IN THE MATTER OF

JOSEPH A. BROWN TRADING AS JOSEPH BROWN WOOL COMPANY, ETC.

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

Docket 7082. Complaint, Mar. 4, 1958—Decision, July 2, 1958

Consent order requiring sellers in Woonsocket, R. I., to cease violating the Wool Products Labeling Act by labeling as "cashmere 70% wool 30%," and invoicing as "70% cashmere waste 30% wool," bales of stock which contained only reprocessed cashmere and reprocessed cashmere waste, respectively, and by failing in other respects to comply with the labeling requirements of the Act.

Mr. Alvin D. Edelson supporting the complaint.
Respondents, unrepresented.

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on March 4, 1958, charging them with having violated the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act, through the misbranding of certain wool products and falsely identifying the constituent fibers thereof in invoices. After being served with said complaint, respondents appeared and entered into an agreement containing consent order to cease and desist, dated May 3, 1958, purporting to dispose of all of this proceeding as to all parties. Said agreement, which has been signed by all respondents and by counsel supporting the complaint, and approved by the Director and Assistant Director of the Commission's Bureau of Litigation, has been submitted to the above-named hearing examiner for his

consideration, in accordance with Section 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint, and have agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive any further procedural steps before the hearing examiner and the Commission, the making of findings of fact or conclusions of law, and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with said agreement. It has been agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing and that the complaint may be used in construing the terms of said order. It has also been agreed that the aforesaid 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.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order provided for in said agreement covers all the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties, said agreement is hereby accepted and is ordered filed upon this decision's becoming the decision of the Commission pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and the hearing examiner, accordingly, makes the following jurisdictional findings and order.

1. Respondent Joseph A. Brown is an individual doing business as the Joseph Brown Wool Company and the Joseph A. Brown Company, and maintains his business address at 496 Rathbun Street, Woonsocket, R.I.

Respondents Samuel Pearlman and Yale Goldberg are individuals and partners in the firm of the Yale Wool Waste Company and maintain their business address at 176 Federal Street, Boston, Mass.

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 Wool Products Labeling Act of 1939 and

1 Order

the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That the respondent, Joseph A. Brown, individually, and doing business as the Joseph Brown Wool Company, and the Joseph A. Brown Company, or under any other name, and Samuel Pearlman and Yale Goldberg, individually, and as partners doing business as the Yale Wool Waste Company, 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 offering for sale, sale, transportation or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, and the Wool Products Labeling Act of 1939, of wool products, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein;

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total fiber weight of such wool product, exclusive of ornamentation not exceeding five percentum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage by weight of such fiber is five percentum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool products, of any nonfibrous loading, filling, or adulterating matter;

(c) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

It is further ordered, That respondent, Joseph A. Brown, individually, and doing business as the Joseph Brown Wool Company, and the Joseph A. Brown Company, or under any other name, and Samuel Pearlman and Yale Goldberg, individually, and as partners doing business as the Yale Wool Waste Company,

or under any other name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the sale of wool products, or any other textile fabrics in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting on invoices, or through other means, the character of the constituent fibers of said wool products, or other textile products.

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 2d day of July 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

RETAIL PAINT AND WALLPAPER DISTRIBUTORS OF AMERICA, INC., ET AL.

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

Docket 6367. Complaint, June 24, 1955—Order, July 3, 1958

Order dismissing, as not sustained by the record, complaint charging associations of paint dealers with conspiring to force manufacturers to sell paint and allied products only to recognized independent dealers.

INITIAL DECISION DISMISSING COMPLAINT

By *Earl J. Kolb*, hearing examiner.

Mr. Floyd O. Collins for the Commission.

Mr. Don O. Russell, of St. Louis, Mo., for Retail Paint and Wallpaper Distributors of America, Inc.;

Mr. Ephraim J. Faber, of New York, N.Y., for Paint Dealers Institute and Paint Dealers Association, Inc.;

Mr. Morton Sokol, of White Plains, N.Y., for Westchester Paint & Wallpaper Dealers Association, Inc.;

Mr. Theodore Schwartz, of Hoboken, N.J., for Paint Distributors Association of Long Island, Inc., and Hudson-Bergen County Paint Dealers Association; and

Mr. Harold Hochman, of Newark, N.J., for North Jersey Paint & Wallpaper Dealers Association, Inc.

This proceeding is before the undersigned hearing examiner for final consideration upon the complaint, answers thereto, testimony and other evidence, and proposed findings as to the facts and conclusions and briefs presented by counsel. The hearing examiner has given consideration to the proposed findings of fact and conclusions, and briefs in support thereof, submitted by all parties, and all findings of fact 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 duly advised in the premises, makes the following findings of fact and conclusions drawn therefrom and order:

1. Respondent Retail Paint and Wallpaper Distributors of America, Inc., a corporation, (sometimes hereinafter referred to as R.P.W.D.A.) is a trade association of members located at

34 North Brentwood Boulevard, St. Louis, Mo. It is composed of approximately 2,500 individuals, partnerships and corporations located throughout the United States, who are primarily engaged in the distribution of paint, wallpaper and kindred lines of merchandise at wholesale and at retail. Some of these paint and wallpaper dealers hold direct memberships in respondent R.P.W.D.A., while others are affiliated through other local dealer associations. There are approximately 27 such local dealer associations affiliated with said respondent. Its purposes being, among others: (a) Elimination of evils and bad or unethical practices existing in the trade, and encouraging uniformity of trade practices; (b) Promoting, encouraging, fostering and safeguarding the welfare and friendly relations of all segments of the industry, and the bringing about of closer cooperation between the dealer and distributor with the manufacturer, salesman, jobber, painting contractor and painter; (c) Diffusing and exchanging information regarding all matters pertaining to the industry, and encouraging, fostering and promoting modern methods of advertising; and (d) Encouraging the formation of local dealer associations in order that modern and intelligent merchandising methods may be advanced and equitable and fair practices followed.

2. Respondent Paint Dealers Institute (sometimes hereinafter referred to as PDI) is an unincorporated trade association located at 103 East 125th Street, New York, N.Y. Its purpose and objectives are similar to those of R.P.W.D.A. Its membership is composed of the six trade associations organized for the purpose of exchanging information regarding all matters pertaining to the industry; promoting equitable and fair trade practices; encouraging and promoting modern and intelligent merchandising methods; promoting, encouraging, fostering and safeguarding the welfare and friendly relations of all segments of the industry in order that there might be closer cooperation between the manufacturer, distributor, wholesaler, dealer and customer. The membership of each of these trade associations is composed of individuals, partnerships and corporations, which are principally engaged in the distribution of paint, wallpaper and allied products at retail and at wholesale. The associations which are members of respondent Paint Dealers Institute are as follows:

(a) Respondent, Paint Dealers Association, Inc., a corporation, (sometimes hereinafter referred to as PDA) located at 103 East 125th Street, New York, N.Y. The membership of this association

is located in the Boroughs of Bronx and Manhattan in New York City.

(b) Respondent Paint Distributors Association of Long Island, Inc., (sometimes hereinafter referred to as the Long Island Association) located at 166 Montague Street, Brooklyn, N.Y. The membership of this association is located on Long Island, N.Y.

(c) Respondent Westchester Paint & Wallpaper Dealers Association, Inc., (sometimes hereinafter referred to as the Westchester Association) located at 175 Main Street, White Plains, N.Y. The membership of this association is located in Westchester County, N.Y.

(d) Respondent Hudson-Bergen County Paint Dealers Association (sometimes hereinafter referred to as the Hudson-Bergen Association) located at 95 River Street, Hoboken, N.J. The membership of this association is located in Hudson and Bergen Counties in the State of New Jersey.

(e) Respondent North Jersey Paint & Wallpaper Dealers Association, Inc., (sometimes hereinafter referred to as North Jersey Association) is located at 786 Broad Street, Newark, N.J. The membership of this association is located in New Jersey.

(f) The Brooklyn Paint and Wallpaper Dealers Association, Inc., is located at 166 Montague Street, Brooklyn, N.Y. The membership of this association is located in Brooklyn, N.Y. This association and its members were not made parties respondent in this proceeding due to the fact that prior to the issuance of the complaint herein the Federal Trade Commission issued its order to cease and desist in Docket No. 6224, prohibiting the Brooklyn Paint and Wallpaper Dealers Association, Inc., and its members from engaging in acts and practices substantially similar to those charged in the present complaint.

3. The issue to be determined in this proceeding is whether or not the activities of the respondents were such as to constitute a combination and conspiracy or planned common course of action to induce or attempt to induce manufacturers and suppliers of paint, wallpaper and allied products to discontinue selling to certain retailers located in the New York Metropolitan Area who were not recognized by respondents as independent paint and wallpaper dealers.

4. One of the standing committees of respondent Retail Paint and Wallpaper Distributors of America, Inc., was the Trade Sales Committee which was organized to deal with unfair trade practices within the industry, and to eliminate practices detrimental

to the industry and the public. This committee from time to time disseminated information and suggestions to members and to manufacturers and suppliers, setting out the functions of distribution performed by the independent paint and wallpaper dealer and the relationship between the manufacturer and the dealer, suggesting that manufacturers should give their major selling emphasis to supporting the dealer sales organization and select sales outlets in the manner not to jeopardize his functioning outlets or reputation of his products. Based upon the entire record, it appears that the Retail Paint and Wallpaper Distributors of America, Inc., has been consistent in pointing out to manufacturers and suppliers the value of the independent paint dealer as a primary outlet for the distribution of their products, but has at no time attempted to dictate to such manufacturers and suppliers, to whom they shall or shall not sell.

5. Sidney Beyer, Executive Secretary of the Brooklyn Paint and Wallpaper Dealers Association, Inc., was very active in attempting to prevent manufacturers and suppliers from selling outlets other than the independent paint dealer, and in this connection instigated, or attempted to instigate, a form of boycott against certain manufacturers. In carrying out this design, he attempted to obtain the assistance of the Paint Dealers Institute and the Retail Paint and Wallpaper Distributors of America, Inc., and when the R.P.W.D.A. did not acquiesce in such demands his organization withdrew from membership therein. There is no evidence that any of the other respondents in this proceeding cooperated with, assisted or participated in any boycott or threat against manufacturers or suppliers for the purpose of forcing them to deal exclusively with the independent paint dealer. While the said Sidney Beyer was also executive secretary of respondent Paint Distributors Association of Long Island, Inc., the testimony and other evidence in this proceeding is not sufficient to support a finding that this respondent and its members entered into a combination and conspiracy to do and perform any of the acts and practices charged in the complaint.

6. In support of the charges of the complaint, evidence was introduced with reference to certain activities initiated by Sidney Beyer as executive secretary of the Brooklyn Paint and Wallpaper Dealers Association, Inc., involving three manufacturers: The Glidden Company, E. I. DuPont de Nemours Company and Pratt & Lambert, Inc.

7. On or about April 23, 1952, there was brought before a

meeting of the Brooklyn Paint and Wallpaper Dealers Association, Inc., the action of The Glidden Company in selling its full line to the Times Square Stores. It was determined at this meeting that in addition to independent action by the association and its members that the matter be referred to the Paint Dealers Institute and the Retail Paint and Wallpaper Distributors of America, Inc. The officers of the Retail Paint and Wallpaper Distributors of America, Inc., referred the matter to its Trade Sales Committee. Members of this committee, together with representatives of the various associations in the New York metropolitan area met with The Glidden Company and discussed the matter of the sales to the Times Square Stores, and subsequent thereto the members of the Trade Sales Committee reported back to the R.P.W.D.A. that the Times Square Stores was a substantial paint outlet and that its volume of paint ran into six figures, while the total volume purchased by all members of the association in the New York metropolitan area from Glidden was under $30,000. Nothing further was done relative to this matter by the R.P.W.D.A.

8. At the instigation of Sidney Beyer, the Paint Dealers Institute issued a notice for a mass meeting which was held on May 19, 1952, and to which all member associations and their respective members were invited. At this meeting the action of The Glidden Company in selling the Times Square Stores was discussed. The record does not disclose any positive action being taken by or through the Paint Dealers Institute other than a subsequent mailing of approximately 400 letters to manufacturers, jobbers, and salesmen's organizations, extolling the virtues and values of doing business with and preserving the independent dealer.

9. On April 21, 1953, a meeting of the Paint Dealers Institute was held at the request of Sidney Beyer for the purpose of discussing the action of E. I. DuPont in placing its full line of paints in the Carroll Linoleum Store in Brooklyn, and the action of Pratt & Lambert, Inc., in placing its paints in a supermarket on Long Island known as the Massapequa Market. Pursuant to the action taken as this meeting the Dealers Institute sent out a memorandum to all manufacturers and suppliers in which it was stated:

> The Institute recognizes that it is the right of a paint supplier to select whatever outlets he may choose for his products. However, in the interest of better business for all concerned, dealers as well as suppliers, the enclosed is

being called to your attention to make known the feeling of members of the Institute about such methods of distributing paint and paint accessories.

The enclosure with this letter was a copy of the resolution adopted by the Paint Dealers Institute. This resolution explains in detail the services rendered by the independent dealer, the failure of the supermarket to perform such services, and appeals to the dealers to select the independent dealer as a prime outlet.

10. In April 1953, Sidney Beyer also wrote the Retail Paint and Wallpaper Distributors of America, Inc., for the purpose of enlisting the assistance of the national association in the E. I. DuPont and Pratt & Lambert matters. The executive vice-president of R.P.W.D.A. immediately referred this matter to the Trade Sales Committee and in his letter of transmittal stated in part as follows:

It seems to me we should take the position that it requires trained sales people—people with technical knowledge of the proper use and application of the product to properly sell paints and to give the right service to the customer and to the manufacturer. We cannot have a part in selecting types of distribution outlets, but we certainly are on "solid ground" when we appeal to the manufacturers to give careful consideration to the distribution of their products through sources thoroughly familiar with the merchandise and its uses.

11. Subsequent thereto, the executive secretary of the Retail Paint and Wallpaper Distributors of America, Inc., together with the Eastern members of the Trade Sales Committee and representatives of the member associations of the Paint Dealers Institute called upon the Carroll Linoleum Store and the Massapequa Supermarket. It was the opinion of all except Sidney Beyer that the Carroll Linoleum Store was a satisfactory outlet for paint and wallpaper, as the proprietor proposed to put in a complete line of paint and wallpaper along with the floor covering business. As to the supermarket, it was found that the paint department was in the basement with no one to serve customers and very poorly displayed. As far as can be ascertained, nothing further was done with reference to these matters by any of the respondents to this proceeding.

12. Based upon the entire record in this proceeding, it appears that the respondents in this proceeding limited their activities to explaining the services of the independent dealer and the advantages of selecting him as a prime outlet for the products of manufacturers and suppliers of paint and allied products. This does not constitute a per se violation of law, and illegality cannot be inferred from this conduct alone. The activities of Sidney

Beyer individually and as Executive Secretary of the Brooklyn Paint and Wallpaper Dealers Association, Inc., cannot be charged to the respondents in this proceeding as there is no evidence in the record that the respondents participated in, agreed to, or ratified any of the activities of Sidney Beyer involving threats, coercion or boycott. In fact, Sidney Beyer in testifying in this proceeding stated he acted independently and without prior authorization and that the respondents did not acquiesce, approve or ratify any of his acts or conduct, but as a matter of fact he was called down for his actions.

13. In view of the above, it is the opinion of the hearing examiner that the charges of the complaint have not been sustained by the record in this proceeding.

It is therefore ordered, That the complaint in this proceeding be, and the same is hereby, dismissed.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

The complaint in this proceeding, charging respondents with violating Section 5 of the Federal Trade Commission Act, was dismissed by the examiner in his initial decision on the ground that the allegations have not been sustained by the record. Respondents are charged in substance with entering into and carrying out some form of an agreement or a planned common course of action to induce manufacturers of paint and allied products to discontinue selling to certain retailers not recognized by respondents as independent paint and wallpaper dealers. The examiner found that respondents had limited their activities to explaining the services of the independent dealer and the advantages of selecting him as a prime outlet and that illegality cannot be inferred from such conduct alone. Counsel supporting the complaint has appealed from the order dismissing the complaint.

The issue here, quite clearly, is whether the examiner correctly found that respondents' activities of an overt nature were within lawful bounds, since there is no substantial evidence otherwise to sustain the allegations.

The two principal associations involved herein are the Retail Paint and Wallpaper Distributors of America, Inc., a national association of paint dealers and others, and the Paint Dealers Institute, an organization of paint dealer associations in metropolitan New York. It appears that the said national association

and the Paint Dealers Institute were drawn into the controversial activities which form the basis for the complaint, by the Brooklyn Paint and Wallpaper Dealers Association, Inc., acting through its executive secretary, Sidney Beyer.[1] These associations were requested on several occasions in 1952 and 1953 by the said Sidney Beyer to do something about the actions of several manufacturers in selling paints in the New York area to outlets other than independent paint and wallpaper dealers.

During the period in question, respondents held some meetings and conferences for the discussion of such matters and made various preliminary inquiries or investigations. The only clearly established result of all this activity, however, was the circulation of letters (sent out by the Paint Dealers Institute to a number of manufacturers and suppliers) expounding on the merits of selling through the independent dealer. This record contains no evidence of threats or coercive acts toward suppliers which could be charged to the respondents named herein. There is no evidence of any effort by respondents to interfere in any way with the freedom of a supplier to select his own outlets, nor is there any basis for an inference that such was the purpose or effect of respondents' activities. There is in fact a considerable showing to the contrary. Contemporary documents make plain that respondents had no wish to dictate to suppliers as to their choice of outlets.

The examiner, having heard the testimony and having weighed all the evidence, was convinced that respondents had limited their activities to explaining the advantages of selecting the independent dealer and had not done more than this. From a finding to this effect he could properly conclude under the circumstances that the allegations of the complaint were not sustained. We believe that the examiner could reasonably find as he did, and, there being no clear showing of error, we will not reverse his judgment.

Accordingly, the appeal of counsel in support of the complaint is denied.

ORDER DISMISSING COMPLAINT

This matter having come before the Commission upon the appeal of counsel supporting the complaint from the initial de-

[1] The Brooklyn Association, not a party herein, was ordered, prior to the issuance of this complaint, to cease and desist from practices substantially similar to those alleged in this proceeding. *In the Matter of Brooklyn Paint and Wallpaper Dealers Association, Inc.*, Docket No. 6224 (Dec. 2, 1954).

cision of the hearing examiner dismissing the complaint herein, and the Commission having heard the appeal on briefs of counsel; and

The appeal having been denied for the reasons set forth in the accompanying opinion:

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

IN THE MATTER OF

EDWARD J. KEENAN ET AL. TRADING AS FRANKLIN INSTITUTE

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

Docket 6546. Complaint, Apr. 30, 1956[1]—Decision, July 3, 1958

Consent order requiring sellers in Rochester, N.Y., of correspondence courses designed to prepare purchasers for U.S. Civil Service positions, to cease representing falsely by advertisements in newspapers, magazines, booklets, circulars, etc., that they were connected with the U.S. Government, that specific vacancies existed in the Federal Civil Service in specified areas based on official Government estimates for which examinations would be held, and that their advertisements of "U.S. GOVT. JOBS" were official Government announcements; to cease making such false representations, along with a variety of others, through salesmen calling on prospects who answered aforesaid advertisements; and to cease using a fictitious trade name for the purpose of collecting delinquent accounts.

Mr. William R. Tincher, and *Mr. Thomas A. Deveny, III* supporting the complaint.

Mr. James T. Welch of the firm of *Davies, Richberg, Tydings, Landa & Duff* of Washington, D.C., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on April 30, 1956 charging them with violation of the Federal Trade Commission Act as alleged in said complaint. After service of the complaint and answer thereto, the said complaint was, on motion of counsel supporting the complaint, after expiration of time for answering said motion, amended by the hearing examiner to show that the respondents herein were Edward J. Keenan, John L. Keenan, Jr., Richard M. Keenan and Thomas A. Keenan, who were co-partners trading as Franklin Institute. The hearing examiner, also on motion of respondents after hearings, dismissed subparagraph 12 of paragraph nine of the complaint on the record at the hearing.

Hearings were held in a number of cities during which over 1,800 pages of testimony were taken and a large number of exhibits were admitted into evidence.

Subsequent thereto, respondents Edward J. Keenan and John

[1] Amended Dec. 2, 1957.

L. Keenan, Jr., entered into an agreement with counsel supporting the complaint, containing an order to cease and desist from certain practices complained of, which agreement purports to dispose of all the issues in this proceeding as to all parties. It is agreed that the amended complaint, insofar as it relates to the respondents Richard M. Keenan and Thomas A. Keenan be dismissed without prejudice. It is agreed further that subparagraphs 5, 8, and 10 of paragraph nine of the amended complaint and the allegations concerning the use of the word "age" in subparagraph 9 of paragraph nine of the amended complaint be dismissed. Agreement for dismissal of these two respondents from the proceeding is based on two affidavits attached and made a part of the agreement. The hearing examiner finds these two affidavits are sufficient grounds in this particular proceeding for dismissing without prejudice as to respondents Richard M. Keenan and Thomas A. Keenan. The agreement states that counsel supporting the complaint believe that there is insufficient evidence available to sustain the allegations contained in subparagraphs 5, 8, and 10 and the above mentioned portion of subparagraph 9, all in paragraph nine of the amended complaint, and hence agree to their dismissal.

Respondents Edward J. Keenan, and John L. Keenan, Jr., formerly copartners trading as Franklin Institute, in the aforesaid agreement have admitted all of the jurisdictional allegations of the amended complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that said respondents waive all further procedural steps before the hearing examiner or 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 such agreement. It has also been agreed that the record herein shall consist solely of the amended complaint and said agreement, 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 after a full hearing and may be altered, modified, or set aside in the manner

provided for other orders, and that the complaint may be used in constructing the terms of the order.

This proceeding having now come on for final consideration on the amended complaint and aforesaid agreement, the hearing examiner finds that the agreement and the order contained therein cover all the allegations of the complaint and provide a complete, fair and appropriate disposition of this proceeding. The order and the agreement are therefore accepted and ordered filed upon becoming a part of the Commission's decision pursuant to Sections 3.21 and 3.25 of the Commission's Rules of Practice. The hearing examiner accordingly makes the following findings for jurisdictional purposes and order.

1. Respondents Edward J. Keenan, and John L. Keenan, Jr., were formerly copartners, trading as Franklin Institute with their office and principal place of business located at 550 East Main Street in the city of Rochester, N.Y.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the above-named respondents. 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 respondents, Edward J. Keenan and John L. Keenan, Jr., formerly copartners trading as Franklin Institute, or trading under any other name; their agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of courses of instruction, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication:

1. That specific vacancies in the Federal Civil Service exist, or will exist in the immediate future, or that said vacancies exist or will exist in designated areas, or that Federal Civil Service examinations will be held for said vacancies, unless such are the facts.

2. That a specified number or type of Federal Civil Service vacancies which exist or will exist in a specified metropolitan or any other geographical area are based upon official United States Government estimates.

3. That advertisements utilized to solicit business or inquiries

are an official announcement of, are sponsored by, or are inserted by the Federal Government.

4. That respondents have an official relationship with, or are connected with, or are endorsed by the United States Civil Service Commission.

5. That persons purchasing courses of instruction will receive a position in the Federal Civil Service.

6. That persons purchasing courses of instruction may cancel their contracts at any time or that said purchasers will receive a refund of the money they have paid, unless such is the fact.

7. That purchasers of respondents' courses of instruction will not have to pay for said courses unless or until they obtain positions in the Federal Civil Service.

8. That the persons being solicited will have no other opportunity to purchase respondents' courses of instruction.

9. That persons being solicited satisfy the physical requirements of the Federal Civil Service position they are seeking, unless such is the fact.

10. That a position in the Federal Civil Service cannot be obtained unless one of respondents' courses of instruction is purchased.

11. That any corporation, firm, or agency owned or controlled by respondents, or either of them, and used by them, or either of them, to collect past due accounts, is a separate or independent collection agency or an independent organization engaged in the business of collecting past due accounts.

It is further ordered, That the aforesaid respondents, in connection with the offering for sale, sale, or distribution of courses of instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from distributing, mailing, or otherwise disseminating reproductions of official forms, notices, or any other official documents of the United States Civil Service Commission.

It is further ordered, That the amended complaint, in so far as it relates to respondents Richard M. Keenan and Thomas A. Keenan be, and the same hereby is, dismissed without prejudice and that the allegations set out in subparagraphs 5, 8, and 10 of paragraph nine of the amended complaint and the allegations concerning the use of the word "age" in subparagraph 9 of paragraph nine of the amended complaint be, and the same hereby are, dismissed without prejudice.

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 3d day of July 1958, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Edward J. Keenan and John L. Keenan, Jr., formerly copartners trading as Franklin Institute, 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

DEHN & CO., INC., ET AL.

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

Docket 6977. Complaint, Dec. 12, 1957—Decision, July 3, 1958

Consent order requiring Seattle brokers of canned salmon and other food products, to cease discriminating in price in violation of Section 2(c) of the Clayton Act by such practices as (1) selling at net prices lower than those accounted for to the packers, and (2) granting price reductions by way of allowances or rebates which were not charged back to the packer-principals.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Dehn & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington. Respondent Karl Dehn and Alan Dehn are president and secretary-treasurer, respectively, of said corporation. Said individual respondents in conjunction and cooperation with each other, formulate, direct and control the acts, practices and policies of the said corporate respondent. The principal office and place of business of said corporate and individual respondents is located at 559 Colman Building, Seattle, Wash.

PAR. 2. Respondents are now, and for many years prior hereto have been engaged in the business of distributing food products including canned salmon. Respondents distribute as primary brokers, negotiating sales for the account of a number of packers located in various areas within and beyond the continental United States, including the Puget Sound and Columbia River areas, and the Territory of Alaska.

PAR. 3. Respondents are a substantial factor in the sale and distribution of canned salmon in the United States, and sell and distribute such food products generally through secondary

or field brokers in various marketing areas, to buyers for resale located throughout the United States. Respondents have directly or indirectly caused such food products, when sold, to be transported from the canning plants of the respective packers thereof, or from their warehouses, to buyers thereof located in various States of the United States other than the State or Territory of origin of such food products. Thus respondents are, and have been for many years prior hereto, engaged in a continuous course of trade and commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act.

PAR. 4. Respondents are usually compensated for their services in arranging for the sale and distribution of such food products by deducting a brokerage commission from the proceeds in their account of sale to their packer-principals. Said account of sale also itemizes various discounts and allowances granted to the purchaser, such as for dents and swells, cash, or for labeling, all of which are shown as deductions from the purchase price and are charged back to the packer-principals in the usual course of business. The brokerage commission deducted by respondents is customarily 5% of the net selling price. The field brokers are customarily compensated for their services by receiving from respondents as primary brokers, a brokerage commission in the amount of 2½% of the net selling price.

PAR. 5. Respondents, in the course and conduct of their business in commerce as primary brokers for various packer-principals, have made grants or allowances in substantial amount in lieu of brokerage to certain buyers of said canned salmon by affording differentials or concessions in price and various rebates and allowances to certain buyers, a part or all of which were not charged back to the various packer-principals but were, on the contrary, taken from all or a portion of the brokerage earnings of respondents and of their field brokers.

Among and including, but not necessarily limited to, the methods or means employed by respondents in so doing were the following:

(a) Selling to certain buyers at net prices which were less than those accounted for to the packer-principals.

(b) Granting to certain buyers deductions from price by way of allowances or rebates, a part or all of which were not charged back to the packer-principals.

PAR. 6. The acts and practices of respondents, as herein alleged, constitute violations of the provisions of subsection (c)

of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Cecil G. Miles and *Mr. John J. McNally* supporting the complaint.

Mr. Richard S. Sprague of the firm of *Bogle, Bogle & Gates*, of Seattle, Wash., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

Commission's complaint, issued December 12, 1957, charged respondents with violation of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act in connection with the sale of seafood products. In the complaint, respondent K. Alan Dehn, was incorrectly named as Alan Dehn. That K. Alan Dehn is the actual name of said respondent and that he was served with the said complaint is recognized by all parties in the agreement hereinafter referred to.

After being served with the complaint, respondents entered into an agreement dated April 11, 1958, containing a consent order to cease and desist disposing of all the issues in this proceeding, which agreement has been duly approved by the assistant director and the director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or 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 such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, 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 after a full

hearing and may be altered, modified, or set aside in the manner provided for other orders, 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, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming 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 Dehn & Co., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 559 Colman Building, Seattle, Wash. Respondents Karl Dehn and K. Alan Dehn are individuals and officers of respondent corporation with their office and principal place of business also located at 559 Colman Building, Seattle, Wash.

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 Clayton Act, as amended by the Robinson-Patman Act. This proceeding is in the interest of the public.

ORDER

It is ordered, That Dehn & Co., Inc., a corporation, and its officers and directors, and Karl Dehn and K. Alan Dehn, individually and as officers of said respondent corporation, and respondents' agents, representatives, or employees, directly or indirectly, or through any corporate or other device, in connection with the sale of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or passing on, either directly or indirectly, to any buyer or to anyone acting for or in behalf of or subject to the direct or indirect control of such buyer, brokerage earned or received by respondents on sales made for their packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of such brokerage, or by any other method or means.

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 3d day of July 1958, become the decision of the Commission; and, accordingly,

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

IN THE MATTER OF

GAVIN BROS., INC., ET AL.

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

Docket 6978. Complaint, Dec. 12, 1957—Decision, July 3, 1958

Consent order requiring a Seattle broker of canned salmon and other sea food to cease making allowances in lieu of brokerage to certain buyers in violation of Section 2(c) of the Clayton Act by such practices as (1) selling at net prices lower than those accounted for to its packer-principals; (2) granting price reductions, a part or all of which were not charged back to the packers; and (3) taking reduced brokerage on sales which involved price concessions.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Gavin Bros., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington. Respondent T. Jay Gavin is president of said corporation and formulates, directs and controls the acts, practices and policies of the said corporate respondent. The principal office and place of business of said corporate and individual respondents is located at 1500 Westlake Avenue North, Seattle, Wash.

PAR. 2. Respondents are now, and for many years prior hereto have been, engaged in the business of distributing food products including canned salmon. Respondents distribute as primary brokers, negotiating sales for the account of a number of packers located in various areas within and beyond the continental United States, including the Puget Sound and Columbia River areas, and the Territory of Alaska.

PAR. 3. Respondents are a substantial factor in the sale and distribution of canned salmon in the United States, and sell and distribute such food products generally through secondary or field brokers in various marketing areas, to buyers for resale located

throughout the United States. Respondents have directly or indirectly caused such food products, when sold, to be transported from the canning plants of the respective packers thereof, or from their warehouses, to buyers thereof located in various States of the United States other than the State or Territory of origin of such food products. Thus respondents are, and have been for many years prior hereto, engaged in a continuous course of trade and commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act.

PAR. 4. Respondents are usually compensated for their services in arranging for the sale and distribution of such food products by deducting a brokerage commission from the proceeds in their account of sale to their packer-principals. Said account of sale also itemizes various discounts and allowances granted to the purchaser, such as for dents and swells, cash, or for labeling, all of which are shown as deductions from the purchase price and are charged back to the packer-principals in the usual course of business. The brokerage commission deducted by respondents is customarily 5% of the net selling price. The field brokers are customarily compensated for their services by receiving from respondents as primary brokers, a brokerage commission in the amount of 2½% of the net selling price.

PAR. 5. Respondents, in the course and conduct of their business in commerce as primary brokers for various packer-principals, have made grants or allowances in substantial amount in lieu of brokerage to certain buyers of said canned salmon by affording differentials or concessions in price and various rebates and allowances, a part or all of which were not charged back to the various packer-principals but were, on the contrary, taken from all or a portion of the brokerage earnings of respondents and of their field brokers.

Among and including, but not necessarily limited to, the methods or means employed by respondents in so doing were the following:

(a) Selling to certain buyers at net prices which were less than those accounted for to the packer-principals.

(b) Granting to certain buyers deductions from price by way of allowances or rebates, a part or all of which were not charged back to the packer-principals.

(c) Taking reduced brokerage on sales which involved price concessions to certain buyers.

PAR. 6. The acts and practices of respondents, as herein

alleged, constitute violations of the provisions of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Cecil G. Miles and *Mr. John J. McNally* supporting the complaint.

Mr. Clay Nixon, of Seattle, Wash., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The complaint herein was issued on December 12, 1957, charging respondents with the violation of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act in connection with the sale of seafood products.

After being served with the complaint, respondents entered into an agreement dated April 11, 1958, containing a consent order to cease and desist disposing of all the issues in this proceeding, without hearing, which agreement has been duly approved by the assistant director and the director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly make in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or 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 such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, 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 after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, 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, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming 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 Gavin Bros., Inc., is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1500 Westlake Avenue North, Seattle, Wash. Respondent T. Jay Gavin is an individual and an officer in respondent corporation, his address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That Gavin Bros., Inc., a corporation, and its officers and directors, and T. Jay Gavin, individually and as an officer of said respondent corporation, and respondents' agents, representatives, or employees, directly or indirectly, or through any corporate or other device, in connection with the sale of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or passing on, either directly or indirectly, to any buyer or to anyone acting for or in behalf of or subject to the direct or indirect control of such buyer, brokerage earned or received by respondents on sales made for their packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of such brokerage, or by any other method or means.

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 3d day of

July 1958, become the decision of the Commission; and, accordingly,

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

IN THE MATTER OF

WALTER P. SHIEL & CO. ET AL.

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

Docket 6979. Complaint, Dec. 12, 1957—Decision, July 3, 1958

Consent order requiring Seattle brokers of canned salmon and other sea food products to cease making allowances in lieu of brokerage in violation of Section 2(c) of the Clayton Act, by such practices as (1) granting various discounts and rebates to certain purchasers which were not charged back to the packer-principals but were taken from respondents' brokerage; and (2) granting discounts and rebates through deduction of 2½ percent instead of the customary 5 percent brokerage in their settlement with their packer-principals.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Walter P. Shiel & Co., hereinafter referred to as corporate respondent, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Washington, with its offices and principal place of business located at 5506 White-Henry-Stuart Building, Seattle, Wash.

Respondent Walter P. Shiel is president; respondents Lawrence C. Calvert and Starr H. Calvert are vice presidents; and respondent William Calvert is secretary-treasurer, respectively, of corporate respondent, and their place of business is the same as that of corporate respondent. Said individual respondents, in conjunction with each other in their capacities as officers of corporate respondent, as aforesaid, and as individuals, control, direct, and, formulate the affairs and policies of the corporate respondent.

PAR. 2. Respondents are now, and for several years last past have been, engaged in the business of distributing canned salmon and other food products as primary brokers negotiating sales for the accounts of a number of packers located in various areas within and beyond the continental United States, including the

Puget Sound and Columbia River areas, and the Territory of Alaska.

PAR. 3. Respondents are a substantial factor in the sale and distribution of canned salmon in the United States, and sell and distribute such food products directly, and through secondary or field brokers in various marketing areas, to buyers for resale located throughout the United States. Respondents have directly or indirectly caused such food products when sold to be transported from the canning plants of the respective packers thereof, or from their warehouses, to buyers thereof located in various states of the United States other than the state or territory of origin of such shipments. Thus respondents are, and for several years last past have been, engaged in a continuous course of trade in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act.

PAR. 4. Respondents are usually compensated for their services in negotiating sales of canned salmon for the accounts of their various packer-principals by deducting a brokerage commission from the proceeds in their accounts of sale to such principals. The said accounts of sale also itemize various discounts and allowances granted to the purchaser, such as for dents and swells, cash, or for labeling, all of which are shown as deductions from the selling price, and are charged back to the packer-principal in the usual course of business. The brokerage commission deducted by respondents, except in certain transactions wherein field brokers were not utilized, is customarily five percent of the net selling price. The field brokers are customarily compensated for their services by receiving from respondents as primary brokers, a brokerage commission in the amount of 2½% of the net selling price. The direct sales negotiated by respondents without the services of a field broker are to relatively large-volume purchasers such as chain store organizations, in the main.

PAR. 5. In the course and conduct of their business as primary brokers of canned salmon in commerce, respondents have made grants or allowances in substantial amount in lieu of brokerage, generally to large-volume purchasers who dealt directly with respondents and not through field brokers. Among and including, but not necessarily limited to, the means and methods employed by respondents in so doing were the following:

(a) Respondents have granted and allowed various discounts and rebates to certain of said purchasers which were not charged

back to the various packer-principals but, on the contrary, were taken from respondents' brokerage.

(b) Respondents have granted and allowed various discounts and rebates to certain of said purchasers which, while ostensibly charged back to the packer-principals, were ultimately borne by respondents by virtue of their deduction of but 2½ percent of the net purchase price as brokerage (instead of the customary 5 percent on sales made through field brokers) in their settlement with such packer-principals.

PAR. 6. The acts and practices of respondents as herein alleged constitute violations of the provisions of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Cecil G. Miles and *Mr. John J. McNally* supporting the complaint.

Mr. James W. Johnston of the firm of *Graham, Green & Dunn* of Seattle, Wash., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The complaint herein was issued on December 12, 1957, charging respondents with the violation of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act in connection with the sale of seafood products.

After being served with the complaint, respondents entered into an agreement dated April 11, 1958, containing a consent order to cease and desist disposing of all the issues in this proceeding, without hearing, which agreement has been duly approved by the assistant director and the director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or 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 such agreement. It has also been agreed that the record herein

shall consist solely of the complaint and said agreement, 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 after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, 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, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming 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 Walter P. Shiel & Co., is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 5506 White-Henry-Stuart Building, Seattle, Wash.

2. Respondent Walter P. Shiel is an individual and is an officer of said corporate respondent with his office and principal place of business located at 5506 White-Henry-Stuart Building, Seattle, Wash. Respondents Lawrence C. Calvert, Starr H. Calvert, and William Calvert are individuals and are officers of said corporate respondent, with their office and principal place of business located at Pier 31, Seattle, Wash.

3. 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 Clayton Act, as amended by the Robinson-Patman Act. This proceeding is in the interest of the public.

ORDER

It is ordered, That Walter P. Shiel & Co., a corporation, and its officers and directors, and Walter P. Shiel, Lawrence C. Calvert, Starr H. Calvert, and William Calvert, individually and as officers of said respondent corporation, and respondents' agents,

representatives, or employees, directly or indirectly, or through any corporate or other device, in connection with the sale of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting, or passing on, either directly or indirectly, to any buyer or to anyone acting for or in behalf of or subject to the direct or indirect control of such buyer, brokerage earned or received by respondents on sales made for their packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of such brokerage, or by any other method or means.

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 3d day of July 1958, become the decision of the Commission; and, accordingly,

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

IN THE MATTER OF

EDWARD B. McGOVERN TRADING AS McGOVERN AND McGOVERN

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

Docket 6980. Complaint, Dec. 12, 1957—Decision, July 3, 1958

Consent order requiring a broker of canned salmon and other sea food in Seattle, Wash., to cease granting illegal rebates and allowances to certain buyers which were taken from his own brokerage fees, in violation of Section 2(c) of the Clayton Act, by such practices as: (1) payment of all or a part of the freight charges, and granting "trade discounts" and "promotional allowances"; and (2) selling at a net price lower than that accounted for to his packer-principal.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (c) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Edward B. McGovern is an individual trading and doing business as McGovern and McGovern, with his office and principal place of business located at 675 Colman Building, Seattle, Wash.

PAR. 2. Respondent is now, and for many years prior hereto has been engaged in the business of distributing canned seafood (chiefly salmon, and to a lesser extent tuna, crab, and clams). Respondent distributes as both a trader for his own account, and as a primary broker negotating sales for the accounts of a number of packers located in various areas within and beyond the continental United States, including the Puget Sound and Columbia River areas, and British Columbia and Alaska. When negotiating sales for the account of his principal, respondent receives for his services, a commission or brokerage fee of 5% of the net selling price of the merchandise sold. When selling through secondary or field brokers who negotiate sales for him respondent pays them for their services a commission or broker-

age fee generally at the rate of 2½% of the net selling price of the merchandise sold.

PAR. 3. Respondent is a substantial factor in the sale and distribution of canned seafood in the United States, and sells and distributes such products directly, and through secondary or field brokers in various marketing areas, to buyers for resale, located throughout the United States. Respondent, as both a trader for his own account and as a primary broker, has directly or indirectly caused said canned seafood so sold to be transported from the places of business of the respective packers thereof, or from their warehouses, to buyers thereof located in various states of the United States other than the state of origin of such canned seafood. Thus respondent is, and has been for many years prior hereto, engaged in a continuous course of trade in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act.

PAR. 4. In the course and conduct of his business in commerce as a trader for profit, respondent has received and accepted and is now receiving and accepting from various packers, brokerage fees, or commission allowances, or discounts in lieu thereof, on canned seafood purchased by respondent for his own account for resale.

In the course and conduct of his business in commerce as a primary broker for his respective packer-principals, respondent has granted and allowed payments in substantial amounts in lieu of brokerage to certain buyers of said canned seafood by granting various allowances and rebates to said buyers which were not charged back to the various packer-principals but which were, on the contrary, taken from respondent's brokerage. Among and including, but not necessarily limited to, the methods or means employed by respondent in paying or granting such amounts out of his brokerage to certain buyers, were the following:

(a) The payment of all or a part of the freight charges;

(b) The granting of amounts designated as a "trade discount";

(c) The granting of amounts designated as a "promotional allowance";

(d) Selling to the buyer at a net price lower than that accounted for to the packer-principal.

PAR. 5. The acts and practices of respondent as hereinabove alleged and described constitute a violation of the provisions of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Cecil G. Miles and *Mr. John J. McNally* supporting the complaint.

Mr. Richard T. Olson, of Seattle, Wash., for respondent.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The complaint herein was issued on December 12, 1957, charging respondent with the violation of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act in connection with the sale of seafood products.

After being served with the complaint, respondent entered into an agreement dated April 11, 1958, containing a consent order to cease and desist disposing of all the issues in this proceeding, without hearing, which agreement has been duly approved by the assistant director and the director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondent, pursuant to the aforesaid agreement has admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondent waives all further procedural steps before the hearing examiner or 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 such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, 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 respondent that he has 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 after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, 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, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for

appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming 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 Edward B. McGovern is an individual doing business as McGovern and McGovern under and by virtue of the laws of the State of Washington, with his office and principal place of business located at 675 Colman Building, Seattle, Wash.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent hereinabove named. The complaint states a cause of action against said respondent under the Clayton Act, as amended by the Robinson-Patman Act. This proceeding is in the interest of the public.

ORDER

It is ordered, That Edward B. McGovern, individually and doing business as McGovern and McGovern, or under any other name, and his agents, representatives, or employees, directly or through any corporate, partnership, or other device in connection with the sale of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Paying, granting, or passing on, either directly or indirectly to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, brokerage earned or received by respondent on sales made for his packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of such brokerage, or by any other methods or means.

2. Receiving or accepting, directly of indirectly, from any seller anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of seafood products by respondent for his own account.

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 3d day

of July 1958, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist.

IN THE MATTER OF

THE SALMON AND TUNA SALES COMPANY ET AL.

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

Docket 6981. Complaint, Dec. 12, 1957—Decision, July 3, 1958

Consent order requiring brokers of canned salmon and other seafood products in Seattle, Wash., to cease making allowances in lieu of brokerage in violation of Section 2(c) of the Clayton Act by such practices as (1) selling at net prices lower than those accounted for to their packer-principals; (2) granting deductions from price by way of allowances or rebates, a part or all of which were not charged back to the packer-principals; and (3) taking reduced brokerage on sales which involved price concessions.

COMPLAINT

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

PARAGRAPH 1. Respondent, The Salmon and Tuna Sales Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington. Respondent B. Lou Thrailkill is an individual and is president of said corporation and formulates, directs and controls the acts, practices and policies of the said corporate respondent. The principal office and place of business of said corporate and individual respondents is located at 1018 Second Avenue, Seattle, Wash.

PAR. 2. Respondents, and each of them, are now, and for many years prior hereto have been engaged in the business of distributing food products, including canned salmon. Respondents distribute as primary brokers, negotiating sales for the accounts of a number of packers located in various areas within and beyond the continental United States, including the Puget Sound area and the Territory of Alaska.

PAR. 3. Respondents, and each of them, are a substantial factor in the sale and distribution of canned salmon in the United States, and sell and distribute such food products generally

through secondary or field brokers in various marketing areas, to buyers for resale located throughout the United States. Respondents have directly or indirectly caused such food products, when sold, to be transported from the canning plants of the respective packers thereof, or from their warehouses, to buyers thereof located in various States of the United States other than the State in which respondents are located. Thus respondents are, and have been for many years prior hereto, engaged in a continuous course of trade in commerce, as "commerce" is defined in the Clayton Act, as amended by the Robinson-Patman Act.

PAR. 4. Respondents, and each of them, are usually compensated for their services in arranging for the sale and distribution of such food products by deducting a brokerage commission from the proceeds in their accounts of sale to their packer-principals. Said accounts of sale also itemize various discounts and allowances granted to the purchaser, such as for dents and swells, cash, or for labeling, all of which are shown as deductions from the purchase price and are charged back to the packer-principals in the usual course of business. The brokerage commission deducted by respondents is customarily 5% of the net selling price. The field brokers are customarily compensated for their services by receiving from respondents as primary brokers, a brokerage commission in the amount of 2½% of the net selling price.

PAR. 5. Respondents, and each of them, in the course and conduct of their business in commerce as primary brokers for various packer-principals, have made grants or allowances in substantial amount in lieu of brokerage to certain buyers of said canned salmon by affording differentials or concessions in price and various rebates and allowances, a part or all of which were not charged back to the various packer-principals but were, on the contrary, taken from the brokerage earnings of respondents and of their field brokers.

Among and including, but not necessarily limited to, the methods or means employed by respondents in so doing were the following:

(a) Selling to certain buyers at net prices which were less than those accounted for to the packer-principals.

(b) Granting to certain buyers deductions from price by way of allowances or rebates, a part or all of which were not charged back to the packer-principals.

(c) Taking reduced brokerage on sales which involved price concessions to certain buyers.

PAR. 6. In the course and conduct of their business as aforesaid respondents, and each of them, have made grants or allowances in substantial amount in lieu of brokerage to certain field brokers on sales to such field brokers for their own accounts.

PAR. 7. In making payments of commissions, brokerage fees or discounts, or allowances in lieu thereof, as alleged and described above, the respondents and each of them in the course and conduct of their business in commerce, as "commerce" is defined in the aforesaid Clayton Act, have paid, granted or allowed, and are now paying, granting or allowing, something of value as a commission, brokerage or other compensation, or allowance or discount in lieu thereof, in connection with the sale of their canned salmon and other food products to buyers who were and are purchasing for their own account for resale, or to agents or intermediaries who were and are in fact acting for or in behalf of or who were and are subject to the direct or indirect control of said buyers.

PAR. 8. The acts and practices of the respondents, and each of them, as above alleged and described are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

Mr. Cecil G. Miles and *Mr. John J. McNally* supporting the complaint.

Respondents, pro se.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The complaint herein was issued on December 12, 1957, charging respondents with the violation of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act in connection with the sale of seafood products.

After being served with the complaint, respondents entered into an agreement dated April 11, 1958, containing a consent order to cease and desist disposing of all the issues in this proceeding, without hearing, which agreement has been duly approved by the assistant director and the director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdic-

tional facts had been duly make in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or 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 such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, 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 after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, 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, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming 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 The Salmon and Tuna Sales Company is a corporation existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business now located at 411 Seneca Street, Seattle, Wash. Respondent B. Lou Thrailkill is an individual and is president of The Salmon and Tuna Sales Company and his principal office and place of business is also now located at 411 Seneca Street, Seattle, Wash.

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 Clayton Act, as amended by the Robinson-Patman Act. This proceeding is in the interest of the public.

ORDER

It is ordered, That The Salmon and Tuna Sales Company, a corporation, and its officers and directors, and B. Lou Thrailkill, individually and as an officer of said respondent corporation, and respondents' agents, representatives or employees, directly or indirectly, or through any corporate or other device, in connection with the sale of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of their seafood products to such buyer for his own account.

2. Paying, granting, or passing on, either directly of indirectly, to any buyer or to anyone acting for or in behalf of or subject to the direct or indirect control of such buyer, brokerage earned or received by respondents on sales made for their packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of such brokerage, or by any other method or means.

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 3d day of July 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

IVAR WENDT

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

Docket 6982. Complaint, Dec. 12, 1957—Decision, July 3, 1958

Consent order requiring a Seattle broker of canned salmon and other sea food to cease making allowances in lieu of brokerage and illegal price concessions, in violation of Section 2(c) of the Clayton Act, including such practices as: (1) selling at net prices lower than those accounted for to his packer-principals, with the difference absorbed out of his brokerage fees; (2) granting deductions from price by way of rebates, a part or all of which were not charged back to the packer-principals but were absorbed by him; and (3) taking a reduced brokerage from his principals on substantial sales which involved price concessions.

COMPLAINT

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

PARAGRAPH 1. The respondent Ivar Wendt is an individual proprietor of a brokerage firm operated in his own name—Ivar Wendt. His place of business is located at 701 Central Building, Seattle, Wash. Respondent Wendt controls, directs and formulates the affairs and operating policies of said brokerage firm.

PAR. 2. The respondent is now and has been for the past several years engaged primarily in the business of distributing canned salmon and various other types of canned fish, crabs and crab meat, lobsters, clams, shrimp, etc., hereinafter sometimes referred to as food products. He operates as a primary broker negotiating sales for the accounts of a number of packers located in various areas within and beyond the continental United States, including the Puget Sound and Columbia River areas. Respondent also makes substantial purchases of canned salmon for his own account for resale.

PAR. 3. Respondent Wendt is a substantial factor in the sale and distribution of food products selling and distributing these products in the various States of the United States but prin-

cipally in the States of New York and Florida. He distributes said products generally through secondary or field brokers located in the marketing areas of the buyers. In the conduct of his business, as aforesaid, respondent has, directly or indirectly, shipped or transported, or caused said food products, when sold to be shipped or transported from the canning plants or warehouses of the packers thereof to buyers located in various States of the United States other than the State or territory of origin of said food products. Thus respondent is now, and has for many years, been engaged in a continuous course of trade in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. Respondent Wendt is usually compensated for his services in arranging for the sale and distribution of said food products for the account of his various packer-principals at the rate of 5% of the net selling price of the merchandise. Respondent deducts the brokerage commission from the proceeds of the sale when accounting to his packer-principals. The account of sales also itemizes other discounts and allowances granted to the purchaser, such as allowances for dents and swells, cash discounts, and discounts for labels, all of which are shown as deductions from the selling price, and charged back to the packer-principals in the usual course of business. In a majority of sales made for his packer-principals, respondent utilizes the services of field brokers located in the various marketing areas of the buyers. When such field brokers are utilized in making the sale, the 5% brokerage is customarily split evenly between the respondent and the field brokers. In many instances, however, respondent negotiates sales direct to large volume purchasers, such as retail chain outlets, without utilizing the services of field brokers.

PAR. 5. In the course and conduct of his business in commerce, respondent, as a primary broker for various packer-principals, has made grants, allowances or rebates in substantial amounts in lieu of brokerage and price concessions which reflect brokerage to certain buyers of said food products, a part or all of which were not charged back to the various packer-principals but on the contrary, were taken from the brokerage earnings of the respondent. In some instances these allowances, rebates or price concessions made to buyers were shared proportionally by the primary and the field broker out of their brokerage earnings on the particular transaction.

Among and including, but not necessarily limited to, the meth-

ods or means employed by the respondent in so doing were the following:

(a) Selling to certain buyers at net prices which were less than those accounted for to his packer-principals with the difference absorbed by respondent out of his brokerage earnings.

(b) Granting to certain buyers deductions from price by way of allowances or rebates a part or all of which were not charged back to his packer-principals and was absorbed by respondent out of his brokerage earnings.

(c) Taking a reduced brokerage from his packer-principals on substantial sales which involved price concessions to certain buyers.

PAR. 6. In addition to representing various packer-principals as a primary broker, respondent has made substantial purchases of canned salmon for his own account for resale, and on these purchases he received and accepted from the seller his usual 5% brokerage. On the resale of all or a part of these salmon respondent allowed and paid to the buyers thereof brokerage in the amount, or the approximate amount, of 2½% of the net selling price.

PAR. 7. The acts and practices of the respondent, as herein alleged and described, constitute a violation of the provisions of subsection (c) of Section 2 of the Clayton Act, as amended.

Mr. Cecil G. Miles and *Mr. John J. McNally* supporting the complaint.

Mr. Dale E. Sherrow of Seattle, Wash., for respondent.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The complaint herein was issued on December 12, 1957, charging respondent with the violation of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act in connection with the sale of seafood products.

After being served with the complaint, respondent entered into an agreement dated April 11, 1958, containing a consent order to cease and desist disposing of all the issues in this proceeding, without hearing, which agreement has been duly approved by the assistant director and the director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondent, pursuant to the aforesaid agreement has admitted

all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings or jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondent waives all further procedural steps before the hearing examiner or 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 such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, 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 respondent that he has 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 after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, 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, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming 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 Ivar Wendt is an individual trading and doing business as Ivar Wendt under and by virtue of the laws of the State of Washington, with his office and principal place of business located at 701 Central Building, Seattle, Wash.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent hereinabove named. The complaint states a cause of action against said respondent under the Clayton Act, as amended by the Robinson-Patman Act. This proceeding is in the interest of the public.

ORDER

It is ordered, That Ivar Wendt, individually and doing business as Ivar Wendt, or under any other name, and his agents, repre-

sentatives, or employees, directly or through any corporate, partnership, or other device in connection with the sale of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Paying, granting, or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of their seafood products to such buyer for his own account.

2. Paying, granting, or passing on, either directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, brokerage earned or received by respondent on sales made for his packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of brokerage, or by any other method or means.

3. Receiving or accepting, directly or indirectly from any seller anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of seafood products by respondent for his own account.

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 3d day of July 1958, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist.

IN THE MATTER OF

WARD'S COVE PACKING COMPANY ET AL.

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

Docket 7021. Complaint, Dec. 31, 1957—Decision, July 3, 1958

Consent order requiring a Seattle sea food packer and its affiliated selling agent to cease violating Section 2(c) of the Clayton Act by such practices as reducing the price on direct sales to favored customers by the 2½ percent which would ordinarily be paid as brokerage fees and, on transactions handled through field brokers, allowing favored customers discounts under the guise of advertising allowances, accomplished by cutting the brokers' normal commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. The respondent Ward's Cove Packing Company, hereinafter sometimes referred to as the corporate respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the territory of Alaska, with its principal office and place of business located at 303 East Northlake Avenue, Seattle, Wash. It is engaged in the business of canning and packing seafood, including salmon, all of which are hereinafter sometimes referred to as seafood products, for sale and distribution to purchasers located throughout the United States. Respondent is a substantial factor in the canned seafood industry.

PAR. 2. Respondent Frank B. Peterson Company is a partnership engaged in business, principally as sales agent for corporate respondent Ward's Cove Packing Company, named herein, but also acts in a lesser degree as a primary broker or sales agent for other seafood canners or packers. Respondent Frank B. Peterson Company maintains its office and place of business at the same address as that of the corporate respondent, or 303 East Northlake Avenue, Seattle, Wash.

PAR. 3. Respondents A. Winn Brindle and Harold A. Brindle

are president, and vice president and secretary, respectively, of corporate respondent, and are also copartners in respondent Frank B. Peterson Company. These individual respondents maintain their offices and principal place of business at the same address as that of the corporate and partnership respondents, or 303 East Northlake Avenue, Seattle, Wash. These individual respondents substantially own and control both the corporate and the partnership respondents, and are also responsible for their acts and practices, including their sales and distribution policies.

PAR. 4. In the marketing of their seafood products, the respondents and each of them, are represented by a number of food brokers in various marketing areas throughout the United States. These brokers are generally referred to herein as field brokers. Normally, these brokers are paid by respondents for their services a commission or brokerage fee at the rate of 2½% of the net selling price of the merchandise sold. In addition to selling through brokers, the respondents, and each of them, sell direct to certain favored customers, without utilizing the services of their field brokers in the particular transactions.

PAR. 5. In the course and conduct of their business in commerce for the past few years, the respondents, and each of them, have sold and distributed, and now sell and distribute their canned seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act, to buyers located in the several States of the United States, other than the State of Washington in which respondents are located. The respondents transport, or cause such canned seafood products, when sold, to be transported from their place of business in the State of Washington to customers located in various other States of the United States, or to other States for storage, pending sale. There has been at all times mentioned herein a continuous course of trade in commerce in such seafood products across state lines between the respondents, and each of them, and the respective buyers thereof.

PAR. 6. In connection with the sale and distribution of their seafood products, in commerce, the corporate and partnership respondents, under the control and direction of the individual respondents, acting both as officers of the corporate respondent and in their individual capacities as copartners trading as Frank B. Peterson Company, have granted discounts or allowances in lieu of brokerage, or have made sales at reduced prices reflecting brokerage, to buyers of such canned seafood products.

Among and including, but not necessarily limited to, the methods or means employed by respondents in so doing are the following:

(a) Granting or allowing to certain buyers, or agents of buyers, reductions in prices in the approximate amount of 2½% of the net selling price of the merchandise in transactions where the services of field brokers were not utilized.

(b) Granting or allowing to certain buyers deductions from prices by way of allowances, discounts or rebates under the guise of advertising allowances, which allowances are accompanied by a reduction in the brokerage or commission normally paid to respondents' field brokers.

PAR. 7. The acts and practices of the respondents, as alleged and described herein, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13).

Mr. Cecil G. Miles and *Mr. John J. McNally* supporting the complaint.

Mr. Richard T. Olson of the firm of *Moriarty, Olson & Campbell* of Seattle, Wash., for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The complaint herein was issued December 31, 1957, charging respondents with paying, granting or allowing, directly or indirectly, something of value as a commission, brokerage, allowance, discount, rebate, or other compensation, upon or in connection with the sale of their canned seafood products to certain buyers, or agents of buyers, in violation of Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13).

After being served with the complaint, respondents entered into an agreement dated April 11, 1958, containing a consent order to cease and desist disposing of all the issues in this proceeding, which agreement has been duly approved by the assistant director and the director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with Section 3.25 of the Rules of Practice of the Commission.

Respondents, pursuant to the aforesaid agreement have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdic-

tional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or 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 such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, 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 after a full hearing and may be altered, modified, or set aside in the manner provided for other orders, 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, and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming 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 Ward's Cove Packing Company is a corporation, existing and doing business under and by virtue of the laws of the Territory of Alaska; respondent Frank B. Peterson Company is a partnership existing and doing business under and by virtue of the laws of the State of Washington; respondents A. Winn Brindle, also known as A. W. Brindle, and Harold A. Brindle are individuals and officers in respondent Ward's Cove Packing Company, and copartners in respondent Frank B. Peterson Company. All of the respondents have their offices and principal place of business located at 303 East Northlake Avenue, Seattle, Wash.

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 re-

spondents under the Clayton Act, as amended by the Robinson-Patman Act. This proceeding is in the interest of the public.

ORDER

It is ordered, That Ward's Cove Packing Company, a corporation, and its officers and directors, and A. Winn Brindle, and Harold A. Brindle, individually and as officers of said corporation, and respondents' agents, representatives or employees, directly or through any corporate, partnership, or other device in connection with the sale of sea food products in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Paying, granting or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of, or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of their seafood products to such buyer for his own account.

It is further ordered, That Frank B. Peterson Company, a partnership, and A. Winn Brindle and Harold A. Brindle, individually and as copartners in the said Frank B. Peterson Company and their agents, representatives, or employees, directly or through any corporate, partnership, or other device in connection with the sale of seafood products in commerce, as "commerce" is defined in the aforesaid Clayton Act do forthwith cease and desist from:

Paying, granting or passing on, either directly or indirectly to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, brokerage earned or received by respondents on sales made for their packer-principals, by allowing to buyers lower prices which reflect all or any part of such brokerage, or by granting them allowances or rebates which are in lieu of brokerage, or by any other method or means.

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 3d day of July 1958, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

HOLLAND FURNACE COMPANY

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

Docket 6203. Complaint, May 4, 1954—Decision, July 7, 1958

Order requiring a manufacturer of furnaces, with plant in Holland, Mich.—with some 475 branch offices in various States and a number of sub-branches, selling its products through house-to-house salesmen whom it supplied with sales manuals, catalogs, and other literature, and asigned a certain territory—to cease using deceptive sales schemes under which its said salesmen posed as Government or utility inspectors or heating engineers to gain access to homes and then dismantled furnaces without the owner's permission, ostensibly to determine the extent of repairs necessary, and refused to reassemble them on false representations that this would involve grave dangers of fire, gas, and explosion, or that the competitor-manufacturer of the furnace was out of business or that parts were unobtainable; requiring owners of such dismantled furnaces to sign releases absolving the company of liability for its employees' negligence or other liability before reassembling the furnaces; or otherwise using scare tactics, misrepresentation, and coercion to sell its furnaces, heating equipment, and parts.

John W. Brookfield, Jr., and *William R. Tincher*, Esqs., supporting the complaint.

Trenkamp & Coakley, by *Robert H. Trenkamp* and *Edward A. McLeod*, Esqs., for respondent.

INITIAL DECISION BY JAMES A. PURCELL, HEARING EXAMINER

PRELIMINARY STATEMENT

Under date of May 4, 1954, the Federal Trade Commission, pursuant to the provisions of the Federal Trade Commission Act, stating that it had reason to believe that the respondent, Holland Furnace Company, a corporation, has violated the provisions of the said Act and that a proceeding by it in respect thereof would be in the public interest, issued its complaint, copy whereof was served upon the respondent in due form of law. The specific charges covering the acts complained of are hereinafter embodied in this decision under the heading of "Issues." The respondent did, on June 23, 1954, file its answer, which answer denied the jurisdiction of the Commission to hear and determine the issues raised herein on the ground that respondent is not engaged in

interstate commerce, and further specifically denied many of the acts charged in the complaint.

On June 23, 1954, respondent moved for a more definite statement of facts or a bill of particulars, which motion was denied by the hearing examiner, from whose ruling the respondent did, on July 20, 1954, appeal to the Commission. On July 27, 1954, the Commission denied the respondent's appeal.

On July 22, 1954, respondent filed a motion for "Suspension and Referral," thereby seeking to suspend these proceedings and have the entire matter referred to the Commission's Bureau of Industry Cooperation for "appropriate action." Contemporaneously with foregoing motion the respondent filed a further motion for a preliminary hearing seeking (1) the suspension of the then scheduled hearing; (2) fixing a time and place for a preliminary hearing for the purpose of receiving evidence and testimony as to the facts establishing the jurisdiction of the Commission over the subject matter of the complaint; and (3) providing that the suspension of hearings aforesaid shall continue for such time as is necessary to obtain a review of the hearing examiner's ruling on appeal to the Commission, respondent contending that the jurisdiction of the Commission should first be established before proceeding with trial of the facts in issue. In support of both of the aforesaid motions respondent filed extensive briefs. Thereafter, on August 20, 1954, and pursuant to formal motion of the respondent, the hearing examiner passed an order granting respondent's motion to abandon its prior motions for a preliminary hearing to determine jurisdiction and change place of hearing, and, by a separate order of even date with the foregoing, denied respondent's motion for suspension and referral of the proceedings to the Bureau of Industry Cooperation. From the last mentioned order the respondent took an interlocutory appeal to the Commission in support of which it filed a rather lengthy brief. By its order of September 14, 1954, the Commission denied respondent's appeal.

On September 3, 1954, the hearing examiner issued his supplemental order fixing the times and places of a series of hearings for the taking of testimony in the cities of Grand Rapids, Mich.; Rock Island and Chicago, Ill. On September 10, 1954, the respondent filed its interlocutory appeal to the Commission from the last-mentioned order of the hearing examiner, and contemporaneously with the aforesaid notice of appeal, respondent filed directly with the Commission an application for a "stay of pro-

ceedings" pending the outcome of such appeal. On September 21, the Commission denied the appeal of the respondent and refused to grant an order staying the proceeding, stating in effect, as to the latter, that such should have been filed with the hearing examiner and not with the Commission. Pursuant to the hearing examiner's order of September 3, 1954, fixing dates and places of hearings for the taking of testimony, the hearing examiner presented himself at the appropriate hearing room in the United States Court House in Grand Rapids, Mich., at 2 o'clock p.m., on September 15, 1954, prepared to proceed. Fifteen minutes before the hearing time, the hearing examiner was served with a temporary restraining order, and an order to show cause, issued out of the District Court of the United States for the Western District of Michigan, Southern Division, in Civil Action No. 2495, entitled Holland Furnace Company, Plaintiff, v. James A. Purcell, Hearing Examiner, Federal Trade Commission, Washington, D.C., which said restraining order was signed by Judge Raymond W. Starr. In obedience to the restraining order the hearing examiner merely opened the proceedings in Grand Rapids and immediately closed the same without the taking of any testimony, thus to show, as a matter of record, that he had complied with the Commission's direction to him to proceed. This same procedure was followed on September 20 and 21, in Rock Island, Ill., and, on September 23, 1954, in Chicago, Ill., the hearing was again opened and immediately closed because the hearing examiner was desirous of proceeding without delay in the taking of testimony immediately upon the lifting of the aforesaid temporary restraining order, the matter at that time being then presented to, and argued before, the aforesaid District Court in Grand Rapids, Mich. On the morning of September 24, 1954, shortly before the reopening of the proceedings in Chicago, Ill., the hearing examiner was advised that, on the afternoon of September 23, the District Court aforesaid had dissolved the restraining order, thus making it possible for the hearing examiner to discharge his duties in the matter.

It will be observed from the foregoing that, while the complaint herein is dated May 4, 1954, it was not until September 24, 1954, and after considerable preliminary skirmishing, that the commencement of the taking of testimony took place.

Thereafter, and in order to receive appropriate testimony on behalf both of the Commission and of the respondent from witnesses located in various places who were qualified to testify

concerning the subject matter of the complaint, hearings were held in the cities of Chicago, Grand Rapids, Rock Island, St. Louis, Indianapolis, Cincinnati, Moline, Buffalo, Rochester, Boston, New York, Baltimore, Cleveland, and Washington, D. C., during the course of which in excess of 8,500 pages of testimony were received from 260 witnesses, 132 thereof appearing at the instance of the Commission, and 128 appearing for the respondent. On behalf of the Commission, 164 exhibits, and on behalf of the respondent, 281 exhibits were tendered or received in evidence. The record shows that the acts complained of were not confined to the 14 cities above enumerated but that certain thereof took place in cities other than those named, the witnesses being transported to such cities for the convenience of the parties at whose instance they were called.

All of the testimony aforesaid was duly reported, reduced to writing, and the transcripts thereof, as well also all exhibits received in evidence, were duly filed in the Office of the Commission in the city of Washington, D. C., as required by law.

Proposed findings of fact, conclusions of law and orders were submitted by all parties, oral argument thereon not having been requested.

Specifically referring to a document filed by respondent's counsel entitled "Respondent's Proposed Findings of Fact and Conclusions of Law": This document, consisting of 261 pages, has devoted 227 pages thereof to a mere detailed condensation or résumé of testimony, *ex parte* in nature, dealing almost exclusively with the testimony of witnesses and evidence favorable to respondent and which are not presentations of proposed findings of fact, susceptible of definite rulings either granting or rejecting them as facts borne out by the total evidence of record, hence must be rejected *in toto*, although the examiner has given considerable consideration thereto in appraising the position of respondent's counsel in regard to the testimony of the witnesses therein delineated. To attempt to rule separately on each would entail an altogether unnecessary expenditure of time and effort. The Rule of Practice under which these proposals were filed, (Sec. 3.19), provides that rulings thereon shall be made by the hearing examiner—

* * * except when his order disposing of the proceeding otherwise unmistakenly informs the parties of the action taken by him.

As said by the Court: [1]

No details of evidence should be submitted to the court as findings under the Rules of Civil Procedure.

The proposed *conclusions of law and proposed order* submitted by the respondent are rejected as not being supported by the facts, hereinafter specifically found, and as not being in accordance with the reliable, probative and substantial evidence of record.

Since the evidence of record largely supports the proposed findings, conclusions and order submitted by counsel in support of the complaint, they are hereby granted to the extent they are incorporated herein, otherwise they are rejected.

This matter being now before the Hearing Examiner for final determination based upon the record as an entirety, he having presided at all hearings, observed all witnesses, considered and ruled upon all testimony and exhibits of record, finds that this proceeding is in the interest of the public and hereinafter makes his findings as to the facts, conclusions drawn therefrom, and order.

The issues tried are based upon the specific charges of the complaint, many of which are denied by the respondent in its answer. Such issues, as below stated, are so interrelated, and the large number of witnesses and length of the transcript is such, that evidence on several issues has been received from one or more witnesses, or involved in one or more transactions, so that, in the interest of brevity and to avoid unnecessary repetition, segmentation of specific testimony or evidence in support of each finding cannot be undertaken. Therefore the findings and conclusions based thereon, as same may overlap in their relation and applicability to the several issues, will be relied upon.

THE ISSUES STATED

1. Is the respondent engaged in interstate commerce within the purview of the Federal Trade Commission Act?
2. Do respondent's salesmen and servicemen falsely represent themselves to be inspectors or representatives of governmental agencies, or utilities companies?
3. Do respondent's salesmen and servicemen falsely represent themselves to be heating engineers?
4. Do respondent's salesmen and servicemen falsely represent

[1] *Knaust Bros.* v. *Goldschlag*, 119 F. 2d 1022. *Cent. R.R. of N. J.* v. *Central Hanover Bank & Trust Co.*, 29 F. Supp. 826.

to owners of furnaces manufactured by competitors of respondent that their furnaces are not repairable; are dangerous in that continued use thereof will result in asphyxiation, carbon monoxide poisoning, fires or other damage; that the manufacturers of their furnaces are "out of business" and that repair parts therefor are unobtainable?

5. Has respondent distributed form letters, post cards and circulars to members of the public offering free inspections, adjustments or minor servicing of furnaces and, by means of such, have respondent's agents, upon gaining admission to homes of furnace owners for purposes of inspection, or to adjust or service said furnaces, dismantle same without permission of the owner thereof?

6. Have respondent's employees, in many instances, refused to reassemble furnaces thus dismantled and, as reason for such refusal, falsely stated to owners that such furnaces are dangerous and to reassemble and continue their use will result in asphyxiation, gas poisoning or fire; and have they required such owners, in writing, to absolve respondent of any liability, including liability for the negligence of its employees, before reassembling such furnaces?

7. Have respondent's employees dismantled furnaces, leaving them unassembled for lengthy periods, after request by owners that such furnaces be reassembled, thus causing the owners great and unnecessary inconvenience?

8. Have respondent's employees misrepresented the condition of furnaces and asserted, contrary to fact, that the continued use thereof would be dangerous, thereby causing the owners of furnaces to purchase from respondent new furnaces, or parts therefor, which they would not have purchased except for such false representations?

9. Have respondent's methods of selling caused owners of furnaces and heating equipment produced by competitors of respondent to become dissatisfied with, or afraid to continue to use such equipment and to discard same before the completion of the useful life thereof, thus effecting sales of furnaces, heating equipment and parts manufactured by respondent?

FINDINGS AS TO THE FACTS

1. Respondent, Holland Furnace Company, is a corporation organized under the laws of the State of Delaware with its

principal place of business located at No. 489 Columbia Avenue, Holland, Mich.

2. Respondent is now, and has been for the past several years, engaged in the manufacture, sale and distribution of furnaces, heating equipment and parts therefor. Respondent owns and operates approximately 475 branch offices, as well also a number of subbranches, located in various States of the United States. All sales of furnaces, heating equipment and parts therefor, effected by the Holland Furnace Company or its representatives are to the ultimate purchasers and users of such equipment.

3. In conducting its business respondent does not ship furnaces as units but, typically, sends a carload of the essential parts which are assembled either in its warehouses or branches, or "on the job" where the furnaces are to be installed. The warehouses mentioned are, in some instances, branch warehouses, that is to say, ones which are connected with the respondent's branches, or central warehouses located at strategic points and which supply the branches in adjoining or surrounding territory. Generally speaking, a central warehouse is located in a large city and acts as a source of supply for respondent's branches located in that city and in surrounding territory. When need arises in the branch offices for material or equipment which is not there on hand or in stock, such is ordered direct from the factory and, in the cases of small branches, the order generally goes direct to the factory rather than to a central warehouse. Respondent also sells repair and replacement parts for its equipment to independent furnace servicing concerns or individuals, which are obtainable from the branch offices. Also the branches, on occasion, exchange material between themselves when necessary, although this is not general, the branches being under instruction to order their needs direct from the factory. The branch offices of the respondent extend throughout the United States with the exception of three or four states in the far south. Deliveries are made by respondent preferably by means of automobile trucks, such trucks not only delivering supplies to the appropriate consignees but, on return trips, haul back to the factory at Holland, Mich., scrap metal and old equipment for recovery purposes. Where exceedingly long hauls are involved, as for instance from Holland to the States of Washington, Oregon, or California, deliveries may be made by railroad freight.

This system of operation has been substantially the same since the year 1934.

Interstate Commerce

4. Respondent maintains, and has maintained, a course of trade in its products aforesaid, in commerce among and between the various states of the United States and in the District of Columbia to such extent as to make it amenable to the jurisdiction of the Federal Trade Commission under the provisions of the Federal Trade Commission Act as "interstate commerce" is defined in said Act.

For a long period of time respondent operated a branch office in the City of Washington, D. C. Respondent furnished certain papers herein [2] showing that from the year 1936 through 1942 respondent operated a branch office in the City of Washington, D. C.; from 1943, to and including 1948, this office was designated a subbranch; during the years 1949, 1950 and 1951, this outlet reassumed its status as a branch, and from 1952 to June 30, 1954, was designated as a subbranch. The complaint in this case is dated May 4, 1954, so the foregoing constitutes an admission that respondent was operating in the Washington territory subsequent to the date of the complaint herein. Testimony shows that although respondent claims to have abandoned operations in the Washington, D. C. area it continued to do business therein through the instrumentality of its Baltimore, Md., branch, and that if a homeowner in this area had a Holland furnace which needed parts and wrote to the respondent at its home office, the latter would refer the inquiry to the nearest branch, which in this instance would be Baltimore, Md., which branch would first dispatch a salesman to ascertain exactly what was needed, and upon determination thereof an agreement would be executed and the material would be delivered through the Baltimore branch.

The respondent's manager of the Baltimore branch testified that sales are made in the Washington area through the Baltimore branch and that equipment is delivered in Washington from Baltimore by means of the respondent's own truck, or by the trucks of their mechanics; that the Holland Furnace Company has a Washington telephone number with the calls thereon being taken by a so-called answering service and relayed to the Baltimore office, and that this telephonic arrangement was in effect in the Baltimore branch when this particular manager took over; that the Baltimore branch does not at present have a subbranch in Washington, D.C.; that he had handled complaints from the

[2] Comm. Ex. Nos. 125 through 128.

Washington area and had been instrumental in resolving such complaints.

There are also of record twelve exhibits which show actual sales of respondent's equipment and repair services through the instrumentality of the Washington, D.C., office, in the States of Virginia and Maryland, as well also in the District of Columbia; there is also an exhibit of record showing a sale from an Indiana branch of respondent to an Illinois customer.

The exhibits mentioned in footnote No. 2 show the locations of respondent's eleven central warehouses and its numerous branch and subbranch warehouses strategically located throughout the United States, while a glance at a map of the United States,[3] prepared by respondent, will disclose its widespread, nationwide, activities which have enabled it to effect gross annual sales which, according to one witness, has reached $30,000,000.00. While it is true that the respondent, in its formal answer to the complaint, denied that it was engaged in interstate commerce, (and on that ground challenged the jurisdiction of the Commission), and has steadfastly maintained that position throughout this proceeding, a quotation from the 1952 annual report of the corporation, over the signature of its President, "by order of the Board of Directors" is revealing:

> As you may possibly know, your company is the only manufacturer in the heating industry which retails. The public cannot buy heating equipment direct from any other factory—only from dealers who sell under their own names. Our branch system throws the complete responsibility for all the actions of its personnel, as well as the functioning of its equipment, directly upon the company. * * *

The said report then goes on to point out:

> Clearly, our 15,000,000 customers have found this policy gratifying.

COMPETITION

5. Respondent is now, and has been at all times herein mentioned, in substantial competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of furnaces, heating equipment, and parts therefor. While respondent admits the charge of competition, it denies that such competition took place in interstate commerce. The fact that the respondent has been engaged in interstate commerce having been specifically found to be true in the preceding finding, it is not

[3] Resp. Ex. No. 228, p. 22.

felt necessary to analyze further the testimony of record in support of this finding.

Method of Procuring and Promoting Sales

6. Respondent sells its merchandise largely through the instrumentality of salesmen or house to house canvassers, who are customarily given a preliminary course of instruction in selling, supplied with sales manuals, catalogues, or other literature of the respondent, and assigned to a certain territory. When a sale is made, the salesman fills in the blank forms supplied him according to the terms of the contract agreed upon, thus evidencing a sale from the respondent to the purchaser, and thereupon accepts partial or full payment of the purchase price. In instances in which the equipment is sold by the extension of credit for the full purchase price, there is, of course, no down payment and the salesman merely procures the execution of the contract by the customer and submits the same in ordinary course for approval by respondent of extension of credit. The installation of the equipment so sold is made by the respondent's "furnace installers" or "furnace mechanics" in the employ of the respondent.

For the purpose of procuring leads to prospective customers, respondent has distributed form letters, post cards and circulars to members of the public, offering free inspections, adjustments and minor servicing of furnaces. Responses to these offers supply to respondent prospects for cleaning and servicing jobs which, in turn, often lead to large sales of major equipment through misrepresentation as herein otherwise found.

Use of "Scare Tactics" in Selling

7. Respondent's salesmen and servicemen have falsely represented to owners of furnaces made by competitors that the furnace owned is defective, is not repairable and is dangerous to the extent that continued use will result in asphyxiation, carbon monoxide poisoning, explosions, fires or other damage.

It is found that respondent's own actions have contributed in large measure to the misrepresentations of their agents, as above, in that it publishes a magazine or house organ named "The Holland Firepot," [4] which has a wide circulation among its employees in all of its divisions, branches and subbranches, and a reading thereof indicates that its prime purpose is to stir up enthusiasm among its employees and thus increase sales volume.

[4] Comm. Ex. Nos. 50 to 61 incl.

In various issues respondent has undertaken to caution its employees against use of "scare tactics" and other questionable methods in selling which, according to the articles in said magazines, have been brought to the attention of the respondent in the form of complaints from Better Business Bureaus and individuals who have been subjected to this form of selling.

Despite the disavowal of respondent of the use of these procedures, and as far back as March of 1951, the respondent was cognizant of many such complaints. One issue of said "Firepot" of March 1951, on page 1, cites some of these questionable practices and undertakes to lecture and admonish its employees that it will countenance no such procedures. Among the specific acts complained of was that employees get into various homes claiming themselves to be inspectors from the gas company, city inspectors, or misrepresent that they are making a "survey" on furnaces. Among other things inveighed against were that Holland salesmen sometimes posed as the "chief engineer" from Holland, and contending they are on a "one-night stand" and that the deal must be closed immediately in order to take advantage of their superior knowledge, or that they can make some special discount which the local branch cannot offer. Other salesmen speak about a model home and say they will give a discount for each prospect going into the house, but after the job is installed the model home story is completely forgotten.

Throughout the hearings respondent has consistently denied that its representatives have used "scare tactics," thus inducing or frightening prospective customers to purchase new equipment. It is singular to note in this connection that despite respondent's expressed disapproval of such practice it has undertaken, throughout these publications, to bring the fire, gas and explosion hazards to the attention of its salesmen and servicemen by quotations from newspaper and magazine articles dealing with the subject. Despite the self-righteous protestations of the respondent that the duty of its representatives is to point out these dangers to the purchasing public as a public duty motivated by altruistic feelings, nevertheless, quotations and accompanying reading matter are but self-serving statements which serve to sow the seeds, in the minds of its employees and solicitors, that the fire, gas and explosion hazards are, and of necessity should be, pointed out. The fact is that such methods are productive of increased sales, all of which is well known to the respondent.

The proven fact that many of the door to door solicitors, em-

ployed by respondent to establish first contacts with prospective purchasers, are young and inexperienced, and further that their recompense depends entirely upon their sales achievements, gives further weight to the finding that respondent's suggestions, even though intent be denied, have contributed to the making of the representations under consideration.

In support of the foregoing finding the following quotations and excerpts are cited:

In the "Firepot" of March 1951, in large bold face print is the following:

Point 11

Use it—but don't build your entire sales talk around it.

The article points out that "Point 11" is a selling argument emphasizing the necessity for cleaning furnaces every year, and the fire hazard, smoke, gas and explosions which might ensue if this is not done.

In the issue of September 1951, appears the following heading:

No Credit to the Heating Industry

Coal fumes kill sleeping girl, eight

The article goes on to state that coal gas fumes carried from the basement killed an 8-year-old girl in her sleep.

In the issue of November 1951, page 1, appears a lengthy article quoting a news item on the dangers of carbon monoxide leaks and the necessity for guarding against them.

In the issue of December 1951, page 1, there appeared an article telling how a minister of the gospel "saved" his entire congregation from death by asphyxiation by monoxide gas due to a defective heating plant.

In the issue of January 1952, under the heading:

More action and less sanctimonious talk would drastically cut the number of these nightmares.

appears an article citing some instances of death and destruction reported by a local newspaper reading:

"Believe 124 dead in mine blast" and also stating that, on the same front page of that newspaper were three other headline stories "equally tragic." One was entitled: "Three Children Burned to Death"; a second headline: "Boy Burned to Death"; and a third headline: "Fireman Killed, Four Injured in Fuel Tank Blast."

The article, on its own, then goes on to state that instances such as the above "will be duplicated on practically every front

page of every paper in the United States." Comment on the above-reported articles goes on to say:

It is perfectly amazing to us how this country can continue to have at least 10,000 people burned to death annually, with billions of dollars worth of damage as well, without an all-out effort upon the part of anyone to stop these fires. The cause of all these fires is not always given. *The fact remains that most of them occur when heating plants are in use, so it is safe to say that most of them can be blamed upon that one item.* (Italics supplied)

The article further goes on to paint in words the harrowing scene of a fire at night, in zero weather, with a "lot of snow on the ground," saying "it's a first-class mess" and that "everyone should see a few of those, and it might be just as well if a few people actually experienced one."

In the "Firepot" of January 1952, under the heading:

Someone is to blame for this sort of thing—couple, children burned to death.

After quoting the newspaper article, a catastrophe in Saginaw, Michigan, the article goes on to say:

The papers are full of this sort of thing. Apparently, this fire was due to a stove which exploded—but that too, is a fault of the heating industry. It isn't just a question of replacing furnaces, you know. These old stoves should be replaced too. A good modern heating plant, properly installed, would have avoided this. Don't pass up these cut-in jobs.

A reading of the newspaper article quoted will disclose that nothing was said about the physical condition of the stove which exploded, and there is nothing therein which justified the comment that "A good modern heating plant, properly installed, would have avoided this." The fire may have been caused by reason other than faulty or defective equipment.

Another article appeared in the January 1953 issue under the heading:

Three Escape Death from Leaky Furnace.

The body of the article states:

Does that headline scare you? * * * Think of the many thousands of others who in the next year will be less fortunate. * * * *Get into those basements, and when defective equipment is found, make sure you tell the customer of the potential danger.* (Italics supplied).

In the "Firepot" of January 1953, under the heading:

Find family of five asphyxiated.

The body of the article goes on to state:

Things like this are happening every day. Carbon monoxide gas, that no

one can detect by sense of smell, taste, or vision, accounts for an untold number of fatalities every week. The irony of this is that Holland men have on occasion been criticized for revealing hazardous conditions of a furnace that could result in either loss of life or property damage.

Fire chiefs and insurance underwriters know the potential danger of a defective heating plant. They realize that many home owners are living over a volcano that could cause death or destruction without any warning.

In the "Firepot" of February 1953, appears the following:

In 1950, the last year for which figures are available, close to 200 persons are known to have died in New York City alone from accidental carbon monoxide poisoning due to incomplete combustion of gas, coal, or other fuels in defectively operating furnaces and gas appliances * * *

The total death and sickness toll from carbon monozide poisoning in the homes and factories, and on the highways of the Nation as a whole, is in all probability much greater than even this large figure suggests, for the presence of carbon monoxide is often not obvious to the doctor or health official, and the effects are attributed to other sources. * * *

This is the time of year when this menace is at its height. Now is the time when Holland men should be out working and doing something about it. (Emphasis supplied.)

The foregoing clearly indicates the attitude and purpose of the respondent concerning the importance of "*getting into that cellar*" and "*open every casing*" as a business feeder and the featuring of the above-quoted news items, and their skillful dispersion and repetition through many issues of the "Firepot," printed and distributed under the aegis and imprimatur of the respondent under attention-arresting headings in large, bold face type, indicates no other finding than that same were intended to serve to implant in the minds of respondent's employees and solicitors the use of "scare tactics" as a sales stimulant, which finding is emphasized by the uniform methods pursued in many and widely diverse geographical areas. It may be contended that emphasis was laid by respondent, in said articles, on these dangers simply as a discharge of a public or altruistic duty but, wittingly or unwittingly, the practical effect has been to increase sales of equipment as there is not a word of testimony to the effect that any installation by respondent has actually avoided fires, explosions, gases or other dangers.

"Cleaner Sales" Supply Leads for Equipment Sales

8. It is found as a fact that so-called "cleaner sales" is an important producer of leads for the sale of furnace units and accessories as will be seen by two 4-page broadsides published

in respondent's magazine the "Firepot" [5] in which the following appears:

> Branch Managers:
> Actually, this is your contest.
> You may not win the trip to Holland, the Elgin wristwatch, or the pen and pencil set, but in reality YOU will be the big winner.
>
> It is a proven fact that cleaner sales will produce unit sales. *Open every casing*, inspect carefully every furnace cleaned, and YOUR reward will be in unit sales and extra profit. (Italics supplied.)

Salesmen Falsely Representing Themselves as Agents of Government or Utility Companies

9. Respondent's salesmen and servicemen, or other employees under whatever designations, have in certain instances falsely represented themselves to be inspectors or representatives of governmental agencies or of local gas or utility companies. An instance of this took place in the St. Louis area where a householder testified that two young men came to her house and said: "We are from the Government inspecting furnaces," and then asked for admission to the house, which was refused. The householder thereupon telephoned to the police and two officers were sent to apprehend the men. Upon being taken into custody the men said that they were salesmen from the Holland Furnace Company and, in an interview at the station house, they denied that they were Government officers but admitted they had represented themselves as working in conjunction with the "Government fuel conservation program." The same admission was again made by the men in the presence of an officer of the Federal Bureau of Investigation, who had been called in to ascertain if any Federal law had been violated. It was decided in the negative and the men were released. Pending their detention in the station house, the St. Louis manager of the respondent was contacted, who presented himself at the station house and relieved the two men of all Holland literature in their possession consisting of order blanks and advertising matter.

That respondent, through its responsible executive officers, had, for a long period of time, been well aware of the prevalent and widespread misrepresentations of its representatives in falsely misrepresenting themselves as governmental and utilities companies is amply borne out by the record. In fact, there were sufficient complaints of this and other characters that respondent

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[5] Comm. Nos. 100 and 101.

saw fit to essay a verbal agreement with the National Better Business Bureau, denominated the "Horizontal Program," which was designed for the handling and clearing of complaints against Holland, (which had been received by Better Business Bureaus in the several states), through the central office of the National Bureau in New York, thus all complaints to be referred direct to Holland and a check kept on the adjustment and satisfaction of all complaints; that the clearing officer for Holland under such program was its advertising director and public relations director; this witness occupied this position from June of 1951 until June of 1954 at which time he resigned from respondent's employment because, as he testified, the National Bureau threatened to sever connections with Holland for the reason that the latter had failed to "conform" to the program and he, the witness, "could not get this policy into effect." This finding, being concerned primarily with bringing home to respondent actual knowledge of the subject matter of this and other charges of the complaint, it matters not that said "Horizontal Program" was not actually effected, or was abandoned. Certain it is that the existence of said charges and knowledge thereof by respondent motivated it in its attempt to effect the program and that it failed is of no moment.

This witness further testified that in his official capacity he reported directly to the President of Holland; that his work carried him to various cities where he contacted representatives of Better Business Bureaus and others with a view to composing complaints against Holland; that among other complaints was the "gas resetting program" used by Holland's agents, which was designated by the Bureaus as the "Tear Down Program"; that witness investigated, and found justified, complaints that respondent's salesmen or servicemen had represented themselves to be inspectors or representatives of Government agencies and represented themselves to be agents or inspectors for gas or utility companies, which facts were reported by the witness direct to the president of Holland.

This witness further testified that in his official capacity he investigated complaints about Holland representatives' activities covering generally all of the charges of the complaint in such cities as St. Louis; Des Moines; Seattle; Los Angeles; Moline; parts of Illinois under the Chicago Better Business Bureau; Cincinnati; Columbus; Dayton; Cleveland; Buffalo; Rochester, Baltimore and perhaps other places; that his investigations showed

many of the complaints to be justified as a result of which authorized adjustments were effected.

There are of record a number of additional witnesses who testified directly that there had been direct representations by Holland's agents that they were governmental and/or public utilities' representatives. This was especially true in the Baltimore area and, while respondent's manager there was cognizant of this charge, he nevertheless did not interview the complaining parties but contented himself with taking the word of his employees that they had not done so.

Respondent's Plea of Want of Knowledge of Wrongdoing by its Agents

10. In its answer to the complaint filed June 23, 1954, respondent denied, because of "want of knowledge," any information that its agents were guilty of misrepresentations or of "scare selling." The record is replete with a spate of complaints along the above lines which were brought to the attention of the respondent, such having been made by private individuals who had been misled by such representations in many areas of the country; by Better Business Bureaus in many different cities, by school officials and others. There appears of record [6] a certified copy of a transcript of proceedings against the respondent instituted by the Michigan Corporation & Securities Commission dated July 23, 1951. The geographical area involved in the particular charges in this matter was the city of Detroit and the adjoining counties of Wayne and Oakland in the respondent's own State of Michigan. This respondent there, as in the case at bar, attempted to enjoin same by a court proceeding, the result whereof does not appear in the certification, but it is safe to assume that respondent's efforts in that behalf were fruitless for the reason that the Michigan Corporation Commission proceeded with the matter to its final conclusion and suspended for 60 days the license of the respondent to continue to do business from the date of the order, to wit, July 23, 1951.

The aforesaid exhibit discloses that the testimony of 24 witnesses was received, creating a record of 650 pages, supplemented by 56 exhibits in evidence. In summarizing that testimony the Commission found, *inter alia*, that a responsible officer of the respondent was apprised of the fact that a Detroit branch

[6] Comm. Ex. 130 A-G.

manager was known to have sold used furnaces as new but the offender was elevated to another position elsewhere and as a division superintendent of the respondent, embracing one or more States; that the testimony received was strikingly uniform in telling of respondent's canvassers who came to the door to sell comparatively inexpensive and needed services, and "who in fact were but the harbingers of salesmen in the guise of engineers or inspectors," and who made, "dire prophecies of harm from heating plants which were in fact either undamaged or easily repairable." Respondent's agents laid particular stress and emphasis on the dangers of asphyxiation, explosion and fire. The certification then goes on to say that it is immaterial that respondent sold furnaces which gave satisfactory service in view of the essentially dishonest and unfair method of the attempt to sell based on calculated misrepresentations as above set forth.

The above proceeding is adverted to here for the sole purpose of bringing home to respondent, as far back as July 1951, actual knowledge of many of the complaints of the type embodied in this proceeding.

False Representations That Respondent's Agents Are "Heating Engineers"

11. It is found that respondent's salesmen and servicemen in soliciting and effecting sales of equipment have falsely represented themselves to be "heating engineers" which representation was, because of lack of training, (actual, educational or empiric), unjustified and was made use of solely for the purpose of impressing upon prospective purchasers the superiority of "heating engineers" over the average run of "furnace men" or "furnace mechanics" employed by competitors. As a fact, respondent has in its employ but six men who are possessors of collegiate degrees which would justify the use by them of the term "engineer," and the majority of these are attached to the main production plant or office of the respondent.

This finding is not intended to convey that a collegiate degree is essential, or to imply that one may not become highly qualified in the trade by reason of individual study and experience. However, when it is borne in mind that respondent has 475 branches and subbranches, employing many hundreds of men throughout the United States, coupled with consideration of the sources from which respondent recruits its help, the total lack of prior experience of the vast majority of recruits, and the paucity of

training given them in the matter of technical details and "know-how" on furnace installations and heating requirements to be determined in individual installations, negatives the thought that there are, among respondent's employees in its multiple branches, any sufficient number of men qualified to assume this appellation of "engineer."

In its hiring of men respondent announces its policy to be: [7]

> High school and college graduates are preferable, but there is no bar on applicants of lesser education. Men with mechanical inclinations are desirable, although those without it can be successfully taught Holland engineering, etc. * * *

As a fact, and according to the testimony of a number of respondent's employees, the instruction and training of men is left to the responsibility of branch and subbranch managers, or their designees, who may or may not be competent in the field of teaching "engineering." Such training has been testified to consist of morning meetings of the staff of employees where talks are given, discussions held and demonstrations made with the aid of miniature or model furnaces,[8] supplemented by certain publications of the respondent.[9] There is no definite evidence as to what portions of such meetings were devoted to mechanical subjects, (in contrast to selling techniques), nor is there evidence of segregation of the two subjects to be taught to separate groups, but it is a fact that, when the sessions were over, all the men took off to their respective territories with the principal object of "selling" because their pay depended on their productive ability reflected in sales, and also the productive reputation and remuneration of their mentors and teachers, the Branch Managers, rested solely and primarily upon sales volume.

Actual instances of the misappropriation of this designation were indulged by respondent's agents, as testified by diverse witnesses, in widely separated areas, such as Moline, Ill.; Chicago, Ill.; Grand Rapids, Mich.; Buffalo, N. Y., Boston, Mass.; Baltimore, Md., and elsewhere. In fact respondent, in its answer to the complaint:

> Denies, for want of knowledge, that its servicemen or salesmen represent themselves to be heating engineers, and denies further that such representation if made, would be false.

In view of the findings herein elsewhere made, and of the

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[7] Resp. Ex. 228, p. 8.

[8] Resp. Ex. 206.

[9] Resp. Ex. 153, 229, 230 and 231, and others.

total lack of sufficient knowledge and training on the part of respondent's employees, it is found that respondent was in possession of knowledge that its employees did, in fact, designate and refer to themselves as "heating engineers" and, despite the assertion by respondent that, "if made," such assertion would not be false, it is found that such assertions were false, unjustified, misleading and made for the sole and express purpose of giving stature to such agents for the purpose of effecting sales.

In one of the many advertising folders issued by respondent,[10] distributed by its solicitors of cleaning and gas proofing jobs, it is stated that respondent, upon completion of such a job, causes "final checking" thereof to be made by "a heating engineer." Another such piece of advertising literature,[11] refers to "engineer's inspection" as an integral part of service pertaining to "Holland Furnace Cleaning."

The respondent introduced a witness who served as chief engineer at respondent's home office and plant from 1936 until February of 1954. By this witness respondent attempted to show the various methods and means it pursued in the technical training of its field personnel; witness testified he participated in company policy and activity of acquainting the branches and their personnel in the proper installation of heating equipment as well also recognizing and identifying defects or shortcomings in heating plants; that this educational policy took the form of printed letters, books and pamphlets, as also dissemination by means of the Company publication, "The Firepot"; that various meetings were held in the home office at which branch personnel were present and at least once each year a national meeting was held, with all branches present or represented; at these meetings the Engineer Department of respondent was allotted certain time for discussion and presentation of engineering subjects; that those in attendance were largely home office personnel, division managers, branch managers and salesmen and installers; that such meetings lasted a period of one day and the time was about equally divided between presentation of engineering and sales; that in addition to the annual meetings there were the daily morning meetings under supervision of the branch managers; that witness undertook, by means of uncolored photographs, to instruct the personnel on various furnace defects

[10] Comm. Ex. 45.
[11] Resp. Ex. 236.

such as crystallization, carbonization, scabs, porosity, pin holes, cracks, blow holes and other defects.

This witness was on the stand, on direct and cross-examination for three days during which time respondent had every opportunity to develop to the utmost all facets of its technical training of employees in this specialized field and by the officer of respondent in direct charge of the program, yet it is found, as a fact, that his testimony, (supplemented by that of others on the same subject), was unconvincing to this examiner, that all of the technical and practical knowledge imparted by him to the branch managers and presumably, (although witness had no direct first-hand knowledge on the subject), passed on by the managers to their salesmen, solicitors and installers which would, in any wise, justify any of the last three categories, or even the branch managers, to arrogate to themselves the title or designation of "heating engineer."

Failure to Reassemble Furnaces

12. It is found that respondent's employees have dismantled furnaces and have left the same unassembled for lengthy periods of time after having been requested by the owners to reassemble them, thus causing such owners unnecessary and great inconvenience. As a reason for failure to promptly reassemble furnaces, respondent's agents have falsely represented that to do so would entail grave dangers of fire, gas and explosion, or that some of the furnaces, being those of competitive manufacturers, have passed their useful life and are not worth the expense involved, or that the manufacturer has "gone out of business" and necessary replacement parts are unobtainable.

Certain instances of record disclose that, prior to actual condemnation of furnaces by respondent, such furnaces were operating satisfactorily, with no apparent malfunctioning or defects.

By reason of such representations many furnace owners have been improperly forced, or improperly persuaded, to purchase new equipment long before the expiration of the useful life of their furnaces, all of which would not have been necessary had the truth been told and such furnaces been restored to workable and safe condition by respondent which could have been accomplished at an expenditure of money greatly under that outlaid for the purchase of new equipment.

There are a number of instances of record, in several areas, where furnaces thus condemned by Holland representatives were

proved to be either in safe and usable condition, or repairable, without the attendant dangers falsely delineated by respondent's agents. Many such repairs were in fact made subsequently to condemnation by respondent, which fact was tesitfied to in a number of instances by home users who had caused repairs to be made by others, and who had continued the use of such furnaces, without untoward effects, and such was further established by the testimony of witnesses who had examined such furnaces after condemnation by respondent and who were technically competent to pass upon the safety of the continued use thereof.

The disassembling of furnaces, which gave rise to this class of complaints of failure to reassemble upon demand, was brought about by respondent's agents when, in their visitations to prospective customers in the solicitation of cleaning and gasproofing jobs, they falsely claimed it was necessary to completely or partially dismantle furnaces, during which period they were obviously inoperable, in order to determine the extent of repairs necessary. Before proceeding with dismantling it is found that in practically all instances respondent's agents procured from prospective customers the execution of its so-called "Form R-10," "Cash Repair and Service Agreement."

During the course of the proceedings there were admitted in evidence no less than eighty of these executed forms. When it is remembered that these contracts were for repairs or lesser services for individual customers, and did not include major contracts for equipment installation, of which there were many, some idea may be had of the large number of transactions on which testimony was received and the impracticability of here analyzing each instance, as well also why it was necessary to receive the testimony of the large number of witnesses and the length of the record.

Respondent's "Form R–10" aforesaid, provided, in the matter of gasproofing service, that respondent was to:

> Disassemble and clean castings and smoke pipe. Inspect dismantled heating system with owner. * * * The furnace must be reassembled within forty-eight hours after disassembling has been started except where delayed by Act of God or procurement of foreign parts in which case furnace will be reassembled within forty-eight hours after such parts are obtained.

and further along, in small type, provides:

> * * * All work will be done at our convenience.

Throughout the proceeding respondent has laid great stress

upon the security of its position in its right to disassemble furnaces because of its legal position, the contract aforesaid expressly according such right to it. This position is demonstrated by the fact that, in almost every instance of wrongdoing proved by the Commission, respondent has sought to counter by introduction of its "Form R–10" in explanation of, and as authority for, its action.

Adverting specifically to the forty-eight hour reassembling clause, above cited, and as evidence that respondent knew of, and realized that, many complaints of failure to reassemble had been received by it, respondent issued its "1943 Service-Sales Policies" Bulletin [12] in which it said:

> Most of the trouble seems to surround our cleaning and G. P. [i.e. gas proofing] services—*where your Company makes not one cent.* Those services are absolutely essential to the home owner, but from a company viewpoint *they are done primarily as good-will builders* and to allow you men to keep your individual organizations going. * * * With this in mind, and to avoid trouble in the future, we are issuing this document. * * * (Italics supplied)
>
> 48 HOUR CLAUSE.
>
> FURNACE REASSEMBLING REQUIREMENTS.
>
> (Amendment to R–10 Contract.)
>
> The change in the R–10 Repair and Service Order as follows will require prompt handling of the "downs." [i.e. disassembled furnaces].
>
> (NOTE BY EXAMINER: Then follows promulgation of the new 48-hour rule and some examples of reasons why furnaces were not reassembled promptly and in ample time to avoid complaints).

In this connection, and aside from any question or inquiry into the legality of the contract represented by the "Form R–10," or of the impregnability of respondent's position and supposed legal rights under said contract, it is found that respondent did not receive *carte blanche* authority to proceed irrespective of the rights and convenience of furnace owners, as it did and is so found, nor could respondent at its caprice "perform all work at its convenience." It is further found that respondent has been guilty of breach of the express terms of the contract on which it relies for protection in that it has, in many instances, failed to reassemble within the contractual time. As a fact this failure or refusal to reassemble was but a thinly-veiled cover for effecting improperly forced sales of equipment, as further herein elsewhere found under the headings of "scare selling" and the use of the solicitation of cleaning and gasproofing jobs as equip-

[12] Resp. Ex. No. 223.

ment sales stimulators. That these solicitations were recognized by respondent as a "new sales tool," and the adoption thereof by "All Holland Men," is borne out by reference to respondent's "Bulletin No. 1350" [13] wherein it was said:

All Holland Men:

A great many branches have been working the Cleaner-Casing-Opening Service with very good results, as per the management's recommendations as outlined in Bulletins Nos. 1338, 1339 and 1340 of June 20, 1949. Judging from the records of the past ten weeks, we are certain it is a successful *Cleaner Service* program and should be adopted by all branches.

* * * * * * *

Please hold a Branch meeting on this *new sales tool*—the Cleaner-Casing-Opening Folder—and start September off with this tried and proven service that gives your homeowners greater service benefits and value—and this, of course, will also reward Holland men.

It is found, as a fact, that this sales method was inaugurated and prosecuted for the primary and sole purpose of developing sales of heating equipment; that there is not and never was intended to be, any profit from such jobs accruing to respondent, the entire proceeds from such being devoted to the payment of commissions to the solicitors obtaining the jobs, the payment of mechanics' salaries or wages, the unexpended balance remaining with the Branch Office and respondent "getting not one cent"; that when sales of equipment were effected through a lead developed by a cleaning job, the solicitor who produced the job received a commission of from three to five per centum on such sale in addition to his original compensation; that the matter of commissions and bonuses was of prime importance to all on the sales production line, from division managers to solicitors, is evident from the testimony of a former sales manager of the respondent who testified that in some instances, in the larger branches, the commissions and bonuses of the branch managers exceeded $50,000 per annum, and by another officer who testified that all remuneration to the sales force was based upon commissions.

Respondent Improperly Required Execution of Releases from Liability

13. From the record it is found that in a number of instances, where disputes have arisen between respondent and its customers, respondent's representatives have improperly required such

[13] Resp. Ex. 236 A-B.

customers to absolve the respondent and its employees of any liability, including liability for the negligence of its employees, in writing, as a condition precedent to the reassembling of furnaces by it theretofore dismantled. In many instances these releases were procured to be signed by false representations as to the intent and character thereof and in other instances such were signed by furnace owners under duress—in some cases in order to get respondent to reassemble furnaces and thus to restore heat to their homes while, in other cases, such were signed as a last resort and in order to induce refunds or settlements on the part of respondent where monies had been theretofore paid it, or to procure releases from contracts whose execution had been procured through misrepresentation or falsity.

That respondent was fully cognizant of complaints along this line is amply demonstrated by the publication of a two-column box notice in respondent's official paper, "The Firepot,"[14] reading as follows:

THIS IS VITAL!

As you men well know, we send out a letter following our receipt of a Satisfaction Report which you have gotten from the customers who have complained in any way.

Knowing, as you do, that we are going to send out this letter, we are dumbfounded to find that some of you are getting these Satisfaction Reports in a manner which is only going to cost you an additional trip, or the expense of Guy Smith before you're through with it.

Several customers have written in indicating that if they signed any Satisfaction slip, they were unaware of it. They admit they signed a paper, but they were of the opinion it was only one indicating someone had been there.

What on earth is the matter with you men? Is it just impossible for some of you to do things the way they are supposed to be done? Settle down a bit and get things clicking the way they should be, will you please?

In one instance, in the city of Dorchester, Mass., a customer was demanding the refund of a deposit, (which refund was ultimately made by respondent), but, according to the claimant, (as reflected by one of respondent's own exhibits[15]), respondent's representative said no refund would be made unless she, the customer, "would sign a paper saying that in case any of the neighbors died from coal gas I would be solely responsible."

There were other complaints in several areas, which are hereby found as facts in support of this specific charge, to the effect that

[14] Comm. Ex. No. 50.
[15] Resp. Ex. No. 28 A–B.

releases were secured under pressure methods and, in a number of instances releases were executed only upon final settlement of claims and as a result of claimants employment of attorneys to prosecute the claims.

THE DEFENSE

14. In support of its defense respondent availed itself of the testimony of 128 witnesses, divided substantially as follows: 86 were, at the time of testifying, in the employ of respondent, such ranging from its president and higher officers through division and branch managers, salesmen, installers, solicitors and mechanics; 22 were former employees of respondent; four were experts; nine were engaged in the banking business; and seven miscellaneous.

The Employees, Past and Present

Many of the present and former employee witnesses of respondent, especially in the lower echelons, were, in one connection or another, directly associated with many of the individual transactions testified to by the witnesses introduced by the Commission. These witnesses were introduced by respondent primarily, and almost exclusively, for the sole purpose of either attempting to explain the circumstances surrounding the individual transactions, or to attack the truth and veracity of the witness who testified to such at the instance of the Commission.

This examiner, who heard all of the testimony and had full and ample opportunity throughout the proceeding to observe the demeanor and appraise the testimony of these witnesses, and to compare such testimony with that theretofore received from Commission witnesses, thus being able to arrive at a conclusion as to where the truth and weight of the evidence really resided, came to the conclusion, and so finds, that these witnesses, either from a sense of loyalty to the respondent or from motives of self-interest, (many of them being central figures in the transactions here involved, their actions being the bases of many of the charges of the complaint), did not measure up to that degree of frankness and truthfulness which would serve to impress or convince this examiner that their testimony was of a type and weight which would induce him to accept same to the extent that such would outweigh the testimony of Commission witnesses.

It is realized that the foregoing finding, involving the testimony of so large a number of witnesses, is indeed broad, but it

is, nevertheless, a fact that, except in the testimony of a few ex-employees, not one of all of the respondent's witnesses faced up to the facts of the situation and admitted to any wrong-doing or untoward conduct on his part in the discharge of his duties, but on the contrary insisted most strenuously on his purity of motive and impeccant rectitude in the matter of business ethics.

In thus disposing of the weight to be accorded the testimony of so great a number of witnesses, such is not done lightly or cavalierly. The converse of this particular finding is that the Commission, to maintain the issues on its part joined, as hereinabove pointed out, produced some 132 witnesses, the majority of whom testified at great length and with apparent frankness and truthfulness, all having been subjected to searching, and in some instances grueling, cross-examination, the latter having little or no effect in weakening or vitiating their testimony on direct. In addition, the examiner has been guided, in his appraisal of the testimony on both sides, by the legal maxim *testes ponderantur, non numerantur,* as well also the rule of *testibus deponentibus in pari numero, dignioribus est credendum.*

By the testimony of the defense witnesses in this category, respondent would have us to believe that each and every of the acts proved up by the Commission were innocent, proper and without culpability on the part of respondent. This cannot be accepted, as to do so would be to do violence to the necessity of finding to the contrary under the greater weight of the evidence.

Another facet in this connection here taken into consideration was the uniform and undeviating testimony of these witnesses that they had done no wrong. It is not readily conceivable that, in an organization of the size of respondent's, (nationwide in its scope of operations, loosely knit as to control, employing large numbers of men of various types, experience and capabilities), there are not some agents or employees who do not measure up to the high standards which respondent would have us believe applies to all of its employees, yet, so it is, that not one such was produced who would frankly admit to any divarication in his methods of obtaining business but, on the contrary, by devious, and at times irrational, explanations sought to justify or explain away the charges.

Yet another consideration enters this finding and it is that, if all of these witnesses are to be believed then it must be decided not only that all of the many witnesses who testified for the Commission were untruthful or mistaken as to the ultimate

justice and correctness of their charges against the respondent but that they were unjustified in lodging their complaints in the first instance. Under the facts of record this view cannot be accepted, for to do so it would follow, as a necessary corollary, that the great spate of complaints were without foundation in fact and all figments of the complainants. The complaints here dealt with did not arise as a spontaneous homogeneous outbreak in one locality, which might be attributable to a local condition, but, on the contrary, extended over a long period of time and in many widely diverse communities, all of the acts complained of evidencing a remarkable parallelism in the various geographical areas visited. In this connection are pointed out the conditions met with in the cities of Moline, Baltimore, Boston, Chicago, Indianapolis, Rochester, Buffalo and elsewhere, in all of which areas existed large numbers of complaints calling upon the good offices of various local Better Business Bureaus in seeking redress from respondent for the wrongs committed. In fact the volume of the complaints originating among the local Better Business Bureaus was such that, in order to handle them with expedition and satisfaction to the Bureaus, the respondent sought a liaison agreement with the national headquarters of the Bureaus in New York City as a central clearing house for all complaints, as hereinbefore related.

Respondent's Expert Witnesses

An expert witness for the respondent testified he is a chemical and combustion engineer; described the fundamental processes of combustion as they occur in warm air furnaces; the differences in combustion of various fuels; the chemical constituents thereof and the end results after combustion; processes of oxidation and resultant formation of carbon monoxide and carbon dioxide gases; the formation of clinkers and soot as by-products of combustion; the differences between the by-products of coal and gaseous and liquid fuels; the operation of a coal-fired furnace and the composition of flue gases under varying conditions of air supply; the different characteristics of gravity-fed and forced-air home furnaces; atmospheric pressures and turbulences and a great quantity of scientific testimony of like tenor and effect extending over some two hundred pages of the transcript.

This witness was not cognizant of any of the facts surrounding any particular instance of the many testified to at the instance of the Commission; had no personal knowledge concerning the

issues here involved which would aid in a determination thereof and answered no hypothetical question predicated of any of the circumstances or facts proved in conjunction with any of the instances proved by the Commission. Hence it is found that his testimony had no bearing on the issues, wherefore same is disregarded.

Another expert for respondent testified he is Dean Emeritus of the School of Engineering of Michigan State College and now engaged as a consultant to manufacturers of heating equipment; identified certain diagrammatic photographs and sketches showing construction and circulatory systems of hot air furnaces of both gravity and forced air feeds; the various conditions which may be found in, or are characteristic of, warm air heating systems in home installations; the differences between primary and secondary heating surfaces; the life expectancies of cast iron and steel furnaces; the effects of overheating and that, in normal usage without mistreatment or overheating, furnaces last over long periods. The witness testified further along the above lines, undertaking in some instances to give opinions on hypothetical questions propounded him but it is found that such opinion testimony, not being based upon sufficient facts proved of record in connection with any specific instances in issue, is of no value to a determination of the issues herein. Witness had no direct knowledge of any of the facts surrounding any particular instance of the many testified to at the instance of the Commission on which grounds it is found that his testimony, as an entirety, is of no assistance in determining the issues here involved, hence is disregarded.

Another expert witness introduced by respondent testified he is a professor of Occupational Medicine in the School of Public Health, Columbia University; among his many professional studies and researches he accorded particular attention to the study and solution of problems involving a number of different types of toxic materials, including carbon monoxide gas in household equipment and domestic surroundings. A bibliography of the publications of the witness appears of record.[16]

This witness was fully qualified in his field and proceeded to testify to the effects of carbon monoxide on human beings; the various concentrations thereof which would produce headaches, nausea, dimness of vision, convulsions, unconsciousness

[16] Resp. Ex. No. 255 A–D.

and death, and gave his expert opinion on hypothetical questions involving five or six instances where respondent's counsel contended the facts proven of record were sufficiently definite to justify the acceptance of the opinions expressed. However, this examiner is of opinion that the answers, even though accepted, have no weight as a defense in any one or all of the particular instances cited and are, therefore, disregarded.

The testimony of this witness was general in character; he had no personal knowledge of any facts or circumstances surrounding any specific furnace, before or after being condemned by respondent's employees; was not in position or capable of passing any valid opinion on, nor to attempt to justify the procedures of respondent in, arriving at any judgment on the physical condition of any furnace or equipment specifically involved in these proceedings and generally his testimony was of no value or aid in determining any of the issues here involved wherefore, as an entirety, it is disregarded.

The final expert introduced by respondent was an associate professor of metallurgy and research supervisor, Ohio State University Research Foundation. This witness was produced to express, among other things, opinions on the causes of defects occurring in cast iron and steel warm air heating equipment; that one year prior to testifying he had been employed by respondent's counsel, to pursue a study, by visual examination, of furnace parts which had been in service, the physical manifestations arising therefrom, and conclusions to be drawn as to the suitability of such furnaces, or parts thereof, to continue in service.

[Prior to the introduction of this witness respondent produced an employee witness who testified, in effect, that he had visited the scrap heap or junk pile of respondent in Holland, Mich., from which he made certain selections of pieces of discarded metal from furnaces which had been turned into respondent from its branch offices, as hereinabove related, when new equipment had been installed; that he did not know how long this scrap had been on the heap; did not know the source thereof; did not know why the furnaces, of which the scrap had been a part, had been replaced; could not testify that any of such scrap had ever constituted a part or portion of any of the furnaces specifically dealt with in any testimony in this case, and that he caused certain photographs thereof to be taken by a commercial photographer in Holland, Mich. These pieces of metals and photographs

were marked for identification for the respondent [17] but were refused in evidence by the examiner on the ground, among others, of failure to show materiality to the issues or connection with any furnace in question in this proceeding.]

Notwithstanding the prior rejection of the exhibits referred to in the next preceding parenthetical paragraph, respondent's counsel attempted, through the expert here under discussion, to again qualify the pieces of metal and photographs as exhibits entitled to admission in evidence, but without success. Such were never accepted.

The witness testified that, prior to his employment by respondent with a view to testifying in this proceeding, he had never pursued any study of gray iron furnace castings, (which is the type of metal principally here dealt with), and that his studies of the metal subsequent to his employment by respondent was confined to material which in all instances was supplied him by respondent and was, to use his expression, "a return to the Holland Furnace Company for one reason or another as presumable scrap."

Specifically referring to the testimony of this witness and what respondent hoped and intended to prove by his testimony, respondent's counsel stated on the record that such testimony would show that, on the basis of the appraisal of furnace conditions, *as disclosed by respondent's employees,* the representations of respondent's agents were not false but on the contrary there was ample basis in fact, and by creditable scientific opinion, that all of such representations were true in fact, fully warranted by the facts in each instance, and were not false or misleading.

The witness testified at length and, after full consideration thereof, it is found that such testimony, as an entirety, is of no value or assistance in resolving the issues here involved, hence is disregarded.

There was no expert or scientific evidence adduced in support of the Commission's case in chief. There was, however, some expert testimony offered in rebuttal of respondent's witnesses above considered and, it having been found that no consideration would be accorded the latter it follows that none will be accorded the rebuttal thereof. In view of the foregoing there can be no possible conflict in scientific opinions which would, in any wise, affect the issues herein.

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[17] Respondent's exhibits for identification, but not in evidence, 182–204.

The Respondent's Banker Witnesses

Respondent introduced nine witnesses in this category and it is felt that they, and their banking institutions should be referred to in order that respondent may have the benefit of the prominence of the witnesses and of their institutions:

1. Vice-president of Federal Savings & Loan Assn. of Baltimore, Md.; 2. Manager of Lending Department, Rock Island Bank & Trust Co.; 3. Vice president, American National Bank & Trust Co. of Chicago; 4. Vice president First National Bank of Cincinnati, Ohio; 5. Vice president Northwest National Bank of Chicago; 6. Loan Manager of Equitable Trust Co. of Baltimore, Md.; 7. Vice president Gramatan National Bank & Trust Co. of Bronxville, N.Y.; 8. Manager of Indianapolis Branch of First Bancredit Corporation and; 9. Manager of Buffalo, N.Y. Branch of First Bancredit Corporation.

These witnesses testified to the general effect that they were purchasers, in great volume of respondent's customers' promissory notes from Holland which it had acquired as evidence of deferred purchases on sales of equipment; that such notes, many of which had been guaranteed as to payment by the Federal Housing Administration, were endorsed over by Holland to such purchasers without recourse; that Holland received therefor the face value of such notes without discount; that the volume of such transactions, since the year 1949, ran into the multiple millions of dollars; that the ratio of customer complaints coming to the attention of these institutions was insignificant and that the character and value of the paper, as to ultimate payment thereof, compared favorably with the general run of discounted commercial paper and in addition thereto several of the witnesses were in position to, and did, compare the number of complaints on Holland paper with that received concerning the discounted paper of other suppliers of heating equipment, (competitors of respondent), stating that the latter comparison equated the Holland paper favorable.

Each of the witnesses had read to them a list of the charges contained in the complaint herein and they testified generally to the effect that they had no knowledge that any of the acts or representations of respondent or its agents, as charged in the complaint, formed the basis for any refusal of respondent's customers to honor their paper by payment thereof.

There is no charge in the complaint that respondent over-

charged its customers; no question of the prices of equipment is involved; no charge of fraud or overreaching on the part of respondent in procuring the execution of promissory notes representing deferred purchase money and no question raised concerning Holland making good on any default in payment by its customers.

All of the commercial paper acquired by these witnesses' institutions was had after the several deals had been closed and the furnace installations effected, thus becoming a *fait accompli*; none of the witnesses knew, or at least did not assert any knowledge, of any preliminary negotiations or representations of respondent's agents leading up to the sale of the equipment and the execution of the promissory notes acquired by them, nor did they testify to knowledge of instances of charged misrepresentations affecting sales which were not completed and did not come within their knowledge, of which there were many.

In fine, this testimony is not only irrelevant to the issue but is also negative in quality and *ex post facto*. That the witnesses had no knowledge of the charges contained in the complaint can patently have no weight in view of the preponderant weight of the evidence, as heretofore found, that there were in truth and fact many such instances.

Under happier circumstances, i.e., were the weight of the total evidence more in balance instead of preponderantly in favor of the charges of the complaint, evidence of this character might have some beneficent power to influence a decision, but in the state of this record such is not possible. The testimony of all of these witnesses will, therefore, be disregarded.

The foregoing review and comment on respondent's defense evidence is occasioned by the opinion in *Universal Camera Corp.*, v. *N.L.R.B.*, 340 U.S., 474, et seq., directing that the "substantial evidence" rule to support an order must be based upon the "entire record" which, of course, includes evidence *contra* that introduced in support of the charges of the complaint. With the rule there enunciated this examiner is in complete accord, hence wishes it to be known that all defenses have received their due consideration at his hands.

CONCLUSIONS

1. The contentions of the respondent to the contrary notwithstanding, it is found that respondent was, at all times touched upon herein, engaged in interstate commerce as such is defined

in the Federal Trade Commission Act and under the many court decisions interpretative of said Act.

U.S. v. *Rock Royal Co-op.* 307 U.S. 533, 569.
U.S. v. *Darby,* 312 U.S. 100, 113–114.
Kirschbaum v. *Walling,* 316 U.S. 517.
Currin v. *Wallace* 306 U.S. 1, 9–11.
DeGorter v. *F.T.C.* No. 15, 184 U.S.C.A. 9th Cir. P. 5.
U.S. v. *Walsh* 331 U.S. 432.
U.S. v. *Food and Grocery Bureau* 43 F. Supp. 975.
U.S. v. *Standard Oil of Calif.* 78 F. Supp. 850.
McComb v. *Dessau,* 89 F. Supp. 295-296.

2. The use by respondent of the unfair and deceptive acts and practices as hereinabove found has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public, to cause many owners of furnaces and heating equipment made by respondent's competitors to become dissatisfied with and afraid of continuing to use such equipment, to discard such furnaces and equipment before the completion of the useful life of such products and to purchase furnaces, heating equipment and parts manufactured and sold by the respondent.

3. In order to find respondent guilty of false, deceptive and misleading acts and practices in pursuance of the sale and distribution of its merchandise it is sufficient, under the law, if the first contact or interview leading to a sale be secured by misrepresentation or deception which, it is concluded, has been amply proved in the instant case.

F.T.C. v. *Standard Education Society, et al.* 302 U.S. 112, 115.
Carter Products, Inc., et al. v. *F.T.C.* 186 F. 2d 821.
Fairyfoot Products Co. v. *F.T.C.* 80 F. 2d 684, 689.

4. It is concluded that many of the acts found to have been committed were made possible, in large measure, by the wide discretion and freedom of action accorded branch managers, and the lack of supervision exercised by respondent, coupled with the profit motive actuating managers and subordinates whose compensation depends wholly upon sales "turned up" by individual solicitation and initiative and the commissions on such sales. When it is borne in mind that there are in excess of four hundred branches, by means whereof respondent operates its business throughout the United States, employing several hundreds of agents, and that the branch manager is supreme in his day to day operations, subject only to occasional checks by division man-

agers or home office personnel, it can be understood that there is present the occasion and opportunity to improve sales volume by illegal or unethical methods proscribed by law. This situation is the result of respondent's elected methods of transacting business and no amount of instructions to employees, solicitors, agents or representatives can save the respondent harmless from failure to properly police its employees to insure that such acts are, in no event, committed.

5. It is concluded that the "purity of respondent's motives" as set forth in its manuals, magazine, "The Firepot," circular letters, etc., as hereinabove found to be facts, are all immaterial if, in fact, their employees violated these instructions to the injury of the public. Instructions to agents and representatives not to misrepresent or otherwise violate the law in this connection do not relieve the respondent of liability in the premises.

Steelco Stainless Steel, Inc. v. *F.T.C.* 187 F. 2d 693.

A seller who uses oral solicitation through canvassers is an absolute guarantor of the truth of their utterances and sporadic or intermittent warnings, or threats of punishment of such employees, is not sufficient to avoid the consequences of their acts. Misrepresentation must be prevented at respondent's peril to the end that it may not reap the benefits and profits of such unlawful acts and deny liability therefor.

6. It is concluded that the acts found to be true under the specific charges of the complaint were not localized or peculiar to any particular or restricted area but, on the contrary covered an area which might be roughly described as a triangle, the cities of Boston, New York, Baltimore, and Washington, D.C., forming the base thereof on the Atlantic seaboard, the apex resting on the Mississippi River at Davenport Iowa, and Moline, Ill., including the Chicago area, thus affecting many of respondent's branch and subbranch offices and employees, as well also its Division supervisors, in the areas affected.

7. On some occasions respondent's customers have been forced, intimidated, or cajoled into signing so-called "satisfaction releases." In many instances the customers have signed such releases as the easiest way out to obtain a refund of monies previously paid to respondent's employees, either by way of deposit or otherwise, or, having been assured that respondent would not reassemble furnaces theretofore dismantled, have signed such

releases as a last measure in order to procure the reassembling of their furnaces and thus to have heat restored to their premises.

8. As a result of the false and misleading representations, and of the unfair and deceptive acts and practices indulged by the respondent, trade has been unfairly diverted to respondent from its competitors with consequent substantial injury to competition in commerce.

9. The acts and practices of the respondent, as hereinabove found, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair and deceptive acts and practices in commerce, and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Standard Oil Co. v. *F.T.C.* 173 F. 2d 210 and cases therein recited and reviewed.

International Text Book Co. v. *Pigg* 217 U.S. 91.

Furst v. *Brewster* 282 U.S. 493.

Consumers Home Equip. Co. v. *F.T.C.* 164 F. 2d 972.

Progress Tailoring v. *F.T.C.* 153 F. 2d 1103.

U.S. v. *General Motors* 121 F. 2d 276 et seq. (wherein see p. 399.)

Hoboken White Lead, etc. v. *F.T.C.* 67 F. 2d 551.

10. On the basis of the above findings and conclusions, it is found and concluded that the Federal Trade Commission has jurisdiction of the subject matter hereof and of the respondent herein and that this proceeding is in the public interest wherefore the following order is issued:

ORDER

It is ordered, That respondent Holland Furnace Company, a corporation, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of furnaces, heating equipment, or parts therefor, do forthwith cease and desist from:

(1) Representing, directly or indirectly that any of its employees are inspectors or are employees or representatives of Government agencies or of gas or utility companies.

(2) Representing, contrary to fact, that its salesmen or servicemen are heating engineers.

(3) Representing that any furnace manufactured by a com-

petitor is defective or not repairable, or that the continued use of such furnace will result in asphyxiation, carbon monoxide poisoning, fires, or other damage, or that the manufacturer of such furnace is out of business, or that parts of such furnace are unobtainable, unless such are the facts.

(4) Tearing down or dismantling any furnace without the permission of the owner.

(5) Representing that a furnace which has been dismantled cannot be reassembled and used without danger of asphyxiation, gas poisoning, fires, or other damage, or for any other reason, when such is not a fact.

(6) Requiring the owner of any furnace which has been dismantled by respondent's employees to sign a release absolving the respondent of liability for its employees' negligence, or of any other liability, before reassembling said furnace.

(7) Refusing to immediately reassemble, at the request of the owner, any furnace which has been dismantled by respondent's employees.

(8) Misrepresenting in any manner the condition of any furnace which has been dismantled by respondent's employees.

OPINION OF THE COMMISSION

By SECREST, Commissioner.

This matter is before the Commission for final decision on the merits on respondent's appeal from the hearing examiner's initial decision which concluded that respondent has violated the Federal Trade Commission Act through the use of unfair methods of competition and unfair or deceptive acts and practices. The order contained in the initial decision prohibits respondent from engaging in a sales scheme in connection with distribution of furnaces and heating equipment whereby its salesmen gain access to homes by misrepresenting themselves as official "inspectors" and "heating engineers" and thereafter dismantling furnaces on the pretext that this is necessary to determine the extent of necessary repairs. The order also inhibits respondent from utilizing coercive and "scare tactics" in inducing the purchase of furnaces from it. Also proscribed are other related practices all of which are established by the record to be part of a systematic sales plan effectuated by means of false representations. The findings of fact which are the basis for the inhibitions of the order are set forth in meticulous detail in the initial decision and there appears no reason to restate them here. We have care-

fully examined the whole record and find respondent's contentions both as to procedural and substantive matters to be without merit. It is our view that the record not only substantially but copiously supports the findings in the initial decision and that the findings furnish a sufficient basis for the prohibitions of the order to cease and desist contained therein.

Respondent throughout this proceeding, and particularly on appeal, vigorously has urged that the Commission lacks jurisdiction. The record discloses Holland owns and operates some 475 branch offices, or retail outlets, as well as a number of subbranches. Salesmen or house-to-house canvassers sell respondent's products with gross annual sales amounting to about $30 million. All sales effected by the Holland Furnace Company or its representatives are to the ultimate purchasers and users of such equipment. Respondent does not ship furnaces as units but sends quantities of essential parts to central or branch warehouses. Respondent argues that once the materials and parts have arrived at its warehouses, the interstate stream of commerce ceases and that the practices proposed to be prohibited take place thereafter in a given state, at the local level, and are not "in commerce." In essence, respondent claims its branches are construction contractors whose operations are removed from the flow of interstate commerce.

The Commission is of the opinion that respondent's contention in this respect must be rejected. The heating equipment involved is manufactured in Holland, Mich., and shipped from there and sold by respondent's authorized representatives on a nationwide basis in some 45 States through respondent's own retail outlets. A realistic view of respondent's activities in moving its products from Michigan across State lines to accomplish its stated purpose of direct sales to ultimate consumers through "500 Direct Factory Branches Serving Over 15,000,000 Customers" admits of no other conclusion than that respondent is engaged "in commerce."

Contracts between respondent and branch managers and salesmen; correspondence between the home office in Michigan and field personnel; those contracts between respondent's salesmen and the purchasing public on respondent's behalf which must be accepted by the home office; and representations made by salesmen in selling respondent's products—all are part and indicate

a pattern of conduct in commerce within the meaning of the Federal Trade Commission Act.[1]

Furthermore, there is record evidence that sales were made from respondent's Baltimore, Md., branch in the District of Columbia and in Virginia; that the Miles, Mich., branch sold in Indiana; that the South Bend, Ind., branch sold in Michigan; Missouri branches sold in Illinois; and Kentucky branches sold in Ohio. Respondent's branch manager in St. Louis, Mo., testified as to sales in Illinois locations from the St. Louis, Mo., warehouse and deliveries to purchasers from the Missouri warehouse. Respondent's operations, as we have seen, are nationwide in scope, its sales contracts are with purchasers in different States, and the technicalities of the "original package doctrine" do not shield it from the consequences of unfair acts and practices engaged in by its authorized sales representatives. The fact that respondent's products are shipped to respondent's employees at its branch warehouses for subsequent delivery to purchasers does not put an end to the interstate character of the transaction. *Binderup* v. *Pathe Film Exchange*, 263 U.S. 291 (1923); *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U.S. 52 (1927); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948). And see cases cited n. 1 below.

Respondent also advances on appeal a separate three-pronged argument.

Respondent urges in its brief that "the initial decision of the hearing examiner incorporates and is based upon: (1) erroneous findings of fact, contrary to the manifest weight of substantial evidence of record and, in some instances, unsupported by any evidence of probative value and (2) erroneous conclusions of fact and law injudiciously reached and arbitrarily and prejudicially applied in a manner constituting abuse of judicial discretion." Respondent contends therefore that the conclusions reached and the order predicated thereon are invalid and accordingly should be set aside in toto.

As previously indicated in this opinion, it is our view that the record substantially supports the findings in the initial decision and that these findings furnish a sufficient basis for the order

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[1] *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103 (C.A. 7, 1946); *Carter Carburetor Corp.* v. *Federal Trade Commission*, 112 F. 2d 722 (C.A. 8, 1940); *United States* v. *General Motors Corp.*, 121 F. 2d 376 (C.A. 7, 1941). And see *Consumers Home Equipment Co.* v. *Federal Trade Commission*, 164 F. 2d 972 (C.A. 6, 1947).

contained therein. We are accordingly rejecting the respondent's contentions, as set forth above, since there is adequate legal warrant and sound record basis for all of the examiner's findings which, in our view, were judiciously and fairly applied to the law and facts.

The second point sought to be established is that there were numerous over-technical, arbitrary, erroneous, inconsistent, contradictory and prejudicial rulings made by the examiner on questions of substance as well as procedure throughout the course of these proceedings. In this same connection, respondent contends that the examiner evidenced an erroneous conception of the purpose, scope and fundamental rules of law governing the conduct of the hearings and that this resulted in imposition upon respondent of the burden of proof and the burden of proving a negative. Respondent also argues that the examiner by his prior evaluation of the import, purpose and scope of the testimony and evidence committed prejudicial and reversible error and demonstrated a degree of preconception and prejudgment of the issues and evidence, the cumulative effect of which was to deny respondent a fair hearing and due process of law.

Respondent, subsequent to submittal of its appeal brief, was granted leave to, and did, file a supplement thereto consisting of thirteen extensive tabulations of record page references, all of which are cited in support of the second point of respondent's separate argument.

The tabulations purport to list instances of rulings adverse to respondent on objections and motions to strike; instances wherein the rule was not enforced requiring that grounds for objections must be stated; occasions when testimony of respondent's witnesses was restricted or limitations placed upon the scope of examination of witnesses, where exhibits were refused in evidence, leading questions were permitted, proffers of testimony were denied and interruption of the examination of witnesses permitted, etc. All of the foregoing are matters peculiarly within the scope of the exercise by the hearing examiner of his sound discretion in regulating the course of proceedings before him. Detailed references to the numerous instances of alleged prejudicial conduct on the part of the hearing examiner would unduly extend this opinion. Suffice it to say that after due consideration we conclude that no one instance, nor the combination of them all, constitutes abuse of discretion or reversible error.

The Commission has carefully considered the implications of

respondent's omnibus attack upon the conduct of these proceedings by the hearing examiner and this on the basis of the whole record before it, including the particular citations to the transcript of testimony tabulated in the supplement to respondent's appeal brief. We are satisfied, under the circumstances disclosed upon this record, that respondent clearly was granted a full, fair and impartial hearing in complete accordance with the requirements of due process and the provisions of the Administrative Procedure Act, 5 U.S.C. 1001, et seq. The second point of respondent's separate argument is rejected.

The third point of respondent's separate argument is that these proceedings, the initial decision and the order therein contained, fail to establish an objective standard against which respondent's activity can be measured and by which the future conduct of its business may be governed and that they are therefore of no legal force and effect and of no practical value and should be set aside.

We are not favored with any elaboration as to exactly wherein respondent will be confronted with any insurmountable difficulties in abiding by the terms of the order or of its specific deficiencies. We believe, however, that the order is clear and unambiguous and reasonably related to the practices found to exist. While prospective in operation it deals with particular activities of the past and is designed to fit the situation and remove the unlawful practices disclosed by the facts. The order is not couched in general sweeping language but enjoins those particular practices engaged in by this respondent which, if permitted to continue, would perpetuate respondent's past illegal activities. Respondent has merely to insure that its salesmen do not engage in the practices prohibited by the order. Compliance should not be difficult if undertaken in good faith. *Dorfman* v. *Federal Trade Commission,* 144 F.2d 737 (C.A. 8, 1944).

We have carefully considered all points raised by the respondent on this appeal and find them to be without merit. The appeal of respondent is accordingly denied and the findings, conclusions and order contained in the initial decision are adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Kern did not participate in the decision of this matter.

FINAL ORDER

Respondent 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 the whole record, including briefs and oral argument; and the Commission having rendered its decision denying respondent's appeal and adopting the initial decision as the decision of the Commission:

It is ordered, That respondent Holland Furnace Company 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 to cease and desist contained in the initial decision.

Commissioner Kern not participating.

Decision

IN THE MATTER OF

WORLD WIDE BROKERAGE CORPORATION ET AL.

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

Docket 6945. Complaint, Nov. 19, 1957—Decision, July 7, 1958

Consent order requiring a Chicago real estate firm to cease representing falsely through post cards, circulars, etc., and statements made by its salesmen to persons who had property for sale that it had available prospective buyers interested in the specific properties and that the property would be sold in a short time as a result of its efforts; that the property was underpriced and the asking price should be raised; that its sales representatives were bonded or insured; that it would finance the purchase of listed properties through its financial department; that the listing fee was an advance on the selling commission and would be refunded if the property was not sold in a short time; that the listed property would be nationally advertised through newspapers and associated real estate brokers; and that it would furnish experienced appraisers to evaluate it.

Mr. John W. Brookfield, Jr., and *Mr. Berryman Davis* for the Commission.

Mr. Herman Herbert Moses of Chicago, Ill., for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondents with misrepresenting services performed by them in advertising and selling real estate and other property. An agreement has now been entered into by respondents and counsel supporting the complaint which provides, among other things, that respondents admit all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondents specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner provided for other

orders of the Commission; that the complaint may be used in construing the terms of the order; and that the 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.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Repondent World Wide Brokerage Corporation is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 100 West Monroe Street, Chicago, Ill.

Respondents Thomas E. Joyce, Burton Sherre, Mrs. Thomas E. Joyce, also known as Nancy Lee Buell, and E. J. O'Malley are officers of the corporate respondent, having addresses the same as that of the corporate respondent.

Respondent Frank Don. Livingston is an individual and Eastern sales representative for the corporate respondent, and is actively engaged in carrying on the business of said corporate respondent in the Eastern area of the United States. His address is Green Haven Shores, Lower Pawcatuck, Conn.

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

ORDER

It is ordered, That respondents, World Wide Brokerage Corporation, and its officers, and Thomas E. Joyce, Burton Sherre, Mrs. Thomas E. Joyce, also known as Nancy Lee Buell, and E. J. O'Malley, individually and as officers of said corporation, and Frank Don. Livingston, individually, and each of respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, or sale, of advertising in newspapers or in other advertising media, or of other services or facilities in connection with the offering or listing for sale, selling, buying or exchanging, of business or any other kind of property, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That respondents have available prospective buyers who are interested in the purchase of specific property;

(b) That property will be sold through the efforts of respondents;

(c) That property sought to be listed is under priced or that the asking price should be increased, or that respondents can or will sell the property at the increased price;

(d) That respondents' sales representatives are bonded or insured;

(e) That respondents maintain a financial department, or that they possess the finances and ability to finance the purchase of listed property;

(f) That the listing fee is an advance on the selling commission or will be refunded to the property owner;

(g) That respondents will advertise the property of a prospective seller by any means that is not in accordance with the facts;

(h) That respondents furnish qualified, experienced or expert appraisers to evaluate property sought to be listed with them.

2. Using the corporate name World Wide Brokerage Corporation, or such statements as "a world wide organization," or representing in any manner or by any means that respondents operate on an international basis.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision filed on April 30, 1958, and the Commission having determined that said initial decision is adequate and appropriate in all respects to dispose of this proceeding:

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

It is further ordered, That the respondent World Wide Brokerage Corporation, a corporation, and respondents Thomas E. Joyce, Burton Sherre, Mrs. Thomas E. Joyce, also known as Nancy Lee Buell, E. J. O'Malley, and Frank Don. Livingston 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 contained in said initial decision.