggested resale price lists, issued by the respondent, in the resale to their respective customers. In support of this contention, the respondent introduced testimony of a number of distributors that they had not suffered any injury by reason of differing or higher prices paid by them as compared with prices paid by competitors in their respective trade areas. On cross-examination, these witnesses admitted that their reasons for stating that they had not been competitively injured was due to the fact that their competitors all followed the suggested resale price of the respondent and that there was no price competition in their particular trade areas.

18. The fact that price competition may have been eliminated in some areas because of uniformity of resale price does not eliminate the question of injury to competition. Any saving or advantage in price obtained by one competitor as against another increased his margin of profit, permitted additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less nonexistent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exist.

19. It was contended by the respondent that the discounts or rebates allowed to the various group purchasing organizations were allowed to the members of such organization to meet the prices of its competitors. The discounts and rebates so allowed were not granted in good faith to meet an equally low price of a competitor, but instead were used as a weapon to obtain new customers at the expense of its seller competitors and not to hold existing customers. For example:

(a) At the time Mid-South Distributors, Inc., was formed, respondent, while selling a majority of the members, was in fact selling more members after the formation of the group than prior thereto, and in 1949, it had 18 members of the Mid-South group who were customers with a gross billing of $306,433.95.

(b) With reference to Warehouse Distributors, Inc., this group was formed in 1948. At the time of the formation, eight of the members were customers of the respondent. In 1949, respondent was selling 30 of the members, including a number of branch offices.

(c) In the case of Automotive Parts Distributors, Inc., this group was formed in 1947 or 1948. At the time of its formation there

were seven members who were customers of respondent. In 1949, respondent was selling 13 members of this group.

(d) In the case of Southwestern Warehouse Distributors, Inc., this group was formed in 1946 or 1947. There were 15 members who were customers of respondent at the time of the formation of the group. The original membership was 23. In 1949, respondent was selling 21 members of this group.

(e) In the case of Midwest Warehouse Distributors, Inc., there were three members of this group who were customers of respondent at the time of the formation in 1949. This group presently has 20 members, 19 of which are now buying from respondent.

20. The defense of meeting competition in connection with sales to the various group members is without merit. The good faith requirement of section 2(b) of the Clayton Act is not met where a price discrimination, with the required resultant effect, is for aggressive rather than defensive purposes. The allowance of discounts and rebates to members of the various groups based upon the aggregate purchases of all the members was designed to meet competition generally and to obtain the business of all the members of a group and were not allowed to meet an equally low price of a competitor.

21. If, as contended by the respondent, it granted a cumulative annual rebate to members of groups, based upon the aggregate purchases of all the members because its competitors were offering such rebate based upon the aggregate purchases of the members of a group, it could not be considered that such action was in good faith since the respondent well knew that the rebates offered by its competitors as well as the rebates offered by respondent to group buyers were unlawful in that the differences in price accorded group and nongroup purchasers could not be justified by showing differences in the cost of manufacture, sale or delivery since their source is a rebate system, based, not on the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to a group.

CONCLUSIONS

1. Respondent's retroactive volume rebate plan has resulted in general widespread and substantial price differences between its customers. Large buyers and members of groups received higher rebates and were benefited by the plan. The competitive opportunities of certain purchasers were injured when they had to pay substantially more for respondent's products than their competitors had to pay.

2. The contention by respondent that no injury occured since non-favored customers testified that they were not injured because of higher rebates granted to their competitors because all sold at respondent's suggested resale price, is without merit. This contention is fully disposed of by the importance attached to the 2 percent cash discount, by these same customers and the fact that this cash discount in some instances amounted to the difference between profit and loss. In so testifying as to the absence of injury, these witnesses were attempting, by conclusion, to deny a mathematical fact, *Moog Industries, Inc.*, v. *Federal Trade Commission*, C.C.A. 8, 238 F. 2d 43.

3. Price differentials not justified by a showing of differences in the cost of manufacture, sale or delivery become price discriminations and are prohibited by section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, if they may substantially lessen, injure, destroy or prevent competition. *Moog Industries, Inc.*, v. *Federal Trade Commission*, supra; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44; *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 751; *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726.

4. The acts and prices of the respondent as herein found are in violation of the provisions of subsection (a) of section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent Standard Motor Products, Inc., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products and supplies of like grade and quality:

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

OPINION OF THE COMMISSION

By Gwynne, Chairman:

The complaint charges respondent with violation of section 2(a) of the amended Clayton Act (U.S.C., Title 15, sec. 13). The practices involved have to do with retroactive volume rebates to respondent's

customers, and also the granting of such retroactive volume rebates on group purchases upon the basis of their aggregate purchases instead of upon the individual purchases of the members. After hearings, the hearing examiner found against respondent and entered the following order:

It is ordered, That respondent Standard Motor products, Inc., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive products and supplies in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products and supplies of like grade and quality:

1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

Respondent has appealed.

The provisions of the amended Clayton Act involved here are as follows:

SEC. 2.[2] (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:

* * * * * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Respondent corporation has, since 1926, been engaged in the manufacture, sale and distribution in interstate commerce of automotive

replacement parts consisting of ignition parts and automotive wire, cable and related items. On October 15, 1947, and while the hearings were in progress, respondent acquired Hygrade Products Company, Inc. and operated it as a separate unit. The hearing examiner found that the Hygrade Products line (fuel pumps and parts) was distributed by respondent in the same manner as it distributed regular Standard Products. "However, for the purpose of expediting this matter and bringing this litigation to a conclusion, the examiner eliminated from consideration in this proceeding, all exhibits and testimony pertaining to the Hygrade line of products."

It is not disputed that the products involved here are of like grade and quality.

Sales of Standard parts during 1949 were over $4 million. Such sales were made in competition with other firms similarly engaged. Sales were made to jobbers and to jobbers known as "distributors," all of whom resold to garages, service stations, fleet owners or other jobbers. Prices of respondent's products were in accordance with its Distributor's Price List issued from time to time, and discounts (including the 2 percent discount for cash), allowances and rebates were based on the customer price list.

In 1949, respondent sold to members of seven group buying organizations. Although there was some variation, the general procedure was as follows: Operations were under two types of contracts known as Distributor's Rebate Contract and Master Distributor's Rebate Contract. These contracts are described in the initial decision as follows:

6. The annual volume rebates provided for in respondent's pricing plan were incorporated in, and made a part of, its Distributors Rebate Contract and Master Distributors Rebate Contract. Since June 19, 1936, and prior thereto, respondent has granted a retroactive volume rebate to its various distributors. The retroactive volume rebates as set out in respondent's contracts with its distributors are as follows:

(a) *Distributors Rebate Contract.* Purchasers operating under this contract buy the Standard line of products subject to a retroactive rebate on purchase price based upon the following rebatable purchase volume, plus a cash discount of 2 percent on the value of all invoices if paid on the 10th following the month of date of shipment:

If the net amount of goods purchased is $1,800 per year the rebate is 3%
If the net amount of goods purchased is 2,400 per year the rebate is 5%
If the net amount of goods purchased is 3,600 per year the rebate is 7%
If the net amount of goods purchased is 5,000 per year the rebate is 9%
If the net amount of goods purchased is 6,500 per year the rebate is 11%
If the net amount of goods purchased is 8,000 per year the rebate is 13%
If the net amount of goods purchased is 10,000 per year the rebate is 15%

"(b" *Master Distributors Rebate Contract.* Purchasers operating under this contract and its endorsement buy the Standard line of products subject to a retroactive rebate on purchase price based upon the following rebatable purchase volume:

Net purchases of $1,800, rebate is 3% advanced monthly.
Net purchases of 2,400, rebate is 3% advanced monthly plus 2% at end of year.
Net purchases of 3,600, rebate is 3% advanced monthly plus 4% at end of year.
Net purchases of 5,000, rebate is 3% advanced monthly plus 6% at end of year.
Net purchases of 6,500, rebate is 3% advanced monthly plus 8% at end of year.
Net purchases of 8,000, rebate is 3% advanced monthly plus 10% at end of year.
Net purchases of 10,000, rebate is 3% advanced monthly plus 12% at end of year.
Net purchases of 25,000, rebate is 3% advanced monthly plus 13% at end of year.
Net purchases of 50,000, rebate is 3% advanced monthly plus 14% at end of year.
Net purchases of 75,000, rebate is 3% advanced monthly plus 15% at end of year.
Net purchases of 100,000, rebate is 3% advanced monthly plus 17% at end of year.

The Master Distributors Rebate Contract, as distinguished from the Distributors Rebate Contract, provides that "The manufacturer will allow the distributors a monthly discount of 5 percent instead of the usual 2 percent. This 5 percent comprises the usual 2 percent cash discount and 3 percent rebate allowed in the advance monthly".

A member of a group buying organization sends its regular purchase orders to respondent direct or through the office of the group. In any event, the latter is kept advised of all transactions. The products ordered are shipped direct to the member buyer, but the billing is to the group organization. Regular settlements are made between the respondent and the group buying organization for the aggregate of all the members' purchases. The volume rebate allowed by respondent is based upon the aggregate purchases of the members. After deducting the expenses of operation, the balance is distributed at regular periods by the group buying organization to the member buyers in proportion to the amount of their individual purchases.

About 1,500 customers buy respondent's products through group buying organizations and receive differing rebates based soley on volume. The rebatable amount on such aggregate purchases during 1949 on Standard line products sales after deducting sales to Metropolitan Automotive Wholesalers (evidence of which was stricken from the record) was $598,761.28. Total volume discounts allowed were $114,976.56.

The initial decision contains tables based on Commission exhibits showing transactions for 1949 between respondent and various customers and groups. Because these tables illustrate graphically the results of respondent's pricing practices, they are reproduced here.

No evidence of cost justification was introduced. It is clear that respondent's rebates were based on aggregate volume and resulted in sales to customers at substantially differing prices.

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Respondent argues that the customers involved were not in competition with each other and that evidence of injury is lacking. Considerable evidence was introduced on these subjects and the hearing examiner found against the respondent as to both features.

The customers involved are, for the most part, small, although some maintain more than one place of business. Their methods of operation are similar and they sell to the same general class of customers. Their trading area usually covers the community in which they are located and an area within a 50-mile radius. The respondent does not grant exclusive territory to any customers and in various trade areas has more than one customer. These customers compete with other customers of respondent, including some who have the benefit of group buying.

The difference in price paid by the nonfavored customer as against the favored is illustrated in the charts included herein. It is a matter of mathematical calculation. The parties involved carry on business under substantially the same conditions. Competition is keen on all levels and margins of profit small. There is evidence that in some cases the overall net profit is between 2 and 4 percent. Testimony of distributors indicated that they take advantage of the 2 percent cash discount and that they find it essential to their business.

As was said in the Commission's Opinion *In the Matter of P. Sorenson Manufacturing Co., Inc.*, Docket 6052, "The fact that the 2 percent involved a cash discount is not significant. Its importance lies in the opinion expressed by the witnesses that a wholesaler, who for any reason is required to pay 2 percent more for his products than his competitor, was at a disadvantage which reflected itself in the margin of his profit and in his financial success."

If a 2 percent differential creates injury, obviously the larger differentials involved here may create even greater injury.

Respondent issued suggested resale price lists, which were generally followed by its customers. This, however, does not settle the question of probability of injury. A more advantageous price to one customer gives him increased margin of profit, permits additional services to customers, more vigorous selling and other opportunities for the extension of his business at the expense of his less-favored competitors. It is true all may not take advantage of these opportunities but normally many would. The situation is similar to that in the case of *Moog Industries, Inc.* v. *FTC* (1956), 238 F. 2d 43, where the court held that the record justified a finding by the Commission that substantial injury to competition may probably be the result.

Respondent also claims that the rebates allowed were justified un-

der section 2(b) in that they were made in good faith to meet an equally low price of a competitor.

The defense under 2(b) is a limited one upon which the respondent bears the burden of proof. Some of the limitations are set forth in *FTC* v. *A. E. Staley Manufacturing Co.* (1945) 324 U.S. 746, where the court considered the legality of a basing point delivered price comparable to that of a competitor. The court said:

Thus it is the contention that a seller may justify a basing point delivered price system, which is otherwise outlawed by § 2, because other competitors are in part violating the law by maintaining a like system. If respondents' argument is sound it would seem to follow that even if the competitor's pricing system were wholly in violation of § 2 of the Clayton Act, respondents could adopt and follow it with impunity.

This startling conclusion is admissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors. But § 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition. Respondents are here seeking to justify delivered prices which discriminate in favor of buyers in Chicago and at points nearer, freightwise, to Chicago than to Decatur, by a pricing system involving phantom freight and freight absorption. We think the conclusion is inadmissible, in view of the clear Congressional purpose not to sanction by § 2(b) the excuse that the person charged with a violation of the law was merely adopting a similarly unlawful practice of another.

AUTOMOTIVE JOBBER "GROUP BUYING" METHOD OF PURCHASING

Manufacturer's published rebate schedule to trade		1	2	3	4	5	6
Net purchases	Rebate	Actual net rebatable purchases each member jobber	Manufacturer's schedule rebate rate applicable	Manufacturer's schedule rebate amount due	Manufacturer's "group" rebate rate	Manufacturer's "group" rebate amount paid	Actual price difference
	Percent		*Percent*		*Percent*		
		1. $10,926.64	15	$1,639.00	20	$2,185.33	$546.33
		2. 4,883.52	7	341.85	20	976.70	634.85
		3. 19,813.71	15	2,972.06	20	3,962.72	990.66
Under $1,800	None	4. 34,902.59	16	5,584.41	20	6,980.50	1,396.09
$1,800-$2,400	3	5. 2,107.24	3	63.22	20	421.45	358.23
$2,400-$3,600	5	6. 34,578.28	16	5,532.52	20	6,915.65	1,383.13
$3,600-5,000	7	7. 2,432.54	5	121.63	20	486.54	364.91
$5,000-$6,500	9	8. 263.35	None	----------	20	52.67	52.67
$6,500-$8,000	11	9. 44,940.96	16	7,190.55	20	8,988.15	1,797.60
$8,000-$10,000	13	10. 8,312.32	13	1,080.60	20	1,662.47	581.87
$10,000-$25,000	15	11. 13,933.59	15	2,090.04	20	2,786.70	696.66
$25,000-$50,000	16	12. 4,500.89	7	315.06	20	899.99	584.93
$50,000-$75,000	17	13. 11,386.24	15	1,707.94	20	2,277.43	569.49
$75,000-$100,000	18	14. 17,050.24	15	2,557.54	20	3,410.06	852.52
$100,000 and over	20	15. 31,821.79	16	5,091.49	20	6,364.36	1,272.87
		16. 16,638.77	15	2,495.82	20	3,327.75	831.93
		17. 5,803.64	9	522.33	20	1,160.75	638.42
		18. 17,307.94	15	2,596.19	20	3,461.61	865.42
Totals	----------	281,604.25	----------	41,902.25	----------	56,320.83	14,418.58

1949 Standard line sales to customers in certain trading areas, from Commission exhibit Nos. 340 and 350–D

1	2	3	4	5	6	7	8	9
Customer and location	Member of buying group	Gross Billing	Cash Discount	Rebate-able Amount	Rebate		Comparison of	
					Amount	Percent	Rebate lost	Cash Discount Taken
Selma, Ala.:								
Selma Parts Service	Automotive Parts	$507.74	$10.56	$434.49	$46.67	10.74		
Auto Parts Co.	do	2,026.31	40.53	1,770.36	53.46	3.02	$136.67	$40.53
Charlotte, N.C.:								
Southern Bearings & Parts	Warehouse Distributors, Inc.	3,678.01	70.89	3,387.00	677.40	20.00		
Wholesale Auto Parts	do	11,772.67	835.45	38,377.49	5,822.89	15.17	1,853.63	835.45
Burlington, N.C.:								
Motor Bearings & Parts Co.	do	1,193.55	23.01	1,129.81	225.96	20.00		
Norton Russ Automotive Co.	do	1,831.76	15.13	1,625.94			325.19	15.13
High Point, N.C.:								
Southern Bearings & Parts	do	855.23	16.48	778.91	155.78	20.00		
Collins Auto Supply Co.	do	826.26	16.52	778.61	22.99	2.95	132.75	16.52
Statesville, N.C.:								
Southern Bearings & Parts	do	1,199.31	23.12	1,098.57	219.72	20.00		
Auto Parts & Electric Co.	do	10,131.08	202.62	9,614.56	1,373.55	14.29	518.99	202.62
Rockingham, N.C.:								
Southern Bearings & Parts	do	1,100.99	21.22	975.66	195.13	20.00		
Smith Auto Parts	do	2,126.43	42.53	1,997.90	48.82	2.44	350.83	42.53
Winston-Salem, N.C.:								
Southern Bearings & Parts	do	1,099.45	21.19	981.76	196.55	20.00		
Motor Parts Co.	do	3,725.80	74.52	3,410.97	231.54	6.79	450.59	74.52
Columbus, Ga.:								
C&B Parts Service Co.	Automotive Parts Distributors, Inc	19.44	.41	6.24	.95	15.22		
Benning Auto Parts Co.	do	2,952.47	59.05	2,740.94	132.36	4.83	284.78	59.05
Satlof Auto Parts	do	2,314.97	46.30	2,231.17	65.45	2.93	274.21	46.30
Jackson, Miss.:								
Robinson Brothers	Mid-South Distributors, Inc.	12,113.51	242.27	11,386.24	2,277.43	20.00		
Ryan Supply Co.	do	10,222.33	204.45	9,614.81	1,369.79	14.25	552.85	204.45
Weatherall Auto Supply	do	3,051.94	61.01	2,867.78	139.57	4.87	433.90	61.04
Meridian, Miss.:								
Motor Supply Co.	do	8,807.64	176.15	8,312.32	1,662.47	20.00		
Adams Supply Co.	do	5,274.06	105.48	4,953.02	426.17	8.60	425.96	105.48
Charleston, S.C.:								
H. Steenken & Co.	Warehouse Distributors, Inc.	9,103.26	175.47	8,381.04	1,676.21	20.00		
C. D. Franke & Co., Inc.	do	2,468.24	49.36	2,256.18	109.27	4.84	342.04	49.36
Greenville, S.C.:								
Scurry & Nixon	do	8,713.80	167.96	8,189.42	1,637.88	20.00		
Kaufman Brothers	do	8,693.21	173.86	8,326.82	1,031.12	12.38	634.50	173.86
Knoxville, Tenn.:								
Tenn. Mill & Mine Supply	Mid-South Distributors, Inc.	18,479.72	369.60	17,050.24	3,410.06	20.00		
Service Auto Parts Co.	do	21,154.00	483.08	22,385.46	3,401.58	15.20	1,074.50	483.08

We agree with the finding of the hearing examiner that the respondent has not sustained the burden of proving its defense.

First, the meeting of the lower price of a competitor was not directed to individual competitive situations. Respondent's argument on this point is summarized in the following statement from page 8 of its brief:

> Generally, when the various "groups" were formed, customers of appellant, who were receiving a rebate of less than 20 percent, had been invited to and were about to become members of the particular group then being formed. In each instance competitors of appellant approached the group at their organiziational meetings and offered to sell an ignition line at a greater discount or rebate (a lower price) than appellant was selling its customers who were about to become members of such "group." Appellant's customers told appellant's salesmen, district sales managers, or general sales manager, as the case might be, of the offer which had been made to the "group" and through the "group" to its members by appellant's competitors, and told appellant's representatives that if appellant did not meet the price offered by its competitors, it would lose their business. In each instance after such a conversation, and only after such a conversation, appellant authorized a sales representative to make an offer to the "group" of a price as low as but never lower than the price offered by competitors in order to retain the business of its customers who were about to become members of the "group". These prices were negotiated prices arrived at between appellant and the "group" dealing at arm's length. They were not prices predicated upon an annual volume rebate based upon the total purchases of the "group." These offers were all made prior to the institution of this or any similar proceeding at a time when appellant believed that the prices offered by its competitors were lawful prices which it had a right in good faith to meet to retain the business it enjoyed.

Respondent's customers were the members of the various buying groups. These members bought and sold respondent's products for profit. The hearing examiner correctly found that "the group buying organization was in reality a bookkeeping device for the collection of rebates, discounts, and allowances received from sellers on purchases made by its jobber members." Under the group buying procedure, the price to individual members would vary according to the aggregate purchases of all the members and of the individual member's share thereof. The net price to any member was a matter of computation after the figures for the particular period were in. In other words, the plan was not adapted to meet the individual competitive situation, but was rather a general system of competition designed to meet similar general systems of competition. See *FTC* v. *A. E. Staley Manufacturing Co.* (1945) 324 U.S. 746; *FTC* v. *Corn Products Refining Co.* (1945) 324 U.S. 726; *FTC* v. *Cement Institute* (1948) 333 U.S. 683.

Second, the operation of the system was not limited to retaining customers who had been offered a better price. Through the operation of discriminatory prices, it in fact secured new customers as is shown by the record.

Third, respondent's group buying programs were not in good faith within the limitation of the 2(b) defense. On this point, the hearing examiner found as follows:

21. If, as contended by the respondent, it granted a cumulative annual rebate to members of groups, based upon the aggregate purchases of all the members because its competitors were offering such rebate based upon the aggregate purchases of the members of a group, it could not be considered that such action was in good faith since the respondent well knew that the rebates offered by its competitors as well as the rebates offered by respondent to group buyers were unlawful in that the differences in price accorded group and non-group purchasers could not be justified by showing differences in the cost of manufacture, sale or delivery since their source is a rebate system, based, not on the quantities or other factors involved in any particular sale, but rather upon the combined dollar amount of all sales to a group.

This conclusion is supported by the *Standard Oil Co.* v. *Brown* (1956), 238 F. 2d 54 decision, where the court said in explaining decisions of the Supreme Court:

* * * If the seller discriminates in price to meet prices that he knows to be illegal or that are of such a nature as are inherently illegal, as was the basing point system in the *Staley* case, supra, there is a failure to prove the "good faith" requirement of Section 2(b).

In any event, all Commission orders operate prospectively. They lay down rules for future operation. The group buying program of respondent with its system of retroactive aggregate rebates has now been declared to be illegal. The same conclusion has been reached by the Commission and by the courts as to similar programs operated by some of respondent's competitors. In its future conduct, respondent cannot justify the operation of an illegal pricing system by claiming it is to meet similar systems of competitors which have also been declared to be illegal.

Respondent also argues that the hearing examiner was in error in permitting the piercing of the corporate veil of the respective groups. The hearing examiner found "the group buying organization was in reality a bookkeeping device for the collection of rebates, discounts, and allowances received from sellers on purchases made by its jobber members." Respondent claims that this finding is incorrect, that the sales were made and the discounts and rebates paid to the various buying groups and that the group organizations are

separate and distinct legal entities apart from their stockholders or members.

The buying groups were organized under state laws. Considerable evidence was introduced as to the formation of one group. The by-laws provided that:

> The object of this Association is the general welfare of society and of the members in particular and the members are not stockholders in the legal sense of the term and no dividends or profits shall be divided among the members.
>
> * * * * * * *
>
> Each member shall be entitled to have returned to him the whole of the net earnings of the surplus resulting to the Association from such member's trading operations from, to, or through, the Association, such net earnings being considered as the profit of each member from the day of the accrual of such earnings after the deduction of the necessary expenses incurred in the operation of the Association.
>
> * * * * * * *
>
> The board of directors or the executive committee shall make contracts with manufacturers and distributors for the sale of merchandise as brokers, factors, or agents to members.

The certificate of membership received by each member provided that the person named had been elected a member entitling him to buy from or through the Association. The membership fee was $250 and dues were fixed annually by the membership. Members might be expelled by a three-fourths vote. New members might be admitted by unanimous vote. A member withdrawing or being expelled forfeited all rights or interest in the Association or "to contract with or through the Association for the purchase of merchandise or other articles."

It is, of course, a general rule that a corporation and its stockholders are deemed separate entities and the rights and obligations of each are determined accordingly. Nevertheless, as was said by the court *In re Clark's Will*, Minn. 1939, 284 N.W. 876, "Courts simply will not let interposition of corporate entity or action prevent a judgment otherwise required."

Corn Products Refining Co. v. *Benson, Secretary of Agriculture* (1956) 232 F. 2d 554, was an appeal from an order of the Secretary of Agriculture denying applicants trading privileges on all markets for one day because of alleged violation of the Commodity Exchange Act and regulations thereunder. The disputed matters involved contracts with a wholly owned subsidiary in hedging operations. The court said:

* * * The existence of a separate corporate entity should not be permitted to frustrate the purpose of a federal regulatory statute—"corporate entity may be disregarded when failure to do so would enable the corporate device to be used to circumvent a statute." * * * Merely because the corporate entities are disregarded for one specific purpose does not require that they be disregarded for other or all purposes, but to fail to disregard them under the circumstances presented here would fail to give effect to the provisions of the Commodity Exchange Act. * * *

In *New Colonial Ice Co., Inc.* v. *Helvering, Commissioner of Internal Revenue* (1934) 292 U.S. 435, involving the collection of taxes, the court said: "As a general rule a corporation and its stockholders are deemed separate entities and this is true in respect of tax problems. Of course, the rule is subject to the qualification that the separate entity may be disregarded in exceptional situations where it otherwise would present an obstacle to the due protection or enforcement of public or private rights."

Other cases have announced the same principles. See *Majestic Co.* v.*Orpheum Circuit* (1927) 21 F. 2d 720 and *Pierce* v.*National Bank of Commerce* (1926) 13 F. 2d 40.

The findings of the hearing examiner in this matter were correct and based on evidence properly in the record.

The appeal of respondent is denied. The findings and order of the hearing examiner are adopted as the findings and order of the commission, and it is directed that an order issue accordingly.

FINAL ORDER

Respondent Standard Motor Products, Inc., having filed an appeal from the initial decision of the hearing examiner in this proceeding; and the matter having been heard by the Commission on briefs and oral arguments of counsel; and the Commission having rendered its decision denying the appeal and adopting as its own the findings, conclusions and order contained in the initial decision:

It is ordered, That respondent Standard Motor Products, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order contained in said initial decision.

IN THE MATTER OF

THE CALIFORNIA SPORTSWEAR & DRESS ASSOCIATION, INC., ET AL.

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

Docket 6325. Complaint, Apr. 4, 1955—Order, Dec. 27, 1957

Order dismissing complaint charging three associations of dress manufacturers, dress jobbers, and dress contractors, respectively, and two labor unions in the $40 million California sportswear industry, with making illegal agreements to control production and fix prices, holding the agreements to be immune from the antitrust laws inasmuch as they did not aid or abet a management conspiracy to suppress competition but were closely related to wages and conditions of employment and were among "congressionally permitted union activities."

Mr. George W. Williams [1] and *Mr. Rufus E. Wilson* supporting the complaint.

Mr. Eugene B. Shapiro, of Los Angeles, Calif., for The California Sportswear & Dress Association, Inc., and certain named respondent members; *Mr. Wilbur E. Quint*, of Los Angeles, Calif., for Associated Sportswear Manufacturers of Los Angeles and certain named respondent members; *Mr. Milton J. Levy*, of New York, N.Y., for California Apparel Contractors Association and members; *Buchalter, Nemer and Field*, by *Mr. Jerry Nemer*, *Rifkind and Elstein*, by *Mr. George A. Elstein*, *Minter and Feder*, by *Mr. Robert S. Feder*, *Mr. J. George Bragin*, *Mr. Joseph Stell*, and *Mr. Olivor B. Schwab*, all of Los Angeles, Calif., and *Moss & Moss*, of Philadelphia, Pa., for individual members of respondent associations; *Mr. Morris P. Glushien* and *Mr. Wilbur Daniels*, of New York, N.Y., and *Mr. Basil Feinberg*, of Los Angeles, Calif., for respondent International Ladies' Garment Workers' Union and affiliated respondents; and *Mr. J. Albert Woll*, by *Mr. Richard H. Frank*, of Washington, D.C. and *Stevenson & Hackler*, by *Mr. Charles K. Hackler*, of Los Angeles, Calif., for respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, and Joseph M. Mihalow.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

The Federal Trade Commission issued its complaint against the above-named respondents on April 4, 1955, charging them with having

[1] Mr. Williams' participation in the proceeding ceased after the presentation of the case-in-chief, he having retired from the Commission shortly thereafter.

engaged in unfair methods of competition and unfair acts and practices in commerce in violation of section 5 of the Federal Trade Commission Act. Copies of said complaint and notice of hearing were duly served upon respondents. Said complaint charges, in substance, that respondents entered into certain collective agreements and understandings to adopt, fix and adhere to certain practices and policies which restrict and restrain competition and trade in the offering for sale, sale and distribution of women's sportswear and kindred articles, in commerce. Except for certain individual members of the respondent associations, all respondents appeared by counsel and filed answers which admitted, substantially, that collective agreements were entered into between the respondent associations and certain of the respondent unions, but denied that said agreements were entered into with the purpose and effect charged in the complaint, and affirmatively pleaded that the Federal Trade Commission has no jurisdiction over the subject matter of this proceeding or certain of the parties thereto.

Prior to the date of initial hearing, motions and supporting memoranda of law were filed on behalf of the respondent unions for a dismissal of the complaint on the grounds (a) that the Commission is without jurisdiction in this proceeding, and (b) that the complaint fails to state a claim upon which relief can be granted. Upon request of the moving respondents, oral argument was held on said motions on October 11, 1955, in Washington, D.C. After hearing argument in support of, and in opposition to, said motions the undersigned made his ruling on the record denying same on the ground that the issues presented could not be disposed of until all the pertinent facts had been fully developed at a hearing on the merits.

Thereafter, hearings were held in regular course before the undersigned hearing examiner, theretofore duly designated to hear this proceeding. Said hearings were conducted on various dates between November 14, 1955, and May 29, 1956, in Los Angeles, Calif., and New York, N.Y. The proceeding was closed for the taking of testimony on June 29, 1956, subject to the submission of certain documentary evidence by counsel for the respondent International Ladies' Garment Workers' Union, which documentary evidence was incorporated into the record by order of the undersigned dated July 26, 1956. The parties were granted leave to file proposed findings and supporting briefs which, after the granting of several extensions of time due to the novelty and complexity of the issues of fact and law involved and illnesses of counsel, were filed on behalf of some of the parties on or about October 1, 1956. Pursuant to leave granted, reply memoranda were filed by counsel for certain of the parties on or about

October 25, 1956. Proposed findings not herein adopted are rejected as not supported by the evidence or as immaterial.

At the hearings held herein, testimony and other evidence were offered in support of and in opposition to, the allegations of the complaint, the same being duly recorded and filed in the Office of the Commission. All parties, except for certain individual members of the respondent associations, were represented by counsel, participated in the hearings, and were afforded full opportunity to be heard and to examine and cross-examine witnesses.

Upon consideration of the entire record herein, and from his observation of the witnesses, the hearing examiner makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENTS

A. *The Sportswear Industry*

1. The term "sportswear" encompasses all items of women's and children's outerwear apparel designed for nonformal wear. It includes particularly, ladies', misses', juniors', children's and toddlers' slack suits, slacks, slack tops, play suits, beachwear, bathing suits, loafer jackets, skirts, sport dresses, cotton or casual dresses of a sportswear nature, blouses, housecoats, pajamas, shorts, unlined or yoke-backed lined jackets and unlined or yoke-backed lined sports coats, unit priced dresses, dozen priced dresses, coats, suits and jackets.

2. The sportswear industry consists of firms primarily engaged in the production of sportswear items. However, it is actually a part of the broader women's apparel industry, and other segments of the industry, including the dress branch and coat and suit branch, also produce garments which may be classified as sportswear or which compete with sportswear. The industry is highly competitive and sportswear firms compete not only with each other but with other branches of the garment industry.

3. Entrepreneurs in the women's apparel industry generally, and its sportswear branch in particular, fall into three main categories: Manufacturers, jobbers and contractors.

(a) A manufacturer is one who owns and operates a factory where he produces all or part of the garments sold by him. Such garments are produced from cloth and materials purchased by him and, in finished form, are sold by him to wholesalers or retailers. The factory of a manufacturer is known as an "inside shop." Therein are performed all of the major operations in the manufacture of a

garment, with the possible exception of certain embroidery or similar finishing operations. This includes the design of the garment, purchase and cutting of the cloth, sewing, displaying of finished product in showrooms and warehouses and ultimate sale to wholesalers or retailers.

(b) A jobber is an entrepreneur who arranges for the sewing of his garments by contractors, for a fee, from cloth which he supplies to such contractors. He supervises the process of manufacture and has responsibility for the sale of the finished garment to wholesalers or retailers. His status is somewhat similar to that of a manufacturer in that he designs the garments, purchases the cloth and has ultimate responsibility for the sale of the finished product. He maintains a showroom and/or warehouse but does not own or operate a factory where the actual sewing takes place. Sometimes the cutting of the cloth is performed by his own employees on his own premises and sometimes this operation, as well as the stitching, is performed by contractors.

During certain periods, particularly during peak demand, when manufacturers find that they do not have enough capacity in their own factories for the stitching of all the garments which they desire to produce, they avail themselves of the use of contractors to perform the sewing operations. To the extent that manufacturers use contractors for this purpose, they occupy the position of a jobber with respect to such contractors and are sometimes referred to as manufacturing jobbers.

(c) A contractor, sometimes called a submanufacturer, is one who maintains a factory where he sews garments from cloth supplied by jobbers or manufacturing jobbers. His function is primarly limited to sewing the garments, except that it may also include the cutting of the cloth where this is not performed by the firm supplying him with work. However, he has no responsibility for purchase of the cloth, design of the garment, and ultimate sale. The fabricating services performed by him are rendered on a fee basis for the jobber. The factory operated by the contractor is known as an "outside shop" in contradistinction to the "inside shop" operated by a manufacturer.

4. The women's garment industry, including its sportswear branch, is characterized by the relatively small size of the producing firms. The average factory in Los Angeles employs between 25 to 40 persons. The average size of the contractor's shop is generally smaller than that of the manufacturer.

The manufacturing processes used are simple and machinery is

relatively inexpensive and easy to obtain. Hence a relatively small amount of capital is required for entrance into the business. To enter business as a manufacturer, approximately $10,000 to $15, 000 is required. Even less money is required to do business as a jobber. To enter business as a contractor with 30 employees requires less than $1,000 in cash.

The insignificance in unit size and the lack of ownership concentration in the industry is in sharp contrast to the considerably larger size, and relatively stronger bargaining power, of the textile firms from which the industry buys its raw materials, and some of the large department stores, retail chains, and mail order houses to which it sells its finished product.

5. The price structure of the industry is characterized by what are known as "price lines." Garments are sold by the producers in certain more or less established price brackets. Thus, for example, the prices at which blouses are sold, per dozen, at wholesale range from $16.75 to $32.50. Individual firms usually produce garments which fall in a limited number of lines. Even though a producer's costs may vary from item to item, he will frequently sell them all in the same price line or lines in which he specializes.

6. The factor of style plays an extremely important part in the garment industry, including the sportswear branch. The ability of a firm to produce garments styled to meet the demands of the public is as important, if not more so, than the ability to produce them at a price.

7. The women's apparel industry, including particularly its sportswear branch, experiences a considerable seasonality in its demand and consequently in its production. This seasonality results not merely from weather and climatic conditions, but from the continuous changes in style. This results in a tendency to concentrate production in certain peak periods and to operate on a minimal basis, or close down altogether, during other periods of the year.

8. Due to the insecure capital position of many firms in the industry, its seasonality, the importance of guessing right on style and the intense competition which exists, there is a considerable business mortality and turnover of firms in the industry. The business life of the average firm is estimated to be only about 5 years. Almost one out of every four jobbers and manufacturers in the field has been in business for only 3 years, while two out of every three have been in the field for less than 15 years. The greatest mortality is suffered by the smaller firms and particularly the contracting firms.

B. *Identity of the Parties*

1. Respondent, The California Sportswear & Dress Association, Inc. (which is hereinafter sometimes referred to as "California Association" or as the "manufacturer" association), is a corporation organized, existing and doing business under the laws of the State of California, with its principal office and place of business at 117 W. 9th Street, Los Angeles, Calif. The membership of said respondent is composed of corporations, partnerships and individuals located in the State of California who are engaged in the manufacture of ladies' garments. The membership of said respondent is divided into two divisions, the sportswear division and the dress division. The nature of the business of its various members determines the division to which each belongs. This proceeding involves only the members of the sportswear division.

2. Respondent Associated Sportswear Manufacturers of Los Angeles (which is hereinafter sometimes referred to as "Associated" or as the "jobber" association), is a corporation organized, existing and doing business under the laws of the State of California with its principal office and place of business located at 850 South Broadway, Los Angeles, Calif. The membership of said respondent is composed primarily of corporations, partnerships and individuals located in the State of California who are engaged in the business of producing sportswear as jobbers.

3. Respondent California Apparel Contractors Association (which is hereinafter sometimes referred to as the "Contractors Association"), is a corporation organized, existing and doing business under the laws of the State of California, with its principal office and place of business located at 629 S. Hill Street (room 1215), Los Angeles, Calif. The membership of said respondent is composed of corporations, partnerships and individuals located in the State of California, who are generally engaged in the business of contracting or subcontracting to fabricate sportswear, from materials supplied to them by sportswear manufacturers and jobbers.

4. The complaint names as respondents, a number of corporations, partnerships, and individuals who are now, or were during the times at issue, members of each of the above-named employer associations. In view of the disposition hereinafter made of this proceeding, the undersigned deems it unnecessary to make detailed findings with respect to the name, address and operations of each of these respondents. For the same reason, the undersigned deems it unnecessary to make separate provision for dismissal of this proceeding as to a number of individually named companies who ceased their membership in the

employer associations prior to the inception of the events at issue, and as to whom motions to dismiss have been made.

5. Respondent International Ladies' Garment Workers' Union is an unincorporated association, affiliated with the American Federation of Labor, with its principal office and place of business located at 1710 Broadway, New York, N.Y. Said respondent (which is hereinafter sometimes referred to as respondent "ILGWU" or as the "union"), has been in existence for many years and during such period, up to and including the present time, has carried, and is now carrying out its operations in the field of labor on a nation-wide scale. Its membership is composed primarily of variously classified workers in the wearing apparel industry. Such workers, in turn, are members of various local unions representative of the trade or craft, engaged in by such workers, and said respondent, in many instances, operates or functions through organizations of such locals, including those mentioned herein.

6. Respondent Joint Council of Sportswear, Cotton Garment & Undergarment & Accessory Workers Unions of the International Ladies Garment Workers' Union (which is hereinafter sometimes referred to as the "Joint Council"), having its office at 1130 Maple Avenue, Los Angles, Calif., is composed of Locals 266, 482 and 496 of respondent ILGWU. Said Joint Council serves as an instrumentality or vehicle for joint bargaining between the above locals and employers in the industry, including respondents California Association, Associated, and Contractors Association.

7. Respondent Samuel Otto has been for several years last past, and is now, vice president and Pacific coast director of respondent ILGWU, with his principal offiice and place of business located at 112 W. 9th Street, Los Angeles, Calif.

8. Respondent John Ulene has been for several years last past, and is now, the manager of respondent Joint Council and has his office and principal place of business at 1130 Maple Avenue, Los Angeles, Calif.

9. Respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers (which is hereinafter sometimes referred to as "Teamsters"), is an unincorporated association, with its principal office and place of business located at 25 Indiana Avenue NW., Washington, D.C. Respondent Teamsters has been in existence for many years and the scope of its operations is nationwide. Membership of said respondent Teamsters is composed of shipping and receiving clerks, warehousemen, drivers, and helpers.

10. Respondent Joseph M. Mihalow has been for several years last past, and is now, secretary-treasurer of Local 994 of respondent Team-

sters, with his office and principal place of business located at 846 S. Union Street, Los Angeles, Calif.

C. *Competition and Interstate Commerce*

1. The manufacture of women's sportswear in the United States is centered chiefly in the cities of New York, Boston, Los Angeles, and Dallas. The wholesale dollar volume of the primary sportswear industry in the United States is $509,256,000. Los Angeles producers account for approximately ten percent of the national production. The sportswear produced in union shops accounts for about 15 percent of the total Los Angeles production. Of the total union production in Los Angeles, about 20 percent is produced in contractors' shops and the balance in the inside shops of manufacturers.

The first area in terms of sales is the New York area with sales of $269,963,000 in 1952–53. Los Angeles is second to New York with sales during the same period of $65,677,000.

2. The respondent manufacturers and jobbers of women's sportswear in Los Angeles generally maintain sales offices in their places of manufacture and elsewhere, some of which are located in New York and other large cities, where samples are displayed and orders are solicited from buyers representing department stores, ladies' specialty shops, and other stores where women's sportswear is sold, throughout the United States. In addition, some of these firms employ salesmen who solicit orders for women's sportswear througout the United States. All orders are forwarded to the producer's plant in the Los Angeles area where the garments are made, and thereafter shipped to the purchasers thereof.

The respondent manufacturers and jobbers purchase the greater part of the fabrics used in the manufacture of their sportswear garments from textile mills located in States other than California. The cloth, after purchase, is shipped to the respondent manufacturer's or jobber's place of business in Los Angeles, where it is cut into the desired patterns and thereafter stitched, either by their own employees or by contractors with whom the manufacturer or jobber is in contractual relationship. Upon completion of the cutting, stitching and other necessary details, the manufacturer or jobber ships the finished garments directly to the purchasers, a substantial number of which are located in States of the United States other than the State of California.

At all times herein mentioned the members of respondents California, Associated, and Contractors Association in the regular and usual course and conduct of their respective businesses, have

carried on, and are now carrying on, a constant course of trade in commerce in said products between and among the various states of the United States and in the District of Columbia, and have been, and are now, engaged in commerce in women's sportswear, as "commerce" is defined in the Federal Trade Commission Act.

3. The members of respondents California, Associated, and Contractors associations are in competition with one another in their respective fields, and with other like manufacturers, jobbers and contractors, both locally and in states of the United States other than the State of California, in the production of, or selling, or otherwise distributing women's sportswear and kindred products, in commerce, within the intent and meaning of the Federal Trade Commission Act.

II. The Alleged Unlawful Practices

A. *Background and Issues*

1. The practices which are challenged in this proceeding arise out of collective bargaining agreements which were entered into in 1953 between respondent Joint Council and Local 994, Teamsters, on behalf of employees in the Los Angeles Sportswear Industry, and each of the respondent employer associations on behalf of their respective members. Such agreements represent a continuation of bargaining relations between the unions in question and the employer associations or their predecessors which had existed for a number of years prior to 1953. When the existing agreements were about to expire in December 1952, negotiations looking toward new agreements were undertaken which continued for about eight months. Separate agreements with respondents California and Associated were signed on July 10, 1953, and another agreement was signed with respondent Contractors on August 4, 1953. Each agreement was for a term of 3 years, retroactive to January 1, 1953.

2. Separate negotiations were carried on by representatives of respondent Joint Council, assisted by respondent Samuel Otto, with each of the employer associations. Negotiations were undertaken first with representatives of respondent California Association on behalf of manufacturers in the industry. After substantial agreement with the manufacturers' group had been reached, the ILGWU officials began negotiations with the respondent Associated, representing the jobbers, seeking to obtain from it an agreement substantially similar to that agreed to by the manufacturers. After agreement had been reached

with the jobbers, negotiations were undertaken with respondent Contractors Association on behalf of the contractors in the industry.

All three employer groups opposed many of the union demands, including particularly the clauses here at issue, but were finally induced to yield to the union demands. The jobbers and contractors objected particularly to being presented with a *fait accompli*, in the form of an agreement which had already been reached with the manufacturers, but they finally accepted the agreement presented to them. The agreements with the manufacturers and jobbers associations, although constituting separately signed agreements between the unions and each of the associations, are identical in their terms. The agreement with the Contractors Association also includes substantially identical provisions as the other two agreements, except for such modifications as were required by virture of the fact that the contractors do not occupy the same status in the process of productioin as the manufacturers and jobbers.

3. The only representative of the Teamsters who participated in the negotiations was Joseph M. Mihalow, who represented Local 994 and not the parent organization. The agreements were signed by him in his capacity of Secretary-Treasurer of the local union. Mihalow played an extremely limited part in the negotiations, his participation consisting mainly in the negotiation of certain clauses dealing with the rates of pay of shipping clerks employed in the manufacturing and jobbing establishments.

4. This proceeding, in essence, challenges certain provisions of the 1953 collective agreements and the practices engaged in pursuant thereto, as involving undue restrictions on competition and tending to create a monopoly in the industry. The complaint alleges eleven separate restrictions on competition. These fall into two main categories, (a) those which limit competition among contractors by restricting the free use of such contractors and by controlling the prices to be paid to them, and (b), those which restrict the production of members of the employer associations by limiting them in the opening of additional plants or acquiring an interest in other concerns.

5. The primary burden of defense in this proceeding has been carried by the ILGWU respondents. Their main substantive defense is that the clauses of the collective agreements, which are here challenged, were inserted at the insistence of the union in order to protect wages, job security and working conditions, and that as such, they are exempt from attack under the antitrust laws by rea-

son of the immunity provided for the activities of labor unions in the Clayton Act and the Norris-LaGuardia Act. They also urge by way of defense the following: (a) The Commission has no jurisdiction over labor unions which are not engaged in business for profit, (b) the matters complained of fall within the exclusive jurisdiction of the National Labor Relations Board, and (c) the parent ILGWU and Samuel Otto, its Pacific coast director, are not proper parties to this proceeding since the agreements in question were entered into on behalf of the local affiliates of the union rather than on behalf of the parent organization.

6. The position of the respondent, Teamsters Union, is substantially similar to that of the respondent ILGWU. Said respondent has also moved to dismiss the complaint as to the parent union on the ground that it was not a party to the agreements in question, and did not ratify or adopt them.

7. The position of the employer respondents is substantially that the provisions of the agreements complained of were the result of collective bargaining between each of the associations and the unions, and that the employers opposed said provisions but were forced to accede to the union demands in order to avert serious labor disputes and work stoppages. The employer respondents permitted the respondent ILGWU to carry the burden of the defense in this proceeding, offered no evidence in their own behalf and, except for the respondent Contractors Association, filed no proposed findings or briefs.

8. The position of counsel supporting the complaint, throughout this proceeding, has been that the provisions of the collective agreement constitute a per se violation of the Federal Trade Commission Act. Counsel accordingly objected to any evidence concerning the conditions which led to the adoption of the challenged clauses or the manner of their practical operation. Commission counsel's basic position is that, under the Supreme Court's decision in *Allen Bradley Co.* v. *Local No. 3*, 325 U.S. 797, whatever immunity from antitrust prosecution a union may otherwise enjoy is lost when it combines with employer groups.

9. As the undersigned views it, the basic question which is here involved is whether the agreements at issue are immune from antitrust attack. Since the facts must be considered in the light of the applicable legal principles and since there is a strong difference of opinion concerning this subject, the undersigned turns first to a resolution of the question of what are the correct legal criteria to be applied to the facts here.

B. *Application of the Antitrust Laws to Unions*

1. The application of the antitrust laws to unions in modern times dates from the Supreme Court's decision in the famous *Danbury Hatters* [2] case, some twenty years after the passage of the Sherman Act. The Supreme Court held that a union-inspired nationwide boycott of plaintiff's nonunion made hats constituted an illegal restraint of trade in violation of the Sherman Act.

2. In apparent response to this holding, Congress included sections 6 and 20 in the Clayton Act so as to exclude certain activities in the course of a "labor dispute" from the antitrust laws. Section 6 declares that "the labor of a human being is not a commodity or article of commerce." It further provides that "nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor * * * organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws." [3]

Supplementing that provision, section 20 barred the issuance of Federal injunctions prohibiting activities such as strikes, boycotts or picketing "in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment." Section 20 concludes with the broad language: "[N]or shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." [4]

3. Within a relatively short time, the exemption thus conferred was narrowed by the Supreme Court in the *Duplex* [5] and *Bedford Cut Stone* [6] cases, both of which involved a union refusal to work on goods made by nonunion firms. The Supreme Court held that the protection afforded by section 20 of the Clayton Act was limited to disputes between an employer and his own employees and, accordingly, the secondary boycott activities of the unions involved were held to constitute a violation of the antitrust laws.

[2] *Loewe v. Lawlor*, 208 U.S. 274 (1908).
[3] 15 U.S.C., sec. 17.
[4] 29 U.S.C., sec. 52.
[5] *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921).
[6] *Bedford Cut Stone Co. v. Journeymen Stone Cutter's Association*, 274 U.S. 37 (1927).

4. In order to overcome what it considered to be the unduly narrow construction by the courts in these and similar decisions, of the labor exemption under the Clayton Act,[7] Congress in 1932 passed the Norris-LaGuardia Act in which a "labor dispute" was defined as including "any controversy concerning terms or conditions of employment * * * regardless of whether or not the disputants stand in the proximate relation of employer and employee."[8] In addition, section 20 of the act barred Federal injunction of enumerated union organizational and economic pressure activities.[9]

5. The immunity of unions from antitrust prosecution, as thus liberalized by the Norris-LaGuardia Act, was first construed by the Supreme Court in *U.S.* v. *Hutcheson*, 312 U.S. 219 (1941). That case arose out of a jurisdictional dispute between two unions in which one of them engaged in secondary boycott activities, of the type which had been held illegal in the earlier *Duplex* and *Bedford Stone* cases. In dismissing the action, the Court stated:

> Section 20 of that [Clayton] Act * * * relieved such practices of all illegal taint by the catch-all provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States" (pp. 229–230).
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> * * * * * * *
>
> So long as a union acts in its self-interest *and does not combine with nonlabor groups*, the licit and the illicit under section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means (p. 232). [Emphasis supplied.]

6. The contingency suggested in the *Hutcheson* case of possible loss of immunity when unions "combine with nonlabor groups" was first considered by the Supreme Court in *Allen Bradley Co.* v. *Local No. 3*,[10] in which a union that had combined with employer groups was held to have lost its immunity from the antitrust laws. Since the case of counsel supporting the complaint rests largely on the parallel which he contends exists between the practices here involved and those in the *Allen Bradley* case, it is well to delineate what that case does and does not stand for

In that case the union had entered into area-wide arrangements with electrical contractors and manufacturers in New York City. Under these agreements the contractors were obliged to purchase equipment

[7] See *Milk Wagon Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940), for discussion of Congressional intent.
[8] 29 U.S.C., sec. 113(c).
[9] 29 U.S.C., sec. 104.
[10] 325 U.S., 797 (1945).

from none but manufacturers who had closed shop agreements with the same local of the union. The manufacturers agreed that they would confine their New York City sales to contractors who employed members of the local union.

Counsel supporting the complaint suggests that it was these provisions of the collective agreements which established "[t]he fact of union-employer combination [which] distinguished this case from the court's holding in *Hutcheson*, and subjected Local No. 3 to the provisions of the Sherman Act." [11] However, it is clear from a reading of the decision that the case involved more than these restrictive provisions. Thus the Court, after noting that the union had gradually obtained more and more closed shop contracts under which contractors were obligated to purchase only equipment manufactured by firms which had closed shop agreements with the union and manufacturers agreed to confine their New York City sales to contractors employing members of the union, stated (p. 799):

> In the course of time, this type of individual employer-employee agreement expanded into industry-wide understandings, *looking not merely to terms and conditions of employment but also to price and market control.* [Emphasis supplied.]

Among the facts relating to price and market control, of which the court took cognizance, were the following: (a) That agencies were set up by the parties "to boycott recalcitrant local contractors and manufacturers and to bar from the area equipment manufactured outside its boundaries," (b) that the business of New York City manufacturers "had a phenomenal growth," (c) that equipment prices in the New York City area "soared to the decided financial profit of local contractors and manufacturers," (d) that "some New York manufacturers sold their goods in the protected city market at one price and sold identical goods outside New York at a far lower price," and (e) that the interstate sale of certain types of electrical equipment was "wholly suppressed" (p. 800).

The true nature of the court's holding must be viewed in the light of the question to which it addressed itself which, after reviewing the above facts, it posed as follows (pp. 799–800):

> Quite obviously, this *combination of businessmen* has violated * * * the Sherman Act, unless its conduct is immunized by the participation of the union. For it intended to and did restrain trade in and monopolize the supply of electrical equipment in the New York City area to the exclusion of equipment manufactured in and shipped from other states, and did also control its price and discriminate between its would-be customers. * * * Our problem in this case

[11] Proposed Findings, p. 37.

is therefore a very narrow one—do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, *they aid and abet businessmen* to do the precise things which that Act prohibits? [Emphasis supplied.]

Addressing itself to the question thus posed, the court ruled as follows:

[W]e think Congress never intended that unions could, consistently with the Sherman Act, *aid nonlabor groups* to create business monopolies and to control the marketing of goods and services.

* * * * * * *

[T]he purpose of mutual help [under section 6 of the Clayton Act] can hardly be thought to cover activities for the purpose of "*employer-help*" in controlling markets and prices (p. 808). [Emphasis supplied.]

* * * * * * *

It would be a surprising thing if Congress, in order to prevent a misapplication of [the antitrust] legislation to labor unions, had bestowed upon such unions complete and unreviewable authority *to aid business groups* to frustrate its primary objective. For if *business groups*, by combining with labor unions, *can fix prices and divide up markets*, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves. * * * Finding no purpose of Congress to immunize labor unions *who aid and abet manufacturers and traders* in violating the Sherman Act, we hold that the district court correctly concluded that the respondents had violated the act (pp. 809–810). [Emphasis supplied.]

It is apparent from the above that the Court was addressing itself to an employer conspiracy to fix prices and divide markets, in which the union was an ancillary party, and not simply with collective bargaining arrangements for the primary protection of the union. That the latter type of arrangement alone would not have been illegal may be gathered from the following statement of the court (pp. 808–809):

It has been argued that this immunity [under the Clayton Act] can be inferred from a union's right to make bargaining agreements with its employer. Since union members can without violating the Sherman Act strike to enforce a union boycott of goods, it is said they may settle the strike by getting their employers to agree to refuse to buy the goods. Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. *We may assume that such an agreement standing alone would not have violated the Sherman Act.* But it did not stand alone. *It was but one element in a far larger program in which contractors and manufacturers united* with one another to monopolize all the business in New York City, *to bar all other business men from that area, and to charge the public prices above a competitive level.* [Emphasis supplied.]

It is significant that on the remand of the proceeding, the court of appeals [12] interpreted the Supreme Court decision as being based on the assumption that, standing alone, an "agreement between the union and the employers in which the latter agreed not to buy goods manufactured by companies which did not employ members of the union would not violate the Sherman Act" (p. 74, fn. 2). What the Supreme Court condemned, in the view of the court of appeals, was "the actions of the union in endeavoring to 'aid and abet business men who are violating the law" (p. 74).

Counsel supporting the complaint suggests that even where industry arrangements are not employer-inspired but involve agreements entered into at the sole insistence of the union, nevertheless, the element of employer connivance, which is necessary to deprive a union of immunity, may be inferred. In support of this position counsel relies on the statement appearing in the concurring opinion of Mr. Justice Roberts to the effect that certain of the employers were "individually coerced by the union's power to agree to its terms" and that—

> It is therefore inaccurate to say that the employers used the union to aid and abet them * * *.

The position of counsel supporting the complaint, in this regard appears to be based on such respectable authorities as the former head of the Antitrust Division of the Department of Justice and the Attorney General's Committee to Study the Antitrust Laws.[13] With all due regard to the knowledgeability of these authorities, the undersigned cannot accept this argument. In the first place, the majority opinion, which the undersigned feels obliged to accept as controlling, emphasizes again and again that the state of facts on which it was ruling was one in which the union was aiding and abetting an otherwise illegal employer conspiracy and not merely a collective agreement for the benefit of the union. This is the view which the court of appeals accepted as controlling on the remand and accords with that adopted in a number of court decisions, as will hereafter appear. Secondly, even the concurring opinion recognized that *some* of the employer groups participated in the conspiracy on their own behalf, albeit others were pressured to join by the union. This is a far cry from arguing employer connivance may be inferred where none of the employers sought the arrangement for their advantage but were all forced into it by the union for the latter's primary advancement.

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[12] 164 F. 2d 71 (C.A. 2, 1947).

[13] Antitrust Law Symposium—1956, CCH, p. 82; Attorney General's National Committee to Study Antitrust Laws (1955), p. 297.

7. The decisions which have been handed down since *Allen Bradley* have made it clear that the employer-union combination which results in a loss of immunity must be based on something more than collective bargaining agreements intended primarily for the union's benefit. In each case, the Court has made it clear that the illegal combination must be one in which the employer group is seeking to advance its own interests by suppressing competition or fixing prices. The courts have not followed any per se approach but have examined into the facts to ascertain who sought the agreement and for whose advantage it operated.

Indicative of the approach the courts have taken is *Anderson-Friberg, Inc.* v. *Clary*, 98 F. Supp. 75 (S.D.N.Y., 1951), involving a collective bargaining agreement which prohibited New York firms from handling or working on granite which was less than 6 feet. It was contended by plaintiffs, a group of manufacturers in Vermont, that the clause in question was intended to suppress competition with them by preventing finished or semifinished stone from being brought into the New York area. The union contended, on the other hand, that the purpose of the clause was to protect their work standards against the competition of products produced under substandard working conditions in Vermont, and that the clause was "independently initiated and advanced in the full exercise of its economic power for the betterment of its membership—and not in the interest of employers or any other nonemployee group nor is it related to price fixing." The employer defendants pleaded that the clause was imposed upon them by the union through the exercise of its economic power and not as a result of any conspiracy on their part.

Faced with these conflicting contentions, the court ruled as follows, on a motion for a preliminary injunction (p. 82):

> It would seem that immunity from injunctive action is dependent upon a factual determination. If there is conspiratorial action as proscribed by the Allen Bradley case, it would not be protected by the Norris-LaGuardia or Clayton Acts. On the other hand, *if it be found that the union was acting in its own self-interest and for the betterment of its members, free and independent of a combination with non-labor groups intent upon violating the antimonopoly laws, it would be immunized against injunctive action.* The applicability of those acts as we have seen under the Allen Bradley case turns on a fact determination. [Emphasis supplied.]

Since the practice in question was embodied in a collective agreement to which the employers were a party, it is clear that the court was refusing to infer employer connivance from the mere fact of participation in the agreement. It thus rejected the per se approach of

plaintiffs which suggested that since the clause in question restricted competition and was embodied in a collective agreement to which employers were a party, the requirements of *Allen Bradley* were met. The court's disagreement with this assessment of *Allen Bradley* is indicated not only in the portion of its opinion above quoted, but in its statement that the "hard core" of the *Allen Bradley* ruling is to be found in the question posed by the Supreme Court, viz, whether unions violate the antitrust laws "when * * * they aid and abet businessmen" (p. 79).

One of the earliest cases interpreting *Allen Bradley* is *Philadelphia Rec. Co.* v. *Manufacturing Ph.-Engr. Ass'n.*, 155 F. 2d 799 (C.A. 3, 1946), which involved an industrywide agreement prohibiting night work, except by consent. The court found, as a fact, that enforcement of the night work restrictive provision by the union against plaintiff was instigated by the employer group in order to put plaintiff out of the commercial photo-engraving field. It accordingly held (p. 803):

> This litigation concerns the converse of the problem involved in the Apex decision, namely, where a labor organization is *used by a combination of those engaged in an industry as the means or instrument for suppressing competition or fixing prices.* As such it comes squarely under the rule of the recent opinion of the Supreme Court in Allen Bradley Co. v. Union * * *. There a combination of union, contractors and manufacturers, forced agreements to purchase and sell electrical equipment locally. [Emphasis supplied.]

It is obvious that the court's conclusion was not based on any per se approach, arising from the employer group's being parties to the collective agreement, but on the fact that the union was being "used by a combination of those engaged in industry as the means or instrument for suppressing competition or fixing prices." It is the latter which the court recognized as being the essence of the *Allen Bradley* decision.

Another significant decision involving a charge of union-employer combination is *U.S.* v. *Employing Plasterers Ass'n. of Chicago*, 138 F. Supp. 546 (N.D. Ill. 1956), which involved a collective agreement between a union and an association of plastering contractors. The complaint alleged a conspiracy between the union and employers to suppress competition among local contractors and prevent out-of-State contractors from doing work in Chicago. One of the clauses of the agreement on which the Government relied, provided that the "original contractor" who started a job was required to finish it.

Although the Supreme Court upheld the sufficiency of the complaint,[14] the complaint was dismissed after trial as not being sustained by the evidence.

At the trial of the case, the Government took the position that the "original contractor" rule constituted a per se violation of the Sherman Act. The union offered evidence to show that the clause in question long antedated the collective bargaining agreement which was under attack, and that it was adopted at its insistence many years prior thereto, in order to prevent the practice of some plastering contractors who sub-contracted part of their work to other firms which were not in contractual relations with the union. The court found this to be the true origin of the clause, rather than a combination by the union and employers to keep other firms from doing work in the Chicago area. It accordingly, stated (p. 548):

> This court finds that the agreement did not come about as a result of a conspiracy between the defendants and has never been so used. *It concludes that the agreement is not a per se violation of the Sherman Act.* On the contrary, the agreement assures attainment of a proper objective which, it appears to this court, is consistent with sound labor policy and labor law. * * *. [Emphasis supplied.]

The cases in which unions have been held to have lost their immunity by entering into agreements with employer groups have involved situations in which the employers have taken an active part in bringing about the arrangement and the agreement was intended to limit competition and control prices to the independent advantage of the employers. Typical of these cases is *Local 175* v. *U.S.*, 219 F. 2d 431 (C.A. 6, 1955), in which members of an electrical contractors association were required to submit bids only through their association, which decided what member would be permitted to make a formal bid on a job. The union cooperated by refusing to work on a job unless it was awarded to the association designated contractor. The court held that the Clayton Act exemption did not apply since it—

> does not exempt a labor union * * * when the union and its officials aid and abet nonlabor groups * * * (p. 433).

To the same effect, see *Las Vegas Merchant Plumbers Assn.* v. *U.S.*, 210 F. 2d 732 (C.A. 9, 1954), involving a contractor association which parcelled out work and limited competitive bidding, assisted by a union. See also *United Brotherhood of Carpenters* v. *U.S.*, 330 U.S. 395 (1947), where the purpose and effect of an employer-union combination was found to be to restrain out-of-State manufacturers from selling in the San Francisco area and to prevent dealers in the area

[14] 347 U.S. 186.

from handling such products. The arrangement, like that in *Allen Bradley*, resulted in higher prices in the area and higher profits to the employers.

The cases above discussed are contrary to the per se approach of counsel supporting the complaint. They indicate that it is necessary in each case to review the provisions of the collective agreement in the light of all attendant facts and circumstances, so as to ascertain whether the clauses were adopted as a result of union demands and for the union's primary benefit, or are the result of an employer conspiracy to restrict competition and raise prices, in which the union merely aided and abetted the employer group.

8. Counsel supporting the complaint argues that even in the absence of employer-union connivance, activities by a union which restrict competition are subject to antitrust review. In support of this position, counsel cites the Supreme Court's decision in the *Apex Hosiery* case.[15] Counsel has evidently misread the *Apex* decision since it was unnecessary for the court there to determine whether the union's sit-down strike was exempt under the Clayton or Norris-LaGuardia Acts, inasmuch as it found that there was no violation of the Sherman Act. The aim of that act, the court stated, was (p. 493):

> * * * the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services * * *.

Since the union's organizational strike did not have as its purpose "restraint upon competition in the market for petitioner's product," the court concluded there was no violation of the Sherman Act.

It should be noted that among the cases, from which the court there distinguished the situation with which it was dealing, were the *Danbury Hatters*, *Duplex Printing*, and *Bedford Stone* cases, in which the unions were found to have violated the Sherman Act. It will be recalled that it was as a result of these cases that the Clayton and Norris-LaGuardia Acts were passed. Since the court found no violation of the Sherman Act, even in its preimmunity state, the *Apex* decision obviously cannot be considered as delimiting the extent of the immunity provided under the later acts, or as holding them inapplicable wherever the union's activity involves a restraint on "commercial competition" (p. 500).

[15] *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940).

Later Supreme Court cases have indicated that even though a union's activities may restrict competition it may, nevertheless, be immune from antitrust attack by reason of the Clayton or Norris-LaGuardia Acts. Thus, in *Milk Wagon Driver's Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91, the court of appeals had concluded that since the union's secondary boycott constituted a violation of the Sherman Act it was illegal, regardless of the Norris-LaGuardia Act. The Supreme Court reversed, stating (p. 103):

> For us to hold, in the face of this legislation [Norris-LaGuardia Act], that the Federal courts have jurisdiction to grant injunctions in cases growing out of labor disputes, *merely because alleged violations of the Sherman Act are involved,* would run counter to the plain mandate of the Act and would reverse the declared purpose of Congress. [Emphasis supplied.]

See also *U.S.* v. *Hutcheson*, 312 U.S. 219, 229-232

The cases are legion that when a union is engaged in activities for bona fide advancement of its interests, it is, absent participation in an employer conspiracy, protected from antitrust prosecution even though its activities involve a restraint on trade. As stated by the court in *New Broadcasting Co., Inc.* v. *Kehoe*, 94 F. supp. 113 (S.D. N.Y., 1950), in dismissing a restraint of trade action against a union charged with seeking to induce sponsors to cease doing business with plaintiff radio station (p. 115):

> It is now well settled that a labor organization, engaged in advancing the legitimate aims of its members, may incur liability under the antitrust laws *only by entering into a combination with employers,* who are *themselves* violating the antitrust laws.
>
> *   *   *   *   *   *   *
>
> [I]t is clear * * * that the union's primary objective has been to advance the interests of its members, however one might characterize some of the methods it is alleged to have employed. Nor does the allegation that *some sponsers have succumbed to the union's pressure disclose that combination with employers* to restrain trade which the Supreme Court has deemed a prerequsite to union liability for antitrust violations. [Emphasis supplied.]

It will be noted that the above decision not only emphasizes the broad scope of a union's immunity but also makes it clear that the loss of exemption, resulting from a combination with employers, involves a combination in which the employers *themselves* are violating the law. This accords with the view taken by the undersigned above, that a finding of employer connivance cannot be based merely on the fact that they are signatories to a collective agreement.

To the same effect see *Courant* v. *International Photographers*, 176 F. 2d 1000 (C.A. 9, 1949), holding that—

* * * antitrust or antimonopoly legislation applies to labor unions only when the unions act in company and cooperation with business concerns * * * for the purpose of restraining trade to the ultimate benefit of themselves [i.e., the business concerns].

Since the complaint in the *Courant* case indicated that "the union's acts were for their own benefit," the court dismissed the action. For a similar holding that a finding of employer conspiracy cannot be based on a collective agreement for the union's benefit, see also *Meier & Pohlmann Furniture Co.* v. *Gibbons*, 113 F. Supp. 409 (E.D. Mo., 1953).

This is not to say that a union has unlimited immunity from the antitrust laws. Its activities must, of course, be reasonably related to some aspect of the employer-employee relationship, or, as it has been said, the employer-employee relationship must be the "matrix of the controversy."[16] The case last cited in the footnote is typical of those in which the union's activities were held to have gone beyond the scope of the employer-employee relationship. The so-called union there was found to be actually a combination of independent entrepreneurs who owned or leased their own boats, some of whom also had employees of their own. The suit arose out of the efforts of the fishermen's association to fix the price of fish. Holding that the association was not entitled to the protection of the Clayton and Norris-LaGuardia Acts, the court stated (p. 146):

We recognize that by the terms of the statute there may be a "labor dispute" where the disputants do not stand in the proximate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a "labor dispute" may relate does not expand the application of the Act to include controversies *upon which the employer-employee relationship has no bearing*. Our decisions in New Negro Alliance v. Sanitary Grocery, 303 U.S. 552 * * *, and Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U.S. 91 * * *, give no support to the respondents' contrary contention, for in both cases the *employer-employee relationship was the matrix of the controversy*.

The controversy here is altogether between fish sellers and fish buyers. * * * That some of the fishermen have a small number of employees of their own * * * does not alter the situation. For, the dispute here, relating solely to the sale of fish, does not place in controversy the wages or hours, or other terms and conditions of employment, of these employees. [Emphasis supplied.]

To the same effect, see *Hawaiian Tuna Packers* v. *International L. and W. Union*, 72 F. Supp. 562 (D. Hawaii, 1947), which counsel supporting the complaint has cited in his proposed findings, in addi-

[16] *Ring* v. *Spina*, 148 F. 2d 647, 651 (C.A. 2, 1945); *Columbia River Packers Ass'n., Inc.* v. *Hinton*, 315 U.S. 143, 146 (1942).

tion to the *Apex* case, *supra*. That case also involved a price fixing conspiracy in which the so-called union included boat owners, as well as employees.

While, as has been indicated above, a union, in order to qualify for exemption, must be acting in its self-interest within the scope of the employer-employee relationship, the courts have made it clear that they will not act as censors concerning the wisdom of the union's determination as to where its self-interest lies. Indicative of the attitude of the courts in this respect is *Milk Drivers' Union* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940), involving a strike to force retail outlets to cease buying milk from certain milk companies, who distributed their milk through so-called "vendors." The latter were considered as independent contractors by the milk companies but the union insisted that they become members. Holding that a "labor dispute" was involved, the Court stated (p. 98–99):

> *Whether rightly or wrongly, the defendant union believed that the "vendor system" was a scheme or device utilized for the purpose of escaping payment of union wages and the assumption of working conditions* commensurate with those imposed under union standards. To say, as the Circuit Court of Appeals did, that the conflict here is not a good faith labor issue, and that therefore there is no "labor dispute," is to ignore the statutory definition of the term; to say, further, that the conditioned abandonment of the vendor sysem, under the circumstances, was an issue unrelated to labor's efforts to improve working conditions, is to shut one's eye to the everyday elements of industrial strife. [Emphasis supplied.]

To the same effect see the *Hutcheson* case, *supra*, where the court stated that as long as the union acts "in its self-interest" and not in combination with employers—

> * * * the licit and the illicit * * * are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means (p. 232).

In the light of the precedent above discussed, the undersigned turns to a consideration of the collective agreements here involved, including the circumstances, background and purposes of the provisions which are here in question, and the actual manner of their operation, in order to determine (a) whether the agreements involve a bona fide labor dispute in which the employer-employee relationship is the matrix of the controversy, and/or (b) whether they are in aid of a conspiracy or other arrangement by employers to control markets and prices or otherwise illegally restrict commercial competition.

C. *The Contractor Restrictions*

1. The complaint alleges the following restrictions on competition among contractors or in the use of contractors, arising out of the Los Angeles sportwear industry collective agreements:

a. Members of the manufacturers' and jobbers' associations may employ as contractors only those contractors who (1) are members of the contractors' association, (2) have entered into collective agreements with the respondent unions, and (3) have been designated and approved in accordance with the provisions of the collective agreements.

b. Prices paid to contractors by members of the manufacturers' and jobbers' association are fixed and determined in accordance with a procedure which prevents free and independent bargaining.

c. Members of the manufacturers' and jobbers' associations may not contract or subcontract "within their shop," even though it may be more economical and advantageous to do so.

d. Members of the manufacturers' and jobbers' associations are required to purchase accessory items such as belts, embroidery and buttons from, or have them made up by, firms which are in contractual relations with respondent ILGWU or one of its affiliates.

2. There is no dispute that the agreements contain certain restrictions on the free and untrammeled use of contractors including particularly the requirement that they must be union contractors and must be designated and approved in accordance with a procedure set out in the agreements. The union contends that these restrictions are required for the protection of its members and are not subject to antitrust attack. This argument will be hereafter more fully considered. The union denies, however, that there is any restriction, such as is alleged in the complaint, that contractors must belong to the respondent Contractors Association. The undersigned turns first to a consideration of this issue.

3. There is no provision in any of the agreements here at issue which requires that members of the jobbers' and manufacturers' associations must deal only with contractors who belong to the contractors' association. Counsel supporting the complaint cites no provision of the agreements, in his proposed findings, which contains any such requirement. However, he refers in his reply memorandum to two clauses, as inferentially supporting his position. One of the clauses cited by him, which appears in both the manufacturer and jobber association contracts, provides in substance that if the union should enter into a contract with a contractors' association, the members of the

manufacturers' and jobbers' associations "pledge themselves and agree to recognize such an association of contractors and to deal with such an association on behalf of its members." [17]

There is nothing in the clause cited which suggests that the pledge to recognize and deal with a contractors' association on behalf of its members involves any commitment not to recognize or deal with other contractors who are not members of such association. On the contrary, the fact that the agreements contemplate there will be contractual relations between the union and nonassociation employers, clearly implies that there may be dealings between nonassociation contractors and association jobbers or manufacturers. Thus, one clause in all of the agreements is entitled "Contracts with Non-Association Firms" and provides, in substance, that contracts with employers who are not members of the associations will conform to the association collective agreements.[18] Another clause in the jobbers' and manufacturers' agreements, dealing with the settlement of piece rates payable to the contractors' employees, provides that copies of the rates agreed upon shall be sent to the contractors' association "if the contractor is a member," [19] thus indicating that it was contemplated there would be contractors who were not association members.

Counsel supporting the complaint also relies on a clause in the contractors' association collective agreement, which incorporates into that agreement the provisions of the other two agreements dealing with the designation of contractors.[20] Counsel argues that since the only machinery for the designation of contractors is found in these collective agreements, it may be inferred that contractors who are not members of the association are not eligible for use and designation as contractors by jobbers and manufacturers.

Counsel's argument in this respect is a complete *non sequitur*. While it may be that the procedure for designating contractors by manufacturers and jobbers (which will hereafter be discussed in greater detail) is controlled by the provisions of the manufacturer and jobber association agreements, there is nothing in these provisions which suggests that the designated contractors must be members of the contractors' association. There is a requirement that the designated contractors must be union contractors; however, this is not tantamount to a requirement that such union contractors must also be members of the contractors' association. On the contrary, the fact that the collective agreements indicate that the union may contract

[17] CX 1 and 2, par. 33(e) 12(c), p. 28.
[18] CX 1 and 2, par. 40, p. 46; Cx 3, par. 39, p. 41.
[19] CX 1 and 2, par. 16, p. 15.
[20] CX 3, par. 33(d), p. 24.

with nonassociation firms makes it apparent that such nonassociation union contractors are eligible for designation. In view of the provision already referred to, that agreements by the union with nonassociation employers shall conform to the association agreements, it may be inferred that the former either include a similar contractor designation procedure, or incorporate by reference the provisions of the association agreements.

According to the uncontradicted testimony in the record, members of the respondent manufacturers' and jobbers' associations use nonassociation contractors. In the face of this credible testimony and the absence of any provision in the agreements to the contrary, it is concluded and found that the allegation of the complaint that members of the respondent manufacturers' and jobbers' associations may recognize and deal only with members of the respondent Contractors Association is not sustained by the record.

4. The collective agreements contain the following provisions, regulating the use of contractors, which the complaint challenges as constituting an unlawful interference with competition: [21]

a. Jobbers and manufacturers may use only union contractors (except that where none are available, nonunion contractors may be used for a limited period).

b. Jobbers and manufacturers may use only such union contractors as they designate by submitting written notification of such designation to the union and receiving its approval. The number of contractors who may be designated by a jobber or manufacturer is limited to the number "actually required by him to manufacture his garments."

c. There are three categories of contractors who may be designated: (1) Permanent and exclusive, i.e., contractors who work exclusively for a single manufacturer or jobber; (2) permanent and nonexclusive, i.e., contractors who work for more than one jobber or manufacturer on a regular basis; and (3) temporary, i.e., contractors who work for a jobber or manufacturer for a limited period where a temporary increase in the latter's production has made it necessary to obtain additional contractor facilities.

d. Should a jobber or manufacturer desire to cancel or modify the designation status of any of his contractors, including the adding or eliminating of designated contractors, he must obtain approval from the union. Among the factors to be taken into consideration in approving such a change of status are: (1) Change in the character

[21] CX 1, 2 and 3, par. 33, p. 23 et seq.

of the manufacturers' or jobbers' production which his present contractors cannot properly and efficiently meet; (2) inability of a contractor to properly and efficiently meet the present requirements of the jobber or manufacturer; and (3) curtailment of the manufacturers' or jobbers' production caused by financial reasons.

e. The decision of the union disapproving any request concerning designation or change of status of contractors is subject to review by the impartial chairman, provided for under the collective agreements, who may reverse the union after a hearing on the question.

f. Contractors must confine their production to manufacturers or jobbers who have designated them, except where any such manufacturer or jobber has no work for a contractor the latter may work for a nondesignating manufacturer or jobber.

5. In addition to the above provisions governing contractor-jobber (or manufacturer) relations, there are several other provisions which are in the nature of restrictions on the use of contractors. These are:

a. No contracting or subcontracting shall be permitted within the shop of any individual employer.[22]

b. Employers who contract out the making of accessory items such as embroidery, pleating, covered buttons, belts, etc., or who purchase such items, shall deal only with firms who are in contractual relations with an affiliate of the ILGWU.[23]

6. The agreements contain certain provisions governing the payments to be made by manufacturers and jobbers to their contractors, for the latter's services in fabricating the garments. It is these provisions which the complaint alleges create a "procedure to fix and determine the prices to be paid to [contractors] which prevents [manufacturers, jobbers and contractors] from bargaining freely and independently with each other as to the amount to be paid to said [contractors]."

The basic provision under attack reads as follows: [24]

> In view of the fact that the ultimate source of employment and wages paid to the employees of the contractors and submanufacturers is the employer [i.e., the jobber or manufacturer] who supplies the work to the contractors and submanufacturers and controls the nature of the product, the parties hereto acknowledge that the employer is directly concerned with the payment of the wages of the workers employed by the contractors and submanufacturers. Therefore, it is agreed that the employer shall pay to the contractors and submanufacturers for work performed for the employer an amount sufficient to enable them to pay to their employees the wages and earnings provided for under this agreement, plus a reasonable amount for

[22] CX 1, 2, and 3, par. 23, p. 18.
[23] CX 1, 2, and 3, par. 32, p. 22.
[24] CX 1 and 2, par. 33(e) 10, p. 27.

the contractors' or submanufacturers' overhead for producing said employer's work and in addition thereto, the employer shall pay to the contractor a sum equivalent to the contribution made or to be made to the vacation, health and welfare fund and retirement fund by the contractor for work performed on the employer's garments, except where the employer makes said contribution for such contractor or submanufacturer directly to the fund.

The employer shall also settle with his contractors or submanufacturers * * * the amount to be paid to such contractors for their overhead, which shall be in addition to the wages and earnings paid to the workers of such contractors or submanufacturers as provided for in this agreement.

In line with the theory of the agreements that the jobber and manufacturer is the "ultimate source of employment and wages paid to the employees of the contractors," the agreements provide that the jobber or manufacturer "shall be responsible for, and guarantee payment of, the wages of workers employed by contractors" and that in the event the latter fail to make payment, the jobber or manufacturer, after notification by the union, will do so in an amount not to exceed 10 days wages. For the same reason, it is provided that a representative of the jobber will be present when the piece rates of the contractor's employees are settled; [25] also, that at the time such piece rates are settled, the contractor "may also settle the amount of his overhead, which sums shall be in addition to the wages and earnings provided for herein for the workers." [26]

Despite the latter provision, in actual practice the jobber or manufacturer is rarely, if ever, present at the settlement of piece rates between the contractor and his employees. Similarly, the amount of the contractor's "overhead," is agreed upon between the contractor and jobber, outside the presence of the Union and employees, and may occur before or after the settlement of employees' piece rates.

7. It is the position of the union that the clauses regulating the contracting out of work and the payment of compensation to contractors were demanded and fought for by it in order to safeguard the labor standards of employees against the debilitating effects of the jobber-contractor system, that they were obtained over the vigorous objection of the employer groups, and that they are not part of any

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[25] Most production employees in the industry are paid on a piece-rate basis. The collective agreements, in referring to the settlement of such piece rates, at one point refer to the settlement of "prices." It is not clear from the argument of counsel supporting the complaint whether he is relying on this reference, as supporting his position that the clause in question involves a form of price fixing. However, it is the common practice in the industry to refer to the fixing of piece rates as the settling of "prices," and it is clear from the entire context of the clause in question that the reference to "prices" is intended to be to employees' "piece rates."

[26] CX 1 and 2, par. 16, p. 14.

joint union-employer effort to restrain competition, divide markets or fix prices in the industry. Considerable testimony and other evidence were offered by the ILGWU respondents with respect to the historical conditions in the industry which gave rise to the demand for such provisions in the collective agreement, and the various efforts made by the union to achieve agreement on these clauses from employers in the industry. Such evidence was received over the objection of counsel supporting the complaint, who contended that the agreements were per se illegal and that such evidence was therefore irrelevant.

8. The evidence offered on behalf of the ILGWU respondents establishes that the jobber-contractor provisions of the collective agreements represent the culmination of a struggle on the part of the union, to protect the labor standards of employees in the garment industry, which goes back over 40 years.

At the beginning of the present century the women's garment industry was still in a most elementary stage in the development of decent labor standards. Most of the industry was concentrated in New York City where the steady stream of immigrants supplied it with a seemingly endless source of cheap labor. Sweatshops, with their unsanitary working conditions, excessively long hours and extremely low wages, were a prominent characteristic of the industry. Although sporadic efforts to ameliorate conditions in the industry had taken place in the preceding decade, the most persistent and far-reaching efforts at improvement began after the turn of the century. The respondent ILGWU, which was organized in 1900, played a prominent part in this effort.

The union's efforts to organize employees in the industry and improve labor conditions was made difficult by the fact that many employers, who had theretofore maintained "inside" shops and had even entered into bargaining relations with the union, began to contract out all or large parts of their production in order to evade responsibility for the labor standards of their employees. One method of contracting used was the so-called "padrone" system, under which a manufacturer designated his foreman or other supervisory employee as an independent contractor and arranged with the latter to have the garments sewn up for a fee, the latter to make his own arrangements for compensation with the employees. The process of production was performed in the manufacturer's own factory which the so-called independent contractor was permitted to use.

In 1910, following a strike in the industry, the collective agreement which was entered into, known as the "Protocols of Peace," outlawed

the practice of subcontracting within the manufacturer's own shop. However, the protocol made no provision with respect to outside contracting and this practice continued to expand in the period following 1910. Often these contractors were former supervisory employees who were financed in their new enterprise by their erstwhile employer.

Since entry into business as a contractor involved a minimum of investment,[27] the decade between 1910 and 1920 saw a marked shift away from "inside" manufacturing to production in the "outside" plants of contractors. By utilizing such contractors, the former manufacturers (who came to be known as jobbers) were relieved of all responsibility for production, and hence for employment conditions. Since they were no longer concerned with spreading out factory overhead costs on a year-round basis, they tended to concentrate their production during relatively brief seasonal periods of peak demand, when they utilized as many contractors as they required, and then allowed most of these contractors and the latters' employees to remain idle during considerable portions of the year.

The steady increase in the number of contracting shops gave rise to what became known as the "auction block" system. While the jobber tended to concentrate his production among a relatively small number of steady contractors, he maintained a coterie of additional contractors to whom he supplied a trickle of work and whom he utilized as a threat to beat down the price which his regular contractors sought for sewing up his garments. Actually, what was involved in the bidding among contractors were the wages of employees since their overhead costs were fairly standardized and approximately 75 percent of the price received from the jobber went for labor costs.

As the contracting system flourished, it presented the union with a serious problem in its effort to maintain decent labor conditions.

The great number of such contractors, the small size of each operation, the frequency with which they went in and out of business or moved their location, and their lack of financial responsibility made it difficult for the union to organize these shops. Even where it did have collective agreements with contractors, the constant economic pressure from the jobbers made it difficult to maintain union standards. Employees, faced with complete loss of work, were frequently induced to accept less than the union standards. The deterioration

[27] The contractor was able to buy his machinery on the installment plan or rent it. The only cash required was enough to meet the payroll for the first week or two. Sometimes the jobber would even advance this.

of labor standards in the contracting shops in turn had an adverse effect on conditions in the manufacturers' inside establishments.

Faced with this situation, the union began to look to the jobber as the key to solving the problems which confronted employees. It contended that he was the actual, if not the legal employer, and that only through him could the flow of work be regularized, decent wage and hour standards maintained, and employees assured the payment of wages which were periodically lost to them when financially insecure contractors disappeared from the business scene. The union's attitude toward the contractor, as a mere agent of the jobber or manufacturer, found support from as respectable a source as the United States Industrial Commission which described him as follows:[28]

> The contractor is an irresponsible go-between for the manufacturer, who is the original employer. He has no connection with the business interests of the manufacturer nor is his interest that of his help. His sphere is merely that of a middleman. He holds his own mainly because of this ability to get cheap labor, and is in reality merely the agent of the manufacturer for that purpose.

Beginning about 1911, the union strove continuously to plug the loophole which had come into being with the widespread utilization of the contractor system. Although the 1910 protocol had abolished all contracting "within shops," it was silent on outside contracting. Many employers tried to evade the protocol by having their work done in out-of-town shops. In March 1911, on complaint of the union, the Board of Arbitration[29] provided for under the protocol, ruled that this practice was against the spirit of the protocol. The practice of using contractors nevertheless continued, and in May 1912 the Board of Grievances granted the union's demand that contractors should be registered with the union, so as to permit the latter to supervise such shops in order to see to it that the employees received the same wages as employees in the inside shops and that the contractor received an additional allowance for his management fee. This constitutes the first definite move, of which there is any record, to regulate the contractor-jobber relationship.

In May 1913 the union submitted proposals looking toward a new collective agreement to replace the protocol, which included demands that contractors be registered and that a jobber would not take on new contractors so long as his existing contractors were not working full time. These proposals were not accepted. However, in 1919, after a strike in the coat and suit branch of the industry, the

[28] Reports of U.S. Industrial Commission, vol. XV, p. 321, quoted in RX 3, p. 12, fn. 1.

[29] One of the outstanding citizens who served on the Board was the late Justice Louis D. Brandeis.

agreement with that group of employers included the following provisions: (a) Prohibition of employment of nonunion contractors; (b) registration of contractors; (c) responsibility of jobbers for wages paid in contract shops; (d) equal distribution of work among contract shops; and (e) prohibition of employment of new contractors unless contractors already engaged were supplied with enough work to keep ten machines fully employed.

Thus it appears that over 30 years ago the union was successful in winning, in part of the garment industry, agreement on contractor regulatory provisions similar to those now challenged. However, as a result of 1921-24 depression in the industry, compliance with these provisions broke down. When employers refused to accept the union's proposals with respect to the use of contractors, which limited a jobber to such number as he could supply with work to their full capacity, the union threatened a strike in the cloak and suit branch of the industry, and the Governor of New York, Alfred E. Smith, appointed a special Advisory Commission of outstanding citizens to investigate and make recommendations for a solution of the problems of the industry.[30]

After 2 years of hearings, devoted largely to the problems arising from the jobber-contractor system, the Commission made its report and recommendations, of which the following are significant highlights:

> A decade ago the industry had risen out of the old sweat-shop conditions in which much of the actual work had been done in tenement-house homes. Manufacturing had become concentrated in large "inside" shops under employers who were directly responsible both for manufacturing and for marketing the product. Since that time, however, there has been a gradual displacement of inside manufacturers by so-called jobbers. This has progressed to such a point that about three-forths of the production now flows through the new jobbing-submanufacturing system.
>
> This system has grown up partly as a device to escape labor responsibilities and partly as an adaptation to the newer methods of retail buying.
>
> An inside manufacturer creates styles, employs a permanent complement of workers, and seeks, so far as possible, to get advance orders from the retailers, placing his chief emphasis upon quality of production. The jobbers * * * [i]nstead * * * is an indirect manufacturer. He purchases his materials and then farms out the production to an elastic and shifting group of small sub-manufacturers who follow his instructions as to style. His emphasis is on

[30] Among those who served on the Commission were Herbert H. Lehman (later Senator from New York), Bernard L. Shientag (later New York State Supreme Court justice), and George Gordon Battle (eminent member of the New York Bar). One of the members, Lindsay Rogers, professor of public law at Columbia University, testified as a witness in this proceeding.

mass production and on selling finished garments from the racks. While * * * the jobbers are the real capitalists in this large branch of the manufacturing process; they do not directly employ labor, and consider themselves free from responsibility for labor standards. Incidentally, they have no incentive for lengthening the season, for the manufacturing overhead is carried by the multitude of small submanufacturers, each with a little loft and a few machines.

The submanufacturers, on the other hand, usually have no contact whatever with the retail trade. Their outlet is through the jobbers. They can not create a demand for their production. They have, for the most part, not enough capital to purchase materials. They seek work and materials from the jobbers.

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This outside system of production is fraught with waste to all concerned. * * * The wastes involved in this system are distributed in various ways. Hundreds of these submanufacturing firms each year lose the small capital with which they have started, and often leave their creditors, including workers, in the lurch. The jobbers themselves have been suffering more and more through the cancellation of retail orders and the return of merchandise due to faulty workmanship, skimping in materials, and disregard of sizes and other specifications. *The greatest burden of waste, however, falls upon the workers, through shortened seasons, and through substandard conditions of employment.*

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Were this pressure [of competition for work] felt only by the submanufacturers, the situation would not be so serious, and it might work its own cure through discouraging the perpetual opening up of new shops.

But the fact is that a large proportion of the submanufacturers succeed in shifting the burden on to the workers. The shops being small, there is a comparatively close relation between the firm and the workers. When work is scarce, as it usually is except for a few weeks in each season, the workers are told that in order to meet the exigencies of price competition and to bring some work into the shop, they must enter into secret arrangements contrary to the minimum labor standards which have been agreed upon, and which are pretty successfully enforced in the larger shops of the inside manufacturers.

These concessions by the workers take various forms. They chiefly involve wages, hours, rates of pay for overtime, work on holidays, and the substitution of piece work for pay by the hour. All this is done without the knowledge of the union officials and is frequently concealed in the books of the firm. Incidentally, it subjects the inside manufacturers to such unfair competition as tends to drive out of legitimate manufacturing into jobbing all except those producing garments of the most exclusive and expensive styles.

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Were it practicable, the workers would be justified in taking the stand that they would work only in inside shops and would refuse to work in outside shops, where they were removed from all direct contact with the owners of the capital involved. The so-called jobbing system of manufacture, however, has become so extensive and so firmly entrenched in the industry that such a stand would be impracticable.

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In determining the relationship between jobber, submanufacturer, and workers we should be concerned not so much with the form as with the substance. *By whatever name he may call himself, the jobber controls working conditions; he controls employment, and that element of control imposes upon him the responsibility that he shall so conduct his business that proper working standards may be upheld* instead of undermined, and that employment may be stabilized instead of demoralized.

* * * * * * *

We appreciate that any remedy that is proposed must be reasonable, practicable, and possible of being carried into effect without a disruption of the industry. Bearing this in mind the Commission recommends that there be such structural modifications in the existing jobbing-submanufacturing system as would tend to regularize the flow of work into submanufacturing shops, raise the level of competition between submanufacturers, cause closer relations between jobbers and submanufacturers, and stabilize working conditions in the shops.

With this in view, we recommend that the parties adopt a system of *limitation of submanufacturers with whom a jobber may do business.* At definite intervals every jobber shall, in accordance with a standard to be agreed upon between the parties, select and designate the submanufacturers he needs to handle his production, leaving him the necessary freedom in securing samples and in changing submanufacturers for cause shown; he *shall not give work to other submanufacturers when his designated submanufacturers are not busy,* and shall adhere, so far as practicable, to a policy of *equitable distribution of work among the submanufacturers designated by him.* The administration of such a system would, as cases arise, be usbject to equitable interpretation through the impartial machinery. [Emphasis supplied.]

The recommendations of the Governor's Advisory Commission were not accepted by the employer groups and the union continued its efforts at regulating the jobber-contractor relationship. It was not until 1933, in the cloak and suit branch of the industry, and 1936 in the dress branch, that the union was able to obtain jobber approval of a contractor designation system and recognition of responsibility toward the employees in the contractors' shops. The jobbers agreed: (a) To designate the contractors they actually needed and confine their production to such contractors, (b) to distribute work equitably among their contractors' work forces, and (c) to pay the contractors an amount sufficient to pay the workers their wages, together with an allowance for the contractors' overhead.

9. The Los Angeles sportswear industry was established in the middle '30s. The employers in Los Angeles were, by and large, former New York employers. Because of their New York experience they had begun, in many instances, to produce sportswear under the same kind of jobber-contractor arrangement which had existed in New York prior to the collective agreements of 1933 and 1936. The union, desirous of avoiding a repetition of the depressed labor

conditions which had formerly characterized the New York market, sought agreement on jobber-contractor provisions similar to those in the New York agreements. The employers resisted and it was not until 1942, after the union had called a strike, that the employers agreed to a system of contractor designation and the use of union contractors. The instant agreements were resisted for a period of almost 8 months before the employer groups accepted the clauses here in issue.

10. Although relying primarily on the agreements themselves as establishing a per se violation, counsel supporting the complaint also offered the testimony of four manufacturing-jobbers for the apparent purpose of showing competitive injury resulting from the contractor-jobber provisions of the agreements. The burden of their testimony was that as a result of being required to use union contractors, their cost of production was somewhat higher than it would have been if they had been permitted to use nonunion contractors. One of the witnesses estimated that the price charged by nonunion contractors was about 15 percent less than that of union contractors, due to the formers' lower labor costs. Another of the witnesses fixed the difference between union and nonunion contractors as 5½ percent.[31]

Several of the witnesses conceded that the difference in price had not placed them at a competitive disadvantage, since the difference was not sufficiently great to raise the selling price of the garment and they merely absorbed it out of their profit.[32] However, one of the witnesses testified that he was placed at a disadvantage with respect to nonunion manufacturers since they are able to undersell him in the larger retail chain outlets, where a small difference in cost is significant.[33]

In evaluating the testimony of these witnesses it should be noted that their complaints with respect to not being permitted to use nonunion contractors were not based on any greater efficiency of such contractors or any particular advantage afforded by their use, other than the fact that such contractors had lower labor cost by reason of not having to meet union pay and benefit standards. It should also be noted that none of the witnesses complained about the contractor designation system, as such. On the contrary, one of the witnesses who complained about not being permitted to use nonunion con-

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[31] It may be noted that the testimony of the latter witness was based on his actual experience when, at the union's insistence, one of his contractors became unionized (R. 813). The first witness' testimony, on the other hand, was merely a rough estimate not based on actual experience (R. 776).

[32] R. 797, 814; see also R. 407.

[33] R. 753, 760.

tractors, conceded that the designation clause had actually proved beneficial because of the increased efficiency resulting from a continuous relationship with an established group of contractors.[34]

11. There is no evidence in the record to show that the provisions of the agreement relating to payment of contractors has resulted in any price fixing, either at the contractor level or in the prices at which the garments are sold to the retailer. While counsel supporting the complaint hinted that there was some established formula for fixing the amount of the contractor's overhead,[35] no evidence was offered either testimonially or through the books and records of jobbers or contractors, to support his ipse dixit.

The agreements provide for the payment to the contractor of a "reasonable amount" for his overhead. However, there is no agreement among the employer associations fixing this amount. On the contrary, the record establishes that the amount of such overhead is a matter for individual bargaining between each jobber or manufacturer and his contractors.[36] Not only is there no evidence of any uniformity of prices among contractors, but there is affirmative credible testimony that the prices charged by a given group of contractors producing the same style garment for the same jobber actually differ.[37]

Counsel supporting the complaint contends that the provision for payment of a reasonable amount for "overhead" was also intended to include a profit to the contractor.[38] However, there is no evidence to support this assertion. On the contrary the testimony would appear to indicate that the contractor's profit is a separate item for negotiation, over and above his overhead.[39] So far as appears from the record, the matter of the contractor's profit is individually negotiated and is not fixed by any industry-wide formula.

The only payment obligation which the jobber or manufacturer has toward the contractor, which may be classified as involving a fixed amount, is to pay him an amount at least sufficient to enable him to pay his employees the wages and earnings provided for under the agreements However, even this obligation does not necessarily involve any uniformity of payments. Most production employees, as has been already indicated, are paid on a piece-rate basis. These rates are based on the complexity and number of operations involved in a particular garment, and are subject to negotiation be-

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[34] R. 793.
[35] R. 251–252.
[36] R. 255–257, 560, 661.
[37] R. 660.
[38] Answer to Motions to Dismiss, and Reply Brief, p. 11.
[39] R. 246.

tween the contractor and his employees. From time to time they cannot reach agreement on such rates and the matter is submitted to the impartial chairman. It was because of the flexibility of these piece rates that the union insisted on the "reasonable amount for overhead" provision, to foreclose the contractor from pleading that he could not pay the piece rates requested by employees because the amount he was receiving from the jobber did not enable him to cover his overhead.

It is the position of the union that the contractor payment provisions were sought by it solely to protect the wage standards of the contractor's employees and assure that these employees would receive the wages agreed upon, and that they were not intended or used for price fixing purposes. This position is adequately supported by the record.

D. *Restrictions on the Acquisition of Additional Factories*

1. The other group of clauses in the collective agreements which are challenged in this proceeding relate to the acquisition or opening of additional plants, or of an interest therein, by members of the respondent employer associations. The complaint charges that under the collective agreements:

a. No member of the three employer associations may acquire an ownership interest in any other firm producing women's sportswear, or open additional factories or establishments for such production, without first giving the respondent unions notice thereof.

b. No member of the three employer associations may acquire an interest in any factory or establishment producing women's wear, subject to jurisdiction of respondent ILGWU, located outside the limits of Greater Los Angeles, unless for the duration of the agreements the production of such plant is not increased.

c. No officer, stockholder, or director of any member of the three employer associations will acquire an interest in any firm producing women's apparel, which is subject to the jurisdiction of respondent ILGWU, unless such firm is then or shall immediately thereafter enter into contractual relations with respondent Unions or an affiliate of respondent ILGWU.

2. Insofar as the allegation referred to in subparagraph a. above is concerned, all that is apparently challenged is the requirement that notice shall be given to the Union of an additional acquisition. It should be noted that the clause in question, in addition to requiring notification to the Union, also provides that the additional plant must

be located in Greater Los Angeles and that the acquisition thereof must not result in reducing the amount of work or the number of employees in the present plant.[40] However, these latter provisions are not charged to be illegal. Insofar as the requirement for notice is concerned, it should be noted that all that appears to be required is notice be given to the Union, and there is no provision for Union disapproval unless the plant is located outside Greater Los Angeles.

3. With respect to the allegation referred to in subparagraph b. above, it should be noted that this appears to be based on a provision of the agreements which follows that just discussed. After providing that additional plants must be located within Greater Los Angeles, the agreements state that this requirement shall not apply to plants which had already been acquired as of the effective date of the agreement, provided the production of such plants were not increased during the term of the agreement.

The union's explanation of this clause is that it had sought to limit all new acquisitions to the Los Angeles area. However, since some employers had already acquired an interest in plants outside the area during the period of negotiation, it was agreed that such plants could be continued provided their production was not increased to the disadvantage of the Los Angeles plants.

4. The allegation referred to in subparagraph c. above, is amply supported by the record. The agreements, in at least two of their provisions, require that where an additional factory, or an interest therein, is acquired, the firm must be in contractual relations with the appropriate ILGWU unit or immediately thereafter enter into such relations.[41]

5. It is the position of the union that the above clauses are aimed principally at preventing the diversion of work and evasion of labor standards, through the setting up of so-called runaway shops. According to the union, such provisions complement those regulating jobber-contractor relations, in that the diversion of work and lowering of labor standards can occur not merely through the use of nonunion contractors, but through the establishment of nonunion inside shops, particularly where such shops are established in outlying areas where policing by the union is difficult.

The record establishes that the runaway shop has been a traditional problem which has confronted the union in the garment industry. Because of the small size of the average shop, its ease of mobility, the minimal capital involved, the simplicity of the labor processes in-

[40] CX 1, 2 and 3, par. 30(b), pp. 21–22.
[41] CX 1, 2 and 3, par. 30(b), p. 22; and par. 1(c), p. 2.

volved, it is relatively easy for a unionized employer to pull up stakes and move. Actual instances of such diversion of work to new shops in remote areas occurred under the prior agreements in the industry and it was to remedy this situation that the clauses in question were inserted in the agreements which are the subject of this proceeding.

E. *Conclusions*

1. Insofar as the collective agreements here involved (a) limit jobbers and manufacturers to the use of union contractors and firms, both in the sewing of the garments and in the making or purchasing of accessory items, and (b) prohibit subcontracting within the inside shops of manufacturers, it is the opinion and finding of the examiner that they embody appropriate labor demands which fall within the matrix of the employer-employee relationship. The record establishes that such provisions have been historic union goals in the industry, resulting from the fact that the practice of subcontracting has been frequently used as a medium for the evasion of labor standards by those whom the Union regards as the principal employer, viz, the jobber or manufacturer. The practice of contracting "within shop" was outlawed as long ago as 1910, and the requirement for the use of union contractors was recognized in the industry as early as the collective agreements of 1919.

The regulation of subcontracting has come to be recognized as a normal subject for collective bargaining. Collective agreements in a substantial number of industries contain provisions dealing with this subject, which range all the way from the outright prohibition of subcontracting, to permitting it where restricted to union subcontractors.[42]

The National Labor Relations Board, which is the agency charged with determining what subjects properly fall within the scope of "good faith" bargaining, as required under section 8(a)(5) of the National Labor Relations Act,[43] has determined that the subject of of subcontracting is one on which employer may be required to bargain. In a proceeding in which an employer was charged with refusing to bargain collectively with a union representing his employees with respect to the subcontracting of work, the board sustained the decision of its examiner who held:

Without attempting generally to delimit the subject matter properly included within the scope of collective bargaining, it seems apparent that the respondent's system of subcontracting may vitally affect its employees by progressively under-

[42] RX 58 A–Z82.

[43] 29 U.S.C. sec. 158(a)(5).

mining their tenure of employment in removing or withdrawing more and more work, and hence, more and more jobs, from the [bargaining] unit.[44]

In determining what matters appropriately fall within the scope of the employer-employee relationship, due regard should be given to accepted collective bargaining practices, and an agency of government should hesitate to overturn such practices unless they clearly fall outside the province of private arrangements and impinge upon the public interest. As stated by one authority, in discussing the principles which should govern in determining what are proper subjects for good faith bargaining under the National Labor Relations Act: [45]

> * * * predominant weight should be given to the practices and philosophy of collective bargaining reflected by voluntary arrangements in industries in which collective bargaining is well established. The law of collective bargaining will have little value to the community if the process of logical deduction from prior decisions results in wide divergence between the administrative and judicial rules and the needs of both management and labor. Furthermore, there is every reason to believe that the needs of the industrial world can be determined most accurately by examining the arrangements which management and labor have worked out through negotiation, trial, and error.[46]

While there may be circumstances where collective arrangements with respect to subcontracting which are considered proper by the parties may run afoul of the antitrust laws, the decided cases make it clear that, standing alone, collective agreements which either outlaw subcontracting or restrict it to union contractors, fall within the protective mantle of the Clayton and Norris-LaGuardia Acts. Thus in *U.S.* v. *Employing Plasterers Ass'n. of Chicago*, discussed above, the "original contractor" clause which prevented all subcontracting, was held to be proper as "assur[ing] attainment of a proper objective which * * * is consistent with sound labor policy and labor law." Similarly, a clause in a collective bargaining agreement governing the fur industry in New York which prohibited contracting by manufacturers "in any shape, manner or form" was upheld by a State appellate court, as "not in violation of the antitrust laws, national or state." [47]

Also persuasive, is the decision of the Fifth Circuit in *Amalgamated Association* v. *Greyhound Corporation*, 231 F. 2d 585 (April 1956), holding that a collective bargaining agreement providing for

[44] *The Timken Roller Bearing Co.*, 70 NLRB 500, 518.

[45] Cox and Dunlop, *Regulation of Collective Bargaining*, 63 Harv. L. Rev. 389, 405 (1950).

[46] See also *Order of R.R. Telegraphers* v. *Ry. Express Agency, Inc.*, 321 U.S. 342, 346 (1943).

[47] *Mencher* v. *B. Geller & Sons, Inc.*, 276 App. Div. 556; 96 N.Y.S. 2d 13, (N.Y. Sup. Ct., App. Div., 1st Dept., Mar. 28, 1950).

reduction in force by seniority does not prevent an employer from laying off employees and hiring an independent contractor to do their work, *in the absence of a contract provision preventing the contracting out of work.* Presumably, a clause specifically prohibiting contracting would have been held legal by the court and would have been construed as barring the reduction in force. See also *Local Union No. 600* v. *Ford Motor Co.*, 113 F. Supp. 834 (E.D. Mich., 1953).

There would seem to be little doubt that if a union may properly seek and obtain agreement for the complete elimination of contracting, without thereby violating the antitrust laws, it may also seek to obtain the less stringent restriction permitting the use of subcontractors on the condition that such contractors maintain bargaining relations with it. Support for this proposition may be found in the Supreme Court's decision in the *Allen Bradley* case. While the court held illegal the union-abetted employer conspiracy to fix prices and divide up markets, it recognized that, standing alone an agreement between the union and employers in which the latter agreed not to buy goods manufactured by firms which did not employ members of the union would not be illegal. As has been mentioned above, this interpretation was given official sanction by the Court of Appeals upon the remand of the case.

The Supreme Court's decision in the *Milk Wagon Drivers' Union* case also supports the position that a provision requiring the use of union contractors is not in violation of the antitrust laws. There the so-called "vendors" were regarded by the milk companies as independent contractors, but the union contended they were being utilized as part of a scheme to evade union wages and working conditions, and insisted that they join the union. The court found it unnecessary to determine whether the vendors were legally independent contractors or employees, and held that irrespective of whether the union's views were "rightly or wrongly" held, its demand that they become unionized was properly part of a labor dispute.

Counsel supporting the complaint cites the Supreme Court's decision in *U.S.* v. *Women's Sportswear Manufacturers Association*, 336 U.S. 460, as lending support to his position. That case involved an agreement between a contractors' association in Boston and jobbers, under which the latter agreed that they would only deal with contractors who were members of the contractors association and were in good standing with the ILGWU. The agreement provided for an equitable distribution of work among the eligible contractors. In response to the argument that the labor provision of the agreement rendered it immune from antitrust attack, the court said (p. 464):

The restraints here went beyond limiting work to union shops; it limited it to those union shops also members of the Association. The trial court found no evidence that the union participated in making the agreement. And if it did, benefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires. *Allen-Bradley Co. v. Local Union No. 3*, 325 U.S. 797. [Emphasis supplied.]

In the opinion of the undersigned the *Women's Sportswear Mfrs. Assoc.* case lends no support to the position of counsel supporting the complaint. As is indicated in the quoted portion, the restraints "went beyond limiting work to union shops." The district court had found that one of the purposes of the agreement was to maintain a uniform standard of prices among contractors. The evidence disclosed that the association policed its membership to prevent price competition and excluded from membership newcomers in the trade. Of particular significance is the fact that in the orginal draft of the agreement there was no reference to the requirement that contractors be unionized. It was rejected in this form by the jobbers, as probably violating the antitrust laws. In the revised draft the labor provision was inserted with the obvious purpose, as the Supreme Court suggested, of utilizing labor "as a cat's-paw to pull employers' chestnuts out of the antitrust fires." It is thus apparent that the case cannot be interpreted as holding that a simple requirement that jobbers must deal only with union contractors is illegal, where such provision is included at the sole request of the Union and for the latter's benefit and protection.

The legality of a provision of this type, under the circumstances indicated, has been recently upheld by a United States district court in *Davis* v. *California Sportswear Assn.*, 38 LRRM 2734 (S.D. Cal., Jan. 27, 1956), involving one of the clauses in the agreements here at issue. The clause there challenged was the one requiring that all work on accessory items must be performed by firms which maintain contractual relations with the union. On a motion for injunction by a nonunion accessory firm, which claimed that the agreement prevented it from working for members of the association, the court held that the clause in question was immune from antitrust attack, absent a showing that "one of the purposes or objects of the contracts entered into by the defendent unions and the employers was some trade benefit to the employers." It stated, in this connection, that—

to come within the [Allen] Bradley rule whereby the union loses immunity to the antitrust laws, one of the purposes or objects of the contract or conspiracy must be some benefit to the nonunion parties thereto proximately resulting from the unlawful restraint upon trade.

Since the clause was prima facie for the union's benefit and there was no showing that the nonunion parties had entered into the agreement "for the purpose or object of receiving some trade benefit," the motion of plaintiff was denied.

It not appearing that the clauses under discussion have any purpose other than the protection of the job opportunities and wage standards of the members of the union, it is concluded and found that, to the extent such clauses involve any interference with competition, they are immune from attack under the antitrust or antimonopoly laws.

2. In adddition to the requirement that contractors must be unionized, the collective agreements also set up a procedure under which the designation or change of contractors, by manufacturers and jobbers, requires union approval. There is no doubt that these provisions constitute a further limitation on the manufacturers' and jobbers' free choice of contractors, to the extent that the union, in effect exercises a veto power over the choice or change of contractors. However, in the light of the historical background which led up to the union's demand for such provisions and the economic status occupied by the contractor in the industry, the undersigned cannot say that they may not be regarded as falling within the category of matters which the union may appropriately demand, for the protection of its members, without losing its immunity from antitrust prosecution.

The basic purpose of these clauses, as has been heretofore seen, is to protect the employment opportunities and wage standards of employees. Prior to the adoption of such provisions manufacturers and jobbers tended to concentrate their production into a relatively brief period, using as many contractors as they needed, and during the balance of the year most of the employees of these contractors were unemployed. Likewise, the use of an unlimited number of contractors, far in excess of what was demanded by the jobber's normal production requirements, created an "auction block" system of bidding which gave rise to widespread evasion of union standards on the part of contractors and their employees in an effort to avoid unemployment. The concessions of the contractors were in reality paid for out of the employees' earnings.

The union, under these circumstances, took the position that the jobber or manufacturer was the true, albeit possibly not the legal, employer of his contractors' employees. Hence it insisted that the employment and seniority rights of employees not be jeopardized

by the use of additional contractors while the existing contractor work force was not being fully utilized.

Running through the agreement is the union's concept that the jobber and the contractor must be regarded as an integrated unit. Thus the agreements provide that if the jobber has an "inside" shop, the work must be equitably distributed between that shop and those of his permanent contractors. They make him responsible for the payment of wages to the contractor's employees. They provide for the jobber's presence at the settling of piece rates between the contractor and the latter's employees (although this procedure is not usually followed in actual practice). The agreements contain the acknowledgment that the jobber and the contractor "are closely allied and have a close unity of interest with each other" in the process of production, and that they are "jointly engaged in an integrated production effort."

While it may be argued that these provisions and statements are merely the self-serving declarations of interested parties, it should be noted that there is respectable authority for the position of the union concerning the jobber, as the true employer of the contractor's work force. Thus, as has already been mentioned, the U.S. Industrial Commission many years ago described the contractor as the "go between for the manufacturer, who is the original employer," and as being "in reality merely the agent of the manufacturer" for the purpose of getting cheap labor. The Governor's Advisory Commission in New York, which investigated the industry, stated that in determining the relationship between the jobber, the contractor and the employees one "should be concerned not so much with the form as with the substance," and that since the jobber controls working conditions and employment, he should be responsible for the working standards of employees. The State of New York has likewise recognized the unusual relationship existing between the jobber and the employees of his contractor, with respect to liability for unemployment insurance taxes.[48]

It may be noted, in this connection, that while the National Labor Relations Act now specifically outlaws secondary boycotts,[49] such as were formerly considered to come within the protection of the Clayton and Norris-LaGuardia Acts, it has nevertheless been held that picketing of a so-called secondary employer is not illegal where he is an "ally" of the primary employer. As stated in *Douds*

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[48] N.Y. Labor Law, Art. 81, sec. 560.7.

[49] 29 U.S.C., sec. 158(b)(4).

v. *Metropolitan Fed. of Architects*, 75 F. Supp. 672, 677 (S.D. N.Y., 1948):

> * * * the practices in a particular industry may be such that the normal contractor-subcontractor relationship carries with it the label of "ally" in a labor dispute context.

In the light of the evidence in this record, it is the view of the examiner that if there is any relationship to which the appellation "ally" may appropriately be applied, it is that which exists between jobber (or manufacturer) and contractor in the women's garment industry.

Viewed from the perspective of the close relationship existing between jobber and contractor, the clauses in question may be considered as analogous to clauses in collective agreements dealing with seniority rights and the sharing of work. The subject of seniority is one which has become well recognized as appropriate for union-employer agreement. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330. In *Amalgamated Association* v. *Greyhound Corp.*, *supra.*, the seniority principle was not held to prevent the discharge of employees and the utilization of the services of an independent contractor to perform their work, due to the absence of a provision in the contract prohibiting subcontracting. Is a provision which seeks to protect employment and security rights, not by prohibiting contracting, but by permitting it on a basis which the union deems necessary to protect such rights, any less appropriate a matter for collective agreement?

A negative answer to this question was supplied many years ago by a decision in New York State involving a substantially identical designation clause which, as has been indicated, is contained in the collective agreements for the dress industry there. In *Abeles* v. *Friedman*, 171 Misc. 1042, 14 N.Y.S. 2d 256 (Sup. Ct., N.Y. Co., 1939), there was involved a proceeding by a jobber to enjoin picketing by the union, which sought to obtain from him agreement to a collective bargaining contract containing a designation clause. After reviewing the history of the development of the jobber-contractor relationship, as heretofore related, the court concluded that the union's effort to obtain an agreement "providing, among other things, for jobber responsibility for the conditions of work in the contractor shops," involved a "labor dispute or a labor controversy" within the meaning of the New York law.

A situation analogous to the instant case was also presented in *U.S.* v. *Employing Plasterers Ass'n. of Chicago*, which has been discussed above in a somewhat different connection. That case involved

a provision in the union constitution and bylaws which required that new contractors desiring to employ union members had to be approved by a union board and had to furnish a $10,000 bond. Although not appearing in the collective agreements, it was contended that these provisions illegally restricted competition. In upholding the legality of these requirements, the court stated (p. 554):

> This court finds that the basic requirements are reasonable for the protection of a proper union objective, namely, an assurance that the prospective contractor can perform satisfactorily and is able to discharge all financial obligations. It not only promotes the attainment of a proper union objective but provides a safeguard for the purchaser that the plastering work is good and that his premises will not some day become encumbered by a lien for work performed by plasterers.
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> * * * * * * *
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> The record contains no evidence whatsoever that either the defendant Local No. 5 or Dalton employed these regulations in any arbitrary or illegal fashion, either against the local or out-of-state plasterers or contractors.

To the extent that the reasonableness of the instant provisions is an issue, it should be noted that the veto procedure, may not be unreasonably exercised and has not in fact operated to unreasonably restrict competition. Thus the agreements provide that changes in designation may be sought where the character of the production of the manufacturer or jobber has changed or where it has declined due to financial reasons, or where the contractor is unable to properly and efficiently meet the requirements of the manufacturer or jobber. Also, the refusal of the union to approve a designation or change therein is not final, but may be appealed to the impartial chairman. The record further establishes that the union's veto rights have not been exercised in an arbitrary or capricious fashion so as to restrict competition among contractors. The testimony of employer association officials establishes that there was a fairly liberal practice, both in the designation and in the change of contractors.[50] It also appears that there was no effort under the provisions to restrict production or prevent new employers from coming into the Los Angeles area.[51]

There is no evidence in the record that the contractor designation system, as distinguished from the requirement for the use of union contractors, has adversely affected competition in the industry. As has already been stated, there were some complaints by manufacturers and jobbers concerning the requirement that they

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[50] R. 405, 670-673, 677.

[51] The provision for the use of "temporary" contractors was specifically included to take care of unexpected increases in production.

use only union contractors, due to the higher labor cost of such contractors, but there was no evidence that the provisions requiring union approval for the designation or change of designation of contractors has resulted in higher costs or prices, or has adversely affected competition.

It is clear from the record that the designation provisions of the agreement were the result solely of the union's demands, aimed at protecting the work standards and employment of its members, and were not part of any employer conspiracy to limit competition or raise prices. Insofar as the jobbers and manufacturers are concerned, they obviously have little to gain from a provision which requires union approval for their use of contractors. The contractors are in a somewhat different position, it is true, in that the operation of the clause so as to regularize the employment of the contractors' employees, also results in some regularization in utilization of their services by jobbers or manufacturers. However, any benefit which the contractors receive is purely incidental to, and derivative from, the union's efforts to protect the working opportunities of the contractors' employees. The record establishes that the contractors played no part in securing the clause in question, it being presented to them as a fait accompli, and that some of them were opposed to it because they preferred to have the unrestricted right to shift from one jobber to another in the hope of being able to secure more advantageous fees for their services.

Since the designation provisions of the collective agreements were sought by the union solely for its benefit and that of its members and since these provisions operate primarily for the benefit of employees and not that of employer groups, and it appearing that the matter is one which reasonably can be considered as falling within the scope of the employer-employee relationship, it is concluded that these clauses are immune from attack under the antitrust laws.

3. The primary restriction on the prices paid to contractors is that they must at least cover the wages and earnings of the contractors' employees which will be due under the agreement. This, in effect, constitutes a floor under the amount which the jobber or manufacturer may pay to his contractors for fabricating the garment. The reason for this provision, as in the case of the designation clause, is that the union regards the jobber or manufacturer as the real employer of the contractors' employees. The agreements themselves "acknowledge that the [jobber or manufacturer] is directly concerned with the payment of the wages of the workers employed by the contractors" for the reason that the former is "the ultimate source of employment and

wages paid to the employees of the contractors * * * and controls the nature of the product."

It is unnecessary to refer again to the historical conditions which gave rise to the union's view of the jobber (or manufacturer) as the real employer of the contractor's employees, or to the support which this view has received from various presumably objective sources. Suffice it to say that under the circumstances here present the union's demand, that the jobber became in effect the guarantor of the payment of wages to the contractor's employees and pay the latter an amount sufficient to cover such wages, may be deemed to fall within the context of the employer-employee relationship.

It may be that this requirement operates to place a limit on bargaining between the jobber and contractor to the extent that the latter may be willing to accept a fee from the jobber which is less than the total amount of his employees' wages. However, as stated by the Supreme Court in the *Apex Hosiery* case, "an elimination of price competition based on differences in labor standards is the objective of any national labor organization," but this effect on competition is not considered to be a violation of the antitrust laws (310 U.S. at p. 503).

The examiner is aware that the agreements also require that the contractor must be paid a "reasonable amount" for his overhead, in addition to the amount intended to cover wages. However, this amount is not fixed by the agreements and is subject to negotiation between the jobber and contractor, as is the amount of the contractor's profit, which is not referred to at all in the agreements. The provision with respect to the payment of a "reasonable amount" for overhead was inserted, out of an abundance of caution on the part of the union, to preclude any possible defense by the contractor that he was unable to pay the piece rates which the Union was seeking, because the amount received from the jobber was not sufficient to cover his overhead.

There is nothing in the record to indicate that this provision was inserted for any other purpose; certainly not for the purpose suggested by counsel supporting the complaint, viz. as a medium for establishing price uniformity among contractors. On the contrary, the credible testimony is that the jobber and contractor "bargain to the nth degree" (R. 256), and that there are actual differences in prices among contractors producing the same style garment for the same jobber (R. 661).

This clause was obtained at the insistence of the union and over the vigorous objection of employer groups. The jobber and manu-

facturer groups receive no benefits whatsoever from the provision. While the contractor does receive a modicum of protection in that he must be paid a sum which is at least the equivalent of his projected wage bill, plus some indeterminate amount for overhead, any benefit which he receives is purely derivative from, and incidental to, the union's efforts to protect its members. The contractors' association played no part in the negotiation of the clause, but was presented with it as an accomplished fact after the union and the manufacturer and jobber associations had completed their separate negotiations.

Under all the circumstances, it is the opinion and conclusion of the examiner that to the extent the provision in the agreement regulating the payment of compensation by jobbers and manufacturers to their contractors restricts competition, it is a provision which may appropriately be considered as falling within the context of the employer-employee relationship, and as such is immune from attack as a violation of the antimonopoly or antitrust laws.

4. The final group of clauses here at issue is those which counsel supporting the complaint contends were intended or calculated to restrict production by placing limitations on the right of employers to open, or acquire an interest in, additional plants. The first of the challenged clauses requires that an employer acquiring an interest in an additional plant shall notify the union of this fact prior to the acquisition. However, the clause does not provide for union approval of the acquisition. As has been heretofore indicated, the same clause provides that the acquisition of the new plant must not result in a decrease in work in the existing plant and also that the new plant must be located within Greater Los Angeles. Although the latter two provisions are not challenged by the complaint, the undersigned will treat them as if they were in issue.

Another requirement of the agreements, which is challenged, is that the newly acquired plant must be in contractual relation with one of the ILGWU affiliates or immediately enter into such relations.

It is obvious that the provisions referred to above all are addressed to the problem of run-away shops which, the record shows, has historically plagued the industry. The record also indicates that provisions for union notification and nonremoval from a specified area are common provisions in collective bargaining agreements in a number of industries.[52]

It does not appear that any of these clauses has as its purpose any limitation of production. On the contrary, the proviso that the

[52] See, e.g., RX 58 B, O, P, Y, Z13, Z31, Z66.

acquisition must not result in a decrease in production in the existing plant is indicative of an intent to maintain production and, hence, employment. These provisions are obviously intended to accomplish the same result as the clauses prohibiting the use of nonunion contractors, since work can be siphoned off not merely to nonunion contractors, but to nonunion plants of the original employer located at points remote from the Union's organizing abilities.

The objective which is sought by the provisions above referred to, viz, the protection of the job opportunities and work standards of the union's membership, is one which may be deemed to fall within the scope of the employer-employee relationship, and the means used are not unreasonably related to that end. It may be noted in this connection, that while containing a general requirement that newly acquired plants must be located within Greater Los Angeles, the agreements contemplate that there may be exceptions to this rule upon a proper showing. Thus application may be made to the union for approval to open a plant outside the area, and the Union's decision of disapproval is not final but may be appealed to the impartial chairman.

There is no doubt that the removal of all or part of an employer's operations for the purpose of evading his collective bargaining obligations would be illegal, and that a strike in protest thereof would be properly considered as constituting a labor dispute.[53] There would seem to be no reason why an agreement not to remove a plant to another location, beyond the union's jurisdiction, should not also be considered as properly falling within the employer-employee relationship.[54]

The only provision challenged by the complaint which has anything to do with a limitation of production pertains to newly acquired plants outside the Los Angeles area. As charged in the complaint, the gravamen of this provision is that no plants may be opened outside of Los Angeles unless it is agreed that the production of such plant will not be increased. As thus charged, the purpose of the clause would appear to be to limit production. This does not, however, place the clause in question in its true perspective.

Preceding this clause is the one previously discussed, containing the general requirement that newly acquired plants must be located within Los Angeles. This, of course, was addressed to the union's

[53] *Diamond Full Fashioned Hosiery Co.* v. *Leader*, 20 F. Supp. 467 (E.D. Pa. 1937); *NLRB* v. *Cape County Mill Co.*, 140 F. 2d 543 (C.A. 8, 1944); *Tarr* v. *Amalgamated Ass'n.*, 250 P. 2d 904, 907, (Sup. Ct., Idaho, 1952; 152 A.L.R. at 155).

[54] *Dubinsky* v. *Blue Dale Dress Co.*, 162 Misc. 177, 298 N.Y.S. 898 (1936); 173 A.L.R. 681.

primary objective of preventing the establishment of run-away shops. Had the agreements stopped there, they would have been unobjectionable from the point of view of antitrust violation. However, since the agreements had been under negotiation until July and August 1953, but were retroactive until January 1, 1953, there was presented the possibility of infringement of the basic clause by reason of the fact that some employers had acquired extra-Los Angeles plants during the intervening period. Rather than require the dismantling or sale of such plants, the agreements added a proviso permitting their continuance, provided production therein was not increased over what it was at the time of execution of the agreements.

From this perspective it is apparent that there was no overall desire to curtail production, but that the clause in question was inserted as a stop-gap measure to meet a special situation, as an exception to the general requirement that newly acquired plants must be located within Greater Los Angeles. While an employer to whom the proviso was applicable could not increase the production of his extra-Los Angeles plant during the term of the agreement, he was at liberty to more than make up for this by an increase of production in his Los Angeles plant. The union's interest lay not in limiting production but in increasing it, except that it sought to channel that increase into the Los Angeles area where it was in a better position to assure compliance with union labor standards. It was part of a package which the union sought solely in the interest of its members, and not in pursuance of any scheme by employers to limit production and, hence, raise prices.

While the clause in question might, in another context, be deemed to extend beyond the scope of the employer-employee relationship, it is the opinion and conclusion of the examiner that under the circumstances here present it may be deemed to be properly part of a protected activity.

5. Viewing the facts here in their totality, including the historic conditions in the industry which gave rise to the union's demand for the contested clauses, the circumstances under which the clauses were adopted, and the manner in which they were carried out, it is the opinion of the examiner that the clauses in question are all reasonably related to the Union's objective of protecting the employment opportunities and labor standards of its membership. The agreements are, accordingly, within the protective mantle of the Clayton and Norris-LaGuardia Acts unless the fact that they are

contained in industry-wide labor agreements results in a loss of such immunity.

The cases which have been heretofore discussed make it clear that when a union acts in its self-interest and for the betterment of its members it is immune from antitrust or antimonopoly attack, except where it acts in combination with nonlabor groups. Although the Supreme Court in the *Hutcheson* case suggested, by way of dicta, that labor unions may lose their immunity when they "combine with nonlabor groups," the Court's decision in the *Allen Bradley* case, as well as decisions interpreting the latter holding, makes it clear that the combination with nonlabor groups which results in such loss of immunity must rest on something more than a collective agreement for labor's protection, but involves the aiding and abetting of employers who are acting in their own self-interest to suppress competition or fix prices.

The only resemblance between the situation in the instant case and that in the *Allen Bradley* case is the superficial one that both involve industry-wide collective agreements. However, there are present here none of the indicia of the employer-inspired conspiracy which the court found to exist in the *Allen Bradley* case. The impetus for the agreements here came solely and exclusively from the union and they were vigorously opposed by the employer groups. Even under the concurring opinion's version of the facts in *Allen Bradley*, it appeared that some employer elements were active participants in the conspiracy. Here we have a union-generated arrangement, purely and simply, which none of the employer groups wanted but which they were forced to accept as a result of economic pressure from the union.

There are present here none of the elements of employer benefit, and restrictions on competition for employer advantage, such as were present in the *Allen Bradley* case. There is no evidence here of any "phenomenal growth" in the business of the respondent employers, of any "soaring" increases in prices and profits, of the creation of a "protected" Los Angeles market in which Los Angeles producers sold at one price and sold outside that area at a far lower price, of the exclusion of new firms desiring to come into the area, of the barring from the area of goods manufactured outside its boundaries, or of the suppressing of sales in certain types of garments.

On the contrary, the evidence shows that the Los Angeles market is highly competitive. Los Angeles producers not only compete with one another, but with garment producers from New York

and other areas. They compete with other firms not only for business in the Los Angeles market, but in seeking to obtain business in other markets. In view of the competition existing between Los Angeles firms and those from other areas, any effort to raise Los Angeles prices or curtail production could only redound to the advantage of producers outside the area.

Such interferences with competition as do exist under the instant agreements are calculated to protect the employment opportunities and wage standards of employees. However, it has been held that restraints upon competition which are sought "in order to secure continuous employment," or to eliminate that part of "price competition based on differences in labor standards" are either not in violation of the antitrust laws or are immune from attack thereunder.[55]

The undersigned entertains no doubt that the clauses in question were agreed to solely in the interest of the union and not in aid of any employer conspiracy. It may be that some of the provisions give the union a considerable voice in management affairs, as for example, the provision requiring its approval of the designation or change of contractors. It may be argued that less severe provisions could have been worked out for the protection of employees. However, this is not a matter for review in terms of the personal predilections of the judicial officer. As was indicated in the *Hutcheson* and *Milk Wagon Drivers' Union* cases, previously discussed, and recognized in the *Allen Bradley* case (p. 810), when the union acts solely in its self-interest, the wisdom or selfishness of the means it has chosen is not a matter for judicial judgment.

It is concluded, from the entire record, that to the extent any of the clauses here in issue interfere with competition, they either do not constitute such an unreasonable interference with competition as to violate the Federal Trade Commission Act, or are immune from attack thereunder as part of a labor dispute or in pursuance of activities which are reasonably related to immune aspects of the employer-employee relationship.

6. The respondents have raised a number of other matters, by way of defense. The union respondents urge, particularly, that the Commission has no jurisdiction over them since they are not a corporation within the meaning of section 4 of the Federal Trade Commission Act, which only applies to an unincorporated association where it is "organized to carry on business for its own profit." The undersigned finds it unnecessary to pass upon any of these defenses

[55] *Apex* case, 310 U.S., at 507, footnote 25, also at 503; also, *Schatte* v. *International Alliance*, 182 F. 2d 158, 167 (C.A. 9, 1950), cert. den., 340 U.S. 827.

or any of the procedural motions for dismissal which have been presented, in view of the conclusion herein reached with respect to the substantive issues in this proceeding.

CONCLUSION OF LAW

It is concluded that counsel supporting the complaint have failed to establish by reliable, probative and substantial evidence that respondents have engaged in any unlawful conduct in violation of section 5 of the Federal Trade Commission Act, and that the complaint should, accordingly, be dismissed.

ORDER

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

OPINION OF THE COMMISSION

By Kern, Commissioner:

Counsel supporting the complaint have appealed from an initial decision holding that the practices challenged were not shown to be within the purview of section 5 of the Federal Trade Commission Act. The complaint charged that respondents had entered into collective agreements and understandings to maintain certain practices and policies restricting and restraining competition and trade in the sale of women's sportswear and similar products in interstate commerce. The agreements in question were between certain respondent employee groups and three respondent associations of manufacturers which account for about 15 percent of the women's sportswear produced in the Los Angeles area. One of the labor organizations named as respondents was the Joint Council of Sportswear, Cotton Garment & Undergarment & Accessory Workers' Unions of the International Ladies' Garment Workers' Union, which played a primary role in negotiating agreements. The three signatory respondent associations of employers were composed of manufacturers, jobbers, and contractors, respectively.

The 11 alleged restraints fall into two broad categories:

(1) Limitations on competition among contractors by restricting manufacturers' and jobbers' use of contractors, primarily through a contract-designation procedure, and by determining prices to be paid to contractors for their services, and

(2) Restraints on production by members of the employer associations, resulting from contract limitations on the opening of addi-

tional plants or the acquisition of interests in other concerns producing women's sportswear.

To determine the legal status, under the Federal Trade Commission Act, of trade restraints resulting from collective-bargaining agreements, we must consider not only antitrust law precepts but also the national labor policy as expressed by the Congress. The Supreme Court declared in *United States* v. *Hutcheson*, 312 U.S. 219 (1941) and reasserted in *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797 (1945), that the Sherman,[1] Clayton [2] and Norris-LaGuardia [3] acts must be jointly considered in deciding whether given labor union activities run counter to the antitrust legislation. A further congressional declaration of national policy on labor matters has been subsequently provided in the Labor-Management Relations Act, 1947.[4] We conceive it to be the duty of this Commission, as well as the courts, to be guided by all four of these legislative expressions of policy.

The aspects of the national labor policy which are especially relevant here are those stated in the Clayton, Norris-LaGuardia, and Labor-Management Relations acts. Under section 6 of the Clayton Act, the acts of members of labor organizations in lawfully carrying out legitimate objectives are excluded from the antitrust laws; section 20 of the same act decrees that certain specified activities pursued in the course of labor disputes are not to be held violative of any law of of the United States.[5] The Norris-LaGuardia Act divests Federal courts of injunctive jurisdiction relating to certain designated activities growing out of "labor disputes," as defined by that act.[6] The Labor-Management Relations Act enunciates a policy of avoiding "industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce," of promoting "the full flow of commerce," and of proscribing practices "on the part of labor and management which affect commerce and are inimical to the general welfare." [7]

The hearing examiner held that though not all collective contracts entered into by the labor unions and employer organizations are categorically exempted from the antitrust laws, neither does the fact that collective agreements impose restrictions on manufacturers and employers regarding the use of contractors and on the employers in

[1] 26 Stat. 209, 50 Stat. 693; 15 U.S.C. § 1 *et seq.*
[2] 38 Stat. 730; 15 U.S.C. § 12 *et seq.*
[3] 47 Stat. 70; 29 U.S.C. § 101 *et seq.*
[4] 61 Stat. 136; 29 U.S.C. § 141 *et seq.*
[5] 38 Stat. 731, 738; 15 U.S.C. § 17, 29 U.S.C. § 52.
[6] 47 Stat. 70; 29 U.S.C. § 104.
[7] 61 Stat. 136; 29 U.S.C. § 141.

other respects render such limiting agreements, standing alone, unlawful.

On the basis of his interpretation of relevant judicial decisions, the hearing examiner concluded that the legality of the practices turns on a factual determination of whether the clauses of limitation were adopted as a result of union demands and for the employees' primary benefit or whether the restrictive provisions resulted, instead, from employer conspiracy to restrict competition and to raise prices with the union aiding and abetting the employer group. He found that the practices and policies under consideration here did not come within the latter category.

We think that the arguments advanced by counsel in support of their contention of error by the hearing examiner misconstrue the Supreme Court's decision in *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797 (1945). In that case a union entered into area wide agreements with electrical contractors and manufacturers in New York City whereby the contractors agreed to purchase equipment solely from manufacturers who had closed-shop arrangements with the local union, while the manufacturers were to confine their sales in that city to contractors employing members of that local union. It was found that the combination of businessmen participants had the purpose and effect of monopolizing the supply of electrical equipment to the exclusion of that shipped from outside and to control and raise its prices. The emphasis which the court placed on the fact that these agreements resulted from aggressive combination of the members involved and the additional fact that the unions were aiding and abetting businessmen to violate the law render, in our judgment, the *Bradley* decision inapposite to the facts here. Thus the Supreme Court, speaking through Mr. Justice Black, said (325 U.S. at 809):

> * * * Employers and the union did here make bargaining agreements in which the employers agreed not to buy goods manufactured by companies which did not employ the members of Local No. 3. We may assume that such an agreement standing alone would not have violated the Sherman Act. But it did not stand alone. It was but one element in a far larger program in which contractors and manufacturers united with one another to monopolize all the business in New York City, to bar all other businessmen from that area and to charge the public prices above a competitive level. It is true that victory of the union in its disputes, even had the union acted alone, might have resulted in individual refusals of all of their employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act. * * * But when the unions participated with a *combination of businessmen* who had complete power *to eliminate all competition among themselves* and

to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts. [Emphasis supplied.]

The present arrangement is quite the antithesis of the *Bradley* situation. This is conceded by counsel supporting the complaint, who state in their brief, "It is well established in the record that the parts of the collective agreements challenged by the complaint were entered into by the employer groups and the contractor association upon the insistence and coercion, so to speak, of the union respondents." The employer respondents' complete lack of interest is thoroughly evident, the hearing examiner having found that "the employer respondents permitted the respondent International Ladies' Garment Workers' Union to carry the burden of the defense in this proceeding, offered no evidence in their behalf and except for the respondent contractors association, filed no proposed findings or briefs" (initial decision, p. 12). This is not to say, however, that labor unions are to be accorded the immunity from the antitrust laws noted hereinafter merely because they were the sole instigators of the proposals agreed to. The circumstances and evidentiary facts of every case must be fully explored to reach a determination as to whether a claim of immunization is a proper one. In considering whether the particular provisions of a labor-management agreement of the sort with which we are concerned here involves those "congressionally permitted union activities" referred to in the *Bradley* decision (325 U.S. at 811), it is not conclusive whether the negotiations were originated by labor or management, and the fact that the collective bargaining was initiated by the union clearly will not serve to validate an agreement that exceeds the limits of permissible union activities.

It seems clear that the holding in the *Bradley* case is that Congress did not intend to exempt from the antitrust laws labor organizations which aid and abet business groups in creating monopolies, controlling the market of goods and services, and otherwise restraining trade. But we think it equally obvious that the *Bradley* decision did not hold that union participation, intended solely for the union members' benefit, in a collective-bargaining agreement with an employer group must bring loss of the statutory immunity.

Decisions handed down by lower courts since the *Bradley* decision similarly hold that an employer-union combination, to result in loss of immunity, must be based on more than mere collective-bargaining agreements intended solely for the union's benefit. Thus in *Anderson-Friberg, Inc.* v. *Clary*, 98 F. Supp. 75 (S.D.N.Y. 1951), the court considered a collective-bargaining agreement restricting the use of

certain dimensions of out-of-State stone by local union employers and stated (98 F. Supp. at 82):

> * * * immunity from injunctive action is dependent upon a factual determination. If there is conspiratorial action as proscribed by the Allen Bradley case, it would not be protected by the Norris-LaGuardia or Clayton Acts. On the other hand, if it be found that the union was acting on its own self-interest and for the betterment of its members, free and independent of a combination with non-labor groups intent upon violating the antimonopoly laws, it would be immunized against injunctive action. The applicability of those Acts as we have seen under the Allen Bradley case turns on a fact determination.

This and other decisions support the view expressed by the hearing examiner in the initial decision that "when a union is engaged in activities for the bona fide advancement of its interests, it is, absent participation in an employer conspiracy protected from antitrust prosecution even though its activities involve a restraint of trade" (initial decision, p. 23). *Courant* v. *International Photographers*, 176 F. 2d 1000 (9th Cir. 1949); *New Broadcasting Co., Inc.* v. *Kehoe*, 94 F. Supp. 113 (S.D.N.Y. 1950).

Convinced, as we are, of the soundness of the hearing examiner's approach to the labor contract provisions herein involved, we also approve his interpretation of the contract clauses and his conclusion that the record does not show that the agreements were made for any purpose other than to aid the union membership or that they have resulted in a type of restraint on the employers' competition that would render such agreements unlawful. Counsel supporting the complaint acknowledge that all clauses in the agreements were inspired by the unions and acceded to by the employers at the employees' insistence, and it cannot be doubted that all such provisions are closely related to wages and conditions of employment. Under the agreements, members of the manufacturer and jobber associations are required to deal only with contractors who have entered into agreements with the respondent unions and to employ only such contractors as are designated and approved to do contracting work, with any changes in designation status to be approved by the union. The contractors agree to confine their work to manufacturers and jobbers who designate them, except when they have no work.

These clauses, together with those under which the jobber or manufacturer guarantees the payment of wages of workers employed by the contractor, represent the culmination of a union struggle that goes back almost to the turn of the century. Labor in the garment industry, which was once plagued by unsanitary sweatshops, excessive hours, and low wages, has long sought to improve working

conditions through establishment of the principle that a contractor or "outside shop" is in reality the manufacturer's agent, and that the manufacturer must assume some responsibility for the conditions obtaining in the shops of such a submanufacturer. After a strike in 1942, the employers in the Los Angeles area, for the first time, agreed to a system of contractor designation and the use of union contractors. The hearing examiner found that there is no substantial evidence in the record to indicate that the contractor-designation system has markedly affected competition among employers. There is no prospect of direct gain attending such a provision for the jobbers and manufacturers. Any benefits afforded thereby to contractors derive wholly from and are only incidental to the union's efforts to protect the opportunity of workers in "outside shops."

The clauses relating to prices paid to contractors provide that such payments must at least cover the wages or earnings of the contractors' employees, together with a "reasonable amount" of overhead. The record is barren of evidence that this provision looked to price uniformity among contractors. Furthermore, there is evidence tending to show that actual differences in prices among contractors producing the same style of garment are prevalent and that their fees are arrived at through vigorous bargaining. This gives added emphasis to the differences between the facts of this case and those of the *Bradley* case, in which competition was stifled because union, contractors, and manufacturers combined as co-partners to achieve a monopoly by means of which they then boycotted equipment manufactured by the plaintiffs. 325 U.S. at 800.

Another of the challenged clauses stipulates that those manufacturing or purchasing pleating and other accessories shall deal only with firms which have contractor relations with respondent International Ladies' Garment Workers' Union or its affiliates. In *Davis Pleating & Button Co.* v. *California Sportswear & Dress Association, Inc.*, 145 F. Supp. 864 (S.D. Calif. 1956), the court denied a motion for injunction by a nonunion accessory firm on the ground that the evidence did not show that the object of that provision was a trade benefit to the employer. The record in this case does not support a different conclusion.

The final group of contract provisions challenged by the complaint involves restrictions imposed on the employers' acquisition of interests in additional plants. The hearing examiner's detailed analysis of these clauses and his conclusion that they did not look to limiting production by the employers have sound support in the

record. These provisions were designed to cope with the problem of the so-called "run-away" shops, i.e., nonunion "inside" shops which manufacturers establish in outlying areas, where policing by the union is difficult, and to which work can be diverted, with a consequent lowering of labor standards. The evidence established actual incidents of such diversion of work, and the clauses in question were aimed at relieving that situation.

In deciding whether the foregoing amount to "unfair methods of competition" or "unfair or deceptive acts or practices in commerce" under the Federal Trade Commission Act, we have not overlooked the most recent major utterance of the national labor policy, as set out in the Labor-Management Relations Act, 1947, which deprecates interference with the normal flow of commerce or full production, in manner inimical to the general good. But because these activities are reasonably related to the advancement of labor well-being—itself a principal object of the national policy—and tend, by the consequent raising of labor standards, to improve the industry output both in quality and in quantity, they cannot fairly be said have overflowed the bounds of permissible labor-management negotiation into the illegal area of oppressive trade restraint hurtful to the public at large.

Counsel supporting the complaint rely heavily on the landmark decision of *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150 (1940), which held that "any combination which tampers with price structures is engaged in unlawful activity." *Id.* at 221. The Commission accepts this proposition as basic and has consistently followed it. In citing it here, however, counsel supporting the complaint beg the question by overlooking the statutory immunization afforded a labor union which, far from participating in a conspiracy with businessmen bent upon monopolistic restraints, "is acting on its own self-interest and for the betterment of its members, free and independent of a combination with non-labor groups * * *." *Anderson-Friberg, Inc.* v. *Clary*, 98 F. Supp. at 82.

We recognize that arguments may be advanced, sound or fallacious, that such a broad immunity may no longer be in the public interest. But such arguments are more properly a legislative concern than a concern of the Commission or the courts. Our duty is to adhere to our paramount responsibility of following the national policy as expressed in the applicable statutes and as judicially interpreted.

We therefore conclude that the practices in which respondents have indulged are among those countenanced by the national policy respecting labor disputes. In implementing that policy, Congress has afforded a legal immunity primarily directed toward contracting

the injunctive jurisdiction of the Federal courts. This agency has the duty, however, of giving due consideration to that policy in its administration of the Federal Trade Commission Act. "Congressionally permitted union activities may restrain trade in and of themselves. There is no denying the fact that many of them do so, both directly and indirectly. Congress evidently concluded, however, that the chief objective of antitrust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition." *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 811 (1944). We therefore hold that because the practices here under consideration are among such "congressionally permitted union activities" they do not constitute unfair acts or practices or unfair methods of competition in commerce within the meaning of the Federal Trade Commission Act.

We do not find it necessary to discuss the other points raised by counsel for respondents in his brief and oral argument, viz, that all activities of labor subject to the Federal power were placed within the exclusive jurisdiction of the National Labor Relations Board; that the Federal Trade Commission, by the terms of its own statute, lacks jurisdiction over labor unions since they are not organized for their own profit or that of their members; that the challenged activities are not in interstate commerce; and that some respondents did not participate in the challenged acts.

The appeal is accordingly denied, and the initial decision is adopted as the decision of the Commission.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the hearing examiner's initial decision in this proceeding, and the matter having come on to be heard upon the record, including the briefs and oral arguments of counsel; and the Commission having rendered its decision denying said appeal and adopting the initial decision as the decision of the Commission:

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

IN THE MATTER OF

BENJAMIN GLICKMAN AND ISAAC GLICKMAN TRADING AS GLICKMAN BROS.

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

Docket 6713. Complaint, Jan. 22, 1957—Decision, Dec. 27, 1957

Order requiring a manufacturing furrier in New York City to cease misbranding and false invoicing of fur products and to comply generally with requirements of the Fur Products Labeling Act.

Mr. Ross D. Young, Jr. and *Mr. Robert E. Vaughan* for the Commission.

Mr. Max Zucker, of New York, N.Y., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

PRELIMINARY STATEMENT

Benjamin Glickman and Isaac Glickman, individually and as copartners trading as Glickman Bros., hereinafter referred to as respondents, are charged with misbranding and issuing false and deceptive invoices in connection with the sale of fur products. The complaint charges that respondents misbranded their fur products by failing to show on the labels attached to each fur product which they manufacture (1) the country of origin and (2), the item number thereof. The complaint further alleges that respondents falsely and deceptively invoiced their fur products by failing to show on their sales invoices (1) the country of origin of the fur and (2), the item number thereof.

Respondents filed an answer to the complaint admitting that they manufactured, sold, and distributed fur products in "commerce," admitted the allegations as to misbranding, but denied the allegations as to false and deceptive invoicing on the ground that they had no intent to deceive. Thereafter, counsel for respondents and counsel supporting the complaint negotiated for a consent agreement. Respondents were willing to execute an agreement to cease and desist misbranding their fur products, as alleged in the complaint, by failing to show on each fur product the (1) country of orgin and (2), the item number thereof, but refused to agree to a consent cease and desist order covering and including each and all of the mandatory requirements of section 4(2) (A) through (F) and section 5(b) (1) (A) through (F) of the Fur Products Labeling Act. Respondents con-

tend that, since the complaint charges that respondents were deficient in only two of the six labeling and invoicing requirements of sections 4(2) and 5(b)(1) of the act, therefore, the cease and desist order to be entered herein should only require cessation of the labeling and invoicing deficiencies found and should not contain and include provisions making it mandatory for respondents to likewise observe the other affirmative requirements of sections 4(2) and 5(b)(1) of the act. Respondents contend that, in the event they should agree to such a broad order as proposed by counsel supporting the complaint, persons in the fur industry who might read such an order would infer and conclude that respondents had violated each and all of the mandatory requirements of section 4(2) and section 5(b)(1) of the act, which would reflect on respondents' integrity and damage them financially in the operation of their business. Rather than accept such a broad order, respondents requested a hearing in the belief that the order to be issued as a result of the evidence introduced at a hearing would, under the law, including the Administrative Procedure Act, only contain those mandatory requirements of said sections of the act which respondents might be found deficient and which respondents admitted.

Hearings were held in New York, N.Y., on March 25 and April 25, 1957, for the presentation of evidence in support of the complaint. Respondents rested at the close of the testimony in support of the complaint and did not present any direct testimony. There is actually no disagreement as to the facts. Proposed findings, conclusions, and order have been submitted by counsel supporting the complaint and counsel for respondents. The examiner has considered the evidence and testimony introduced at the hearing and the proposed findings of fact, conclusions, and order submitted by counsel. All proposed findings and conclusions not specifically found or concluded in this decision are rejected. Upon the basis of the entire record the examiner makes the following findings of fact, conclusions, and issues the following order:

Findings of Fact

The respondents Benjamin Glickman and Isaac Glickman are copartners trading as Glickman Bros., with their office and principal place of business located at 146 W. 29th Street, New York, N.Y. Since the effective date of the Fur Products Labeling Act, August 9, 1952, and for approximately 25 years prior thereto, respondents have been engaged in the manufacture, sale, and distribution in "commerce"

of small fur garments, such as stoles, capes, and furs to retail and department stores. Respondents manufacture and sell mink garments exclusively. Approximately 80 percent of the mink skins purchased by respondents for manufacture are raw skins which are delivered direct from the dealer to the dresser for processing preparatory to manufacture by respondents into fur garments. About 70 percent of the mink skins purchased by respondents originate in the United States and the remaining 30 percent originate in five or six foreign countries, including Norway, Denmark, Sweden, and Scandinavian countries. The raw skins purchased by respondents do not bear individual tags showing the country of origin of each skin. The only reference to the origin of the individual raw skin is contained on the invoice delivered by the dealer to respondents at the time of purchase. Occasionally respondents purchase more than one batch of raw mink skins from a dealer which may have originated in more than one foreign country. In such a situation, when the raw skins are sent to the processor, skins which have originated in more than one foreign country may be placed in one vat during processing, thus making it impossible to thereafter identify the country of origin of each particular skin. Although the evidence shows that a tag or label was attached to each individual mink garment manufactured, sold, and distributed in "commerce" by respondents which contained the word "Mink" and the country of origin thereof, nevertheless, since raw furs from several foreign countries may have been intermingled during processing in some instances, it follows that, in such instances, the designation on the label as to country of origin may not have been an accurate representation. This was one of the two types of violations alleged in the complaint with respect to misbranding. Respondents admitted this allegation. The other related to the failure of respondents to list the item number [1] on the tag or label attached to each individual fur garment manufactured by respondents. Respondents also admitted this allegation and it is found that, prior to September 1956, the tag or label on fur products manufactured, sold, and distributed by respondents did not show the item number thereof. However, since Sepember 1956, respondents have been maintaining a record of the item number on each fur product which they manufacture and such item number is shown on the tag or label which is attached to each individual fur garment.

The other type of violation alleged in the complaint concerns respondents' practices with respect to invoicing. Respondents do not

[1] By maintaining an item number for each individual fur garment, a line of continuity from the source to the finished fur product may be maintained.

deny that their invoicing practices did not comply with the requirements of the act in every respect. It is found, with the exception of one invoice dated January 26, 1956, that, for the period beginning January 3, 1956 (invoice No. 866) through September 28, 1956 (invoice No. 1643), the invoices issued by respondents in connection with the sale and delivery in "commerce" of their manufactured fur products did not contain the item number as required by rule 40(a) of the rules and regulations promulgated under the Fur Products Labeling Act nor the country of origin as required by section 5(b)(1)(F) of the act.

CONCLUSIONS

The aforesaid acts and practices of respondents, as found herein, are in violation of the provisions of the Fur Products Labeling Act and the rules and regulations promulgated thereunder, and constitute unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

At the time of the hearing, the principal question for decision was the form of the cease and desist order to be issued herein. Since that time the Commission has resolved the question by its decision in *Mandel Brothers, Inc.*, docket No. 6434, issued on July 5, 1957. In that case, as here, the respondent was found to have violated the Fur Products Labeling Act by failing to label and invoice its fur products in accordance with some of the mandatory requirements of sections 4(2) and 5(b)(1) of the act. However, the cease and desist order contained in the initial decision in that case was limited in scope to the mandatory requirements of sections 4(2) and 5(b)(1) which respondent was found to have failed to observe, and did not include each of the other mandatory requirements of sections 4(2) and 5(b)(1) of the act. On appeal from the examiner's failure to include each of the mandatory provisions of sections 4(2) and 5(b)(1) in the cease and desist order, the Commission held that, in such a case, the order should include each of the mandatory provisions of sections 4(2) and 5(b)(1) even though respondent was found deficient in only some of the labeling and invoicing requirements of sections 4(2) and 5(b)(1) of the act. Accordingly, the order to be issued herein will follow that decision.

ORDER

It is ordered, That respondents, Benjamin Glickman and Isaac Glickman, individually and as copartners trading as Glickman Bros., or under any other name, and respondents' representatives, agents

and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale or offering for sale in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the manufacture for sale, sale, offering for sale, transportation, or distribution of fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as "commerce", "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(A) The name or names of the animal or animals that produced the fur, as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

(F) the name of the country of origin of any imported furs used in the fur product; and

(G) the item number of such fur product as required by rule 40(a) of the regulations under the Fur Products Labeling Act.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(A) The name or names of the animal or animals that produced the fur as set forth in the Fur Products Name Guide and as prescribed by the rules and regulations;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name and address of the person issuing such invoice;

(F) the name of the country of origin of any imported furs contained in the fur product; and

(G) the item number of such fur product as required by rule 40(a) of the regulations under the Fur Products Labeling Act.

OPINION OF THE COMMISSION

By Secrest, Commissioner:

In his initial decision filed after hearings were concluded, the hearing examiner found that the respondents had misbranded and falsely invoiced certain of their fur products in respects there designated. Holding that these acts and practices were in violation of the Fur Products Labeling Act and of rules and regulations promulgated thereunder, the initial decision's order to cease and desist proposes to require that the respondents correct the labeling and invoicing deficiencies there found and directs their adherence in future labeling and invoicing to the requirements prescribed under sections 4(a)(2) and 5(b)(1) of that act. The appeal filed by the respondents from the initial decision excepts to the scope of the order.

The respondents manufacture and sell in commerce to retailers and wholesalers mink stoles and capes and other garments composed of that fur. The respondents have admitted the juridictional allegations of the complaint and interpose no exceptions to the hearing examiner's finding that their labeling practices constituted misbranding within the meaning of the Act in that certain of the labels attached to their garments have not contained statements, as required under section 4(a)(2) of the act, correctly identifying the country of origin of imported furs contained in their fur products. Furthermore, prior to September 1956, their garment labels contained no item number designating the particular products being sold.

Identification by item number on labels and invoices for garments subject to the Act is required under rule 40(a) of the rules promulgated by the Commission pursuant to authority delegated to it under the Fur Products Labeling Act. As to respondents' invoicing practices, the appeal further concedes that the fur products were not duly identified on sales invoices by item numbers and that the invoices issued by the respondents departed from the requirements of section 5(b)(1) of the act in that they likewise omitted a statement as to the country of origin of imported furs which were components of the garments.

In addition to prescribing that the country of origin of any imported fur skins contained in garments be disclosed on required

labels and invoices for products covered by the act, sections 4(a)(2) and 5(b)(1) also require that such labels and invoices show the name or names of the animals producing the fur, that they identify, in manners there designated, the manufacturers or sellers of the fur products and that disclosures be made, when such be the fact, that the garments contain used fur, are composed of paws, tails, bellies or waste fur or contain dyed, bleached or otherwise artificially colored fur; and the sections specify that failure to supply such information on labels and invoices likewise constitutes misbranding and false invoicing. The order contained in the initial decision includes provisions directing that the respondents similarly observe the foregoing companion requirements of those subsections in their future marketing of garments covered by the act. No evidence was received indicating that the respondents had failed in any manner to disclose labeling or invoicing information prescribed under these latter provisions and no violations on those scores were found in the initial decision. The appeal contends that the scope of the order should be limited solely to directing compliance with those requirements of the subsections and rules which the evidence shows the respondents heretofore have failed to observe and that the proscriptions additionally requiring adherence in labeling and invoicing to the subsections' companion provisions lack adequate legal basis.

We are of the view, however, that the initial decision's order has sound basis both in law and public policy. Under the act, a fur product subject thereto is misbranded and its manufacture for sale or its distribution is unlawful unless it has attached to it a label setting forth clearly and conspicuously all the data indicated as necessary to be included thereon by section 4(a)(2); and such garment is falsely invoiced unless there is issued in connection with its sale an invoice containing each of the statements contemplated by section 5(b)(1). It is clear, therefore, that the essence of the respondents' illegal conduct consisted of their failure to attach proper labels to their fur products and to issue proper invoices in connection with sales thereof.

In our decision in the matter of *Mandel Brothers, Inc.*, docket No. 6434 (decided July 5, 1957), we rejected, for reasons there stated, contentions similar to those passed here by the respondents. We held in that case and reaffirm that ruling here that orders to be issued in connection with offenses where there has been failure to comply fully with requirements of sections 4(a)(2) or 5(b)(1) should require not only cessation of the practices theretofore engaged

in but should require that proper labels be attached and proper invoices be issued in full compliance with sections 4(a)(2) and 5(b)(1). We therefore deem the hearing examiner's order in this proceeding to be appropriate in scope and accordingly are denying respondents' appeal and are adopting the initial decision as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the above-named respondents from the initial decision of the hearing examiner and upon the briefs filed in support of and in opposition to the appeal; and

The Commission having rendered its decision denying the appeal and adopting the initial decision of the hearing examiner as the decision of the Commission:

It is ordered, That the respondents 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 the order to cease and desist.

IN THE MATTER OF

RODNEY, INC., ET AL.

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

Docket 6824. Complaint, June 24, 1957—Decision, Dec. 28, 1957

Consent order requiring sellers in Chicago to cease advertising falsely in newspapers that greatly exaggerated and fictitious prices were the usual retail prices for their sewing machines and that the difference between such prices and the advertised prices represented savings to purchasers; and that their machines carried a "25-Year Guarantee" or "Lifetime Guarantee" when in fact the electrical parts were guaranteed for only 1 year and other parts not at all.

Mr. William A. Somers for the Commission.

Froelich, Grossman, Teton and Tabin, by *Mr. Seymour Tabin*, of Chicago, Ill., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) issued its complaint herein, charging the above-named respondents, Rodney, Inc., a corporation, and Irwin Ratner, Joseph Wandel, and Joseph Ratner, individually and as officers of said corporation, with having violated the provisions of the Federal Trade Commission Act in certain particulars. The respondents were duly served with process and in due course filed their answer. The initial hearing was cancelled pending negotiations of counsel for a consent agreement.

On October 25, 1957, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement containing consent order to cease and desist," which had been entered into by and between all the respondents herein except Joseph Ratner, and by their attorney and William A. Somers, counsel supporting the complaint, under date of October 24, 1957, subject to the approval of the Bureau of Litigation of the Commission. Such agreement had been thereafter duly approved by that Bureau.

On due consideration of the said "Agreement containing consent order to cease and desist," the hearing examiner finds that said agreement, both in form and in content, is in accord with section 3.25 of the Commission's rules of practice for adjudicative proceedings and that by said agreement the parties have specifically agreed that:

1. Respondent Rodney, Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Illinois. Respondents Irwin Ratner and Joseph Wandel are individuals and officers of said corporate respondent. Said corporate and individual respondents have their office and principal place of business located at 5671 Milwaukee Avenue, Chicago, Ill.

The individual respondent, Joseph Ratner, named in the complaint as secretary of the corporate respondent, is not now and never has been the secretary of the said corporate respondent. The affidavit of Irwin Ratner, which is attached to and made a part of the agreement, states that Joseph Ratner is not now and never has been the secretary of respondent Rodney, Inc., and that Joseph Ratner has never been an employee and is not now connected with the respondent corporation in any capacity whatsoever, and has not in any manner formulated, controlled, nor directed the acts and practices of the respondent Rodney, Inc.

2. Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 24, 1957, issued its complaint in this proceeding against respondents, and a true copy was thereafter duly served on respondents.

3. The respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. This agreement disposes of all of this proceeding as to all parties.

5. The respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

7. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

8. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

Upon due consideration of the complaint filed herein, and the said "Agreement containing consent order to cease and desist", the latter is hereby approved, accepted and ordered filed, the same not to become a part of the record herein, unless and until it becomes a part of the decision of the Commission. The hearing examiner finds from the complaint and the said "Agreement containing consent order to cease and desist" that the Commission has jurisdiction of the subject matter of this proceeding and of the person of the respondents signatory to said agreement; that the complaint states a legal cause for complaint under the Federal Trade Commission Act both generally and in each of the particular charges alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the full disposition of all the issues in this proceeding, such order to become final only if and when it becomes the order of the Commission; and that said order, therefore, should be, and hereby is, entered as follows:

ORDER

It is ordered, That respondents Rodney, Inc., a corporation, and its officers, and Irwin Ratner and Joseph Wandel, individually and as officers 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 sewing machines or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

1. Representing that certain amounts are respondents' regular and customary retail prices of their products when such amounts are in excess of the prices at which such products are regularly and customarily sold by respondents at retail;

2. Representing any savings are afforded on the sale of their products unless the represented savings are based upon the price at which such products offered are regularly and customarily sold in the normal course of business;

3. Representing that their products are guaranteed for any period of time or in any other manner unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

It is further ordered, That the complaint be, and it is hereby, dismissed as to respondent Joseph Ratner.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 28th day of December 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Rodney, Inc., a corporation, and Irwin Ratner and Joseph Wandel, individually and as officers of said corporation, 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 the order to cease and desist.

IN THE MATTER OF

EXPOSITION PRESS, INC., ET AL.

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

Docket 6638. Complaint, Sept. 18, 1956—Decision, Jan. 7, 1958

Consent order requiring a publisher in New York City to cease making in advertising a variety of false claims as to the size and extent of its organization, the amount of its business, the number and quality of services rendered authors, etc., to induce authors to sign contracts for publication of their books under its "Cooperative Publishing Plan," and including such false representations as that authors paid a "minimal subsidy" when they actually paid the entire cost.

Mr. Charles S. Cox supporting the complaint.
Mr. Philip Adler, of New York City, for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on September 18, 1956, charging them with violation of the Federal Trade Commission Act as set forth in said complaint. After issuance and service of the complaint, separate answer was filed for the respondent Mildred Langer. Joint answer was also filed for respondents Exposition Press, Inc., and Edward Uhlan. After filing of these answers, hearings were held in New York City at which evidence in support of the allegations of the complaint was received. At these hearings 1,000 pages of testimony were taken and over 200 exhibits were offered. Subsequently respondents and their counsel and counsel supporting the complaint entered into an agreement containing a consent order to cease and desist from certain of the practices complained of which agreement purports to dispose of all of the issues in this proceeding. This agreement has been duly approved by the assistant director and director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore designated to act as hearing examiner herein, for his consideration in accordance with section 3.25 of the rules of practice of the Commission.

It is noted that in said agreement it is stated that the individual respondent Mildred Langer, although she was vice president and secretary of the corporate respondent, Exposition Press, Inc., had no control over the acts and practices of the corporate respondent. Counsel supporting the complaint recommends that the complaint be

dismissed as to her. This is treated as a motion to dismiss as to respondent Mildred Langer both in her individual capacity and as an officer of the corporate respondent and is granted.

It is further noted that counsel supporting the complaint in said agreement recommends that the charge in the complaint relative to respondents' use of the word "Press" be dismissed, giving what is considered adequate reason therefor. These charges are contained in the first part of paragraph 6 and the first part of paragraph 7 of the complaint. This is also treated as a motion and is granted.

It is further noted that counsel supporting the complaint in said agreement states that the agreement adequately covers all other material allegations of the complaint; that any allegations not covered are minor ones on which the evidence if taken would probably not be sufficient to sustain an order and for that reason he is willing to abandon such charges. This is in effect a motion to dismiss as to any charges in the complaint not covered by the order to cease and desist in the agreement, on the ground that in the opinion of counsel such charges could not be proven, is treated as such a motion and granted.

In said agreement, respondents herein have admitted all of the jurisdictional facts alleged in the complaint and have agreed that the record may be taken as if findings of the jurisdictional facts had been made in accordance with such allegations. Said agreement provides further that respondents waive all further procedural steps before the hearing examiner and the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement and that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered into after a full hearing and may be altered, modified or set aside in the manner provided for other orders of the Commission and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order, the hearing examiner finds that the agreement and the order contained therein adequately cover all of the allegations of the com-

plaint and provide for a fair, just and appropriate disposition of this proceeding. The order and the agreement are hereby accepted and ordered filed upon becoming a part of the Commission's decision pursuant to sections 3.21 and 3.25 of the rules of practice and the hearing examiner accordingly makes the following findings for jurisdictional purposes, and order:

1. Respondent, Exposition Press, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York. Individual respondent Edward Uhlan is president and treasurer and individual respondent Mildred Langer was vice president and secretary, respectively, of the corporate respondent. Individual respondent Edward Uhlan, formulates, directs, and controls the acts, practices, and policies of the corporate respondent, whereas, individual respondent Mildred Langer was vice president and secretary of the corporate respondent but subject to the direction and control of individual respondent Edward Uhlan. Respondents have their office and principal place of business at 386 Fourth Avenue, New York 16, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act. This proceeding is in the public interest.

ORDER

It is ordered, That respondent Exposition Press, Inc., a corporation, and its officers, and respondent Edward Uhlan, individually and as an officer of said corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the solicitation of contracts for the printing, promotion, sale and distribution of books, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or indirectly:

1. That they publish a new titled book each day of the year or a number in excess of those actually published for any specific period;

2. That none of the books published by them have resulted in failures;

3. That their plan of publication and promotional efforts will result in the sale of at least 650 copies or will sell out the first edition or will usually result in the author making a profit on the publication subsidy paid by him;

4. That their sales promotion includes paid space advertisements of their authors' books in the New York Times Book Review or any other newspaper or magazine, without additional charge, unless such is the fact;

5. That their subsidy charge to an author is based only on the literary merit, sales appeal, typographical and production problems of each particular book;

6. That theirs is a "cooperative" publishing plan unless they contribute a sum equal to the author's subsidy;

7. That the sales will warrant more than one edition of any book published by them or that their past sales have been such as to require more than one edition of their books in the majority of cases;

8. That their plan of publication, promotion, sales and distribution of books is endorsed or recommended by established authors, literary agents, publishers' or writers' groups who are acquainted with their method of operation, unless such is the fact;

9. That the cost of publication, promotion, sales and distribution of books by them compares favorably with the lowest cost of trade-publishers, unless such is the fact;

10. That the majority editorial opinion of their staff of a submitted manuscript is laudatory, when such is not the fact;

11. That they will consider for their imprint and will only recommend for publication those manuscripts with the requisite literary merit and sales appeal;

12. That any person has read a given manuscript, when such is not the fact;

13. That they supply their authors with the same promotion services that the largest trade book publishers give their big name best selling authors;

14. That they have salaried travelling salesmen who devote all their time in direct selling of only their books, unless such is the fact;

15. That their books are generally purchased in large numbers as a common practice by leading public, institutional and private libraries throughout the United States;

16. That their promotion will always result in placement of their books in book stores in the vicinity of the author's home or residence;

17. That they will always provide copies of the promoted book in time for local purchase at the time of an interview and guest appearances on TV and radio programs;

18. That they arrange for displays of their author's books at conventions without charge to the author, unless such is the fact;

19. That they will always arrange speaking appearances, autograph parties, TV and radio interviews or guest appearances;

20. That their books have been selected for distribution by book club groups in excess of the titled books actually selected;

21. That they have sold motion picture rights, unless such is a fact, and sold reprint rights to newspapers and magazines of their author's book in excess of the number actually sold;

22. That they publish and also bind all the copies of the titled book they agree to publish, when such is not the fact;

23. That they have sold serial rights for magazine publication of a subsidized manuscript after the author executes a contract with them, unless such is the fact.

B. Overstating, directly or indirectly:

1. The number of titled books they have published which have sold sufficient copies to repay the author the subsidy paid by him;

2. The number of authors who are satisfied with their publishing and promotional service or the number of authors who ask them to publish subsequent books.

It is further ordered, That this proceeding be and the same hereby is dismissed as to respondent Mildred Langer.

It is further ordered, That the charges in the complaint found in paragraphs numbered six and seven of the complaint in regard to use of the word "Press" in the corporate name of respondent, on letterheads, in circulars and in advertisements and in newspapers and magazines be and the same hereby are dismissed.

It is further ordered, That all other charges in the complaint in regard to unfair methods of competition and unfair and deceptive acts and practices, except those covered by the order to cease and desist set forth above, be and the same hereby are dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner did, on the 7th day of January 1958, become the decision of the Commission; and, accordingly:

It is ordered, That the respondents Exposition Press, Inc., and Edward Uhlan 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 the order to cease and desist.