paragraphs 32 and 33, paragraphs 63 through and including paragraph 80, paragraphs 91 through and including paragraph 104; by striking from the conclusions paragraph 6; and by substituting therefor the findings and conclusions of the accompanying opinion.

*It is further ordered*, That the initial decision as above modified and as modified in the accompanying opinion be, and it hereby is, adopted as the decision of the Commission.

Commissioner MacIntyre not concurring for the reason that he considers this to be a price discrimination case of a fundamental type where competitive opportunities of small business retailers are substantially adversely affected by a continuing 10% price discrimination in favor of the large chains with which they "keenly" compete and, consequently, believes that minimally this matter should be handled in the same manner as Federal Trade Commission Docket No. 8513, *In the Matter of Atlantic Products Corporation, et al* (December 13, 1963) [63 F.T.C. 2237]. Commissioner Reilly not participating for the reason that he did not hear oral argument.

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IN THE MATTER OF

## CONTINENTAL PRODUCTS, INC., ET AL.

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

*Docket 8517. Complaint, June 29, 1962—Decision, Apr. 23, 1964*

Order requiring Chicago sellers of various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances, to retailers and to the public direct, to cease representing falsely that their merchandise was offered for sale at wholesale prices by such statements in catalogs and circulars as "* * * a wholesale catalog * * * at the lowest wholesale prices * * * general wholesale merchandise * * *." The evidence is insufficient to support the allegation in the complaint challenging respondent's use of the term "retail price".

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Continental Products, Inc., a corporation, and Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig and Paul M. Mayer, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the

Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Continental Products, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 2030 South Michigan Avenue, Chicago, Illinois.

Respondents Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig and Paul M. Mayer are individuals and officers of the said corporate respondent. They formulate, direct and control the policies, acts and practices of said corporate respondent, including those hereinafter set out. The address of each individual respondent is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances, to retailers for resale and to individual members of the public.

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

PAR. 4. Respondents, in the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, have advertised the same by means of catalogs and circulars, disseminated by and through the United States mails to prospective purchasers located in various States other than the State of Illinois. Among and typical, but not all inclusive, of the statements appearing in respondents' catalogs and circulars are the following:

> * * * a wholesale catalog * * * at the lowest wholesale prices * * * a great department store in a catalog * * * general wholesale merchandise * * *
>
> Prices shown are retail prices established by the manufacturer or recommended by us. Your cost is hidden in the stock numbers.
>
> Confidential—Your Net Low Cost is Hidden in the Stock Number—Retail prices * * * have been suggested by the manufacturer as list prices for dealers who are buying for resale. You pay only the coded price.
>
> 26-89537-1356 * * * Retail 22.50

PAR. 5. Respondents, for each article of merchandise described in their catalogs and circulars, set forth two prices; one, a so-called coded price and the other, a higher price, designated as "Retail". By means of such pricing methods and the aforesaid quoted statements, and others of like import not specifically set out herein, respondents represent, directly or by implication, that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, at which the merchandise is offered for sale, are wholesale prices; that the prices designated as "Retail" are the prices at which the merchandise is usually and customarily sold at retail; and that the difference between the coded price and the "Retail" price represents savings from the usual and customary retail price in the trade areas where the representations are made.

PAR. 6. In truth and in fact, respondents do not sell, or offer to sell, all of their merchandise at wholesale prices. To the contrary, the prices of many of their articles of merchandise are in excess of wholesale prices and the said coded prices of such articles are not wholesale prices but are in excess thereof. The prices designated as "Retail" prices, for many of their articles of merchandise, are not actual retail prices but in fact are in excess of the price or prices at which said merchandise is generally sold at retail in the trade areas where such representations are made. The differences between respondents' said coded and "Retail" prices do not represent savings from the generally prevailing retail price or prices. The statements and representations set out in Paragraph Four, and the implications arising therefrom, are therefore false, misleading and deceptive.

PAR. 7. At all times mentioned herein respondents have been, and are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

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

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

*Mr. William A. Somers* and *Mr. Edward A. Markus, Jr.* supporting the complaint.

*Rothschild, Hart, Stevens & Barry*, by *Mr. Edward I. Rothschild* of Chicago for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

JUNE 18, 1963

The complaint herein alleges violation of Section 5 of the Federal Trade Commission Act, mainly by the misrepresentation, in effect, that list prices in a mail order catalog circulating throughout most of the states of the Union are prevailing prices, and also by the misrepresentation that the catalog's actual retail selling prices are wholesale prices.

The complaint issued on June 29, 1962. On filing of the answer, the examiner had counsel confer with each other in anticipation of a prehearing conference, which was thereafter held, pursuant to order, resulting in an order containing prehearing directions. On the examiner's certificate, the Commission issued an order authorizing hearings to be held in Ft. Wayne and Milwaukee, as well as Chicago. Respondents filed an extensive motion complaining that the prehearing order directions had not been complied with by complaint counsel, but this motion was, with some reservations, denied.

The hearing was duly commenced by taking testimony in the three cities, but complaint counsel's proof of but one retailer for an item in each city as to the retailer's own price, without reference to other prices, raised a serious question as to adequacy of proof on the case-in-chief. Thereafter, however, complaint counsel filed a petition to reopen, which was at first denied, on conditions, and then granted on his written stipulation that the proof was defective. Complaint counsel also requested the examiner to certify the necessity of reopened hearings in more than one city, but this was denied.

Respondents' counsel, unopposed by complaint counsel, contended that he required time after the closing of complaint counsel's case to prepare the defense. The examiner disposed of this on reopening by noticing the reopened hearing for February 13 and 14, 1963, and giving respondents an extended weekend, *i.e.*, to February 18 and 19, for defense, with rebuttal commencing February 20.

The reopened hearing was held accordingly in Chicago, with no testimony offered on rebuttal. The entire transcript is 1519 pages. On reopening, complaint counsel adduced testimony as to only two of the three cities and reduced the number of items testified to from 89 [1] to 49. However, there also was some general testimony on the unreality of the catalog's list prices, which are identical with the manufacturers' list prices. A motion to dismiss was denied and it was held that the burden of going forward passed to the respondents. Re-

[1] As per stipulation of counsel dated June 13, 1963, substituting this for different and differing figures appearing, instead of 89, in their submissions and briefs.

spondents produced a trade expert who actually corroborated the unreality of the list prices, testifying that they were the highest prices obtainable throughout the country by "some" retailers and were fixed so as to accommodate all types of retail outlets.

On the closing of the hearing, leave was given to respondents to submit certain exhibits by a fixed date. Subsequently there was a motion by them to file further exhibits, which was granted but merely to clarify the record. The case was closed on March 20, 1963, conforming to the extended filing date. Time was also fixed for submissions, which was subsequently extended on complaint counsel's motion. Proposed findings, conclusions, order and brief were submitted by each side. There were also extensive answering submissions from each side.

In a general way, the decision herein may be summarized as follows:

I. The testimony that respondents' retail list prices are unrealistic, particularly the testimony of respondents' expert that the prices represent only the highest prices some retailers charge, and the finding that the list prices are a representation of national rather than merely local prevailing prices, all establish the inherent deceptiveness of respondents' list prices, without the necessity of full local area proof, absent adequate proof by the respondents to the contrary.

II. Complaint counsel's effort to prove his case as to retail prices by local area evidence fails, particularly with the reduction on reopening to 49 items and to two cities, together with other deficiencies, and because at the very most the proof relates only to the two city areas proper and does not comprehend the extensive suburbs, which were included in the trade areas by the testimony of his own witnesses.

III. As to wholesale prices, more particularly respondents' use of the word "wholesale" in the catalog to describe their actual selling prices to consumers, complaint counsel has proved his case.

* * * * * * *

Respondent Continental Products, Inc., hereinafter referred to as Continental, publishes an illustrated mail order catalog, and supplements thereof, circulating admittedly [2] in 39 States of the United States, and advertising various types of merchandise, including well-known national brands (CX 1, p. 355 [3]), sold by them in the states.

Each item of merchandise is listed in the catalog by a price designated as "Retail", which is the manufacturer's suggested retail price (Tr. 503,4). Continental purchases the merchandise from the manufacturers, or through them.

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[2] Respondents' Proposed Finding 12(c). There also seem to be more than 39 such states.

[3] This, the 1961 catalog, lists almost 50 such brands and states: "These are only some of the major nationally advertised brand names represented in the Continental Catalog."

Accompanying each "Retail" price in the catalog is a coded price, easily decipherable once explained, at which the particular article is sold by Continental, both to retailers and to ultimate consumers, including firms buying for ultimate consumers. The coded price is substantially lower than the "Retail" price.

A typical retailer purchasing from Continental would be a general store or similar outlet in a remote community with little competition. Such retailer or outlet pays the coded price and sells at the "Retail" price, or possibly something off that price. It may well keep the catalog on the counter, without carrying actual inventory (Tr. 1485: 1–6), and the customer-consumer, not knowing the code, pays what is asked. Another, and perhaps more recent, example of this type of outlet is a beauty shop (Tr. 1462) selling on the same general basis and under somewhat analogous conditions.—The retailer-user of the catalog as a "counter salesman" is historical in this type of catalog business, going back to years when Continental dealt only with retailers.

Typical ultimate consumers, or firms purchasing for such consumers—all of whom pay the same coded price as a retailer—fall into various classes, some of which are described in paragraph 2 of the answer herein; particularly the second sentence thereof:

2. Respondents admit that they have advertised, offered for sale, sold and distributed various items of merchandise including jewelry, cameras, typewriters, hardware, sporting goods and appliances to retailers for resale. Respondents admit that they have sold and distributed said articles to *individual members of the public*, but allege that such sales have been confined to their Chicago stores, to individuals buying from catalogs distributed to retailers, industrial concerns or other companies, and to individuals who got on their mailing list through such prior purchases. * * * (Our emphasis.)

Another class of non-retailers, testified to by respondent Earl W. Grawoig, one of Continental's principals and respondents' chief witness, consists of cooperatives, purchasing for members. According to him, banks also purchase merchandise from the Continental catalog to be given away as premiums for new deposits. Firms also purchase said merchandise for incentive awards, or for gifts. Even law firms are solicited by Continental for its non-retailer business designed to place its merchandise in the hands of ultimate consumers.[4] That this type of business is in general, if not in every instance, regarded as directed to consumers, rather than retailers, who by definition sell to consumers, see *L. & A. Mayers Co., Inc.*, 21 F.T.C. 434 (1935), and *Leeds Travelwear, Inc.*, 61 F.T.C. 152 (1962).

The testimony of Mr. Grawoig is that 85 percent (Tr. 1380:9) of the catalog mailing list and of merchandise sales are to business firms. This, the examiner must rule at once, apart from the self-serving character of the testimony, does not support the utterly gratuitous conclusion, reiterated throughout respondents' proposed findings and brief, that the 85 percent figure relates to retailers. Actually, according to Mr. Grawoig, Continental keeps no tabulation as to which of its customers are retailers and which are not, an order is filled whether coming from a retailer or anybody else, and names for its mailing lists are ordered from professional name companies without any specification whatever as to their being retailers.[4]

Moreover, the Continental catalog contains direct and dramatic appeals, with appropriate drawings, to ultimate consumers or firms and other entities purchasing for distribution to ultimate consumers. The catalog also contains a full explanation of how such consumers may read the coded prices. The catalog, in the same pages devoted to this message, also refers to coded prices as a way in which consumers can buy at "wholesale."

Mr. Grawoig's further testimony, equally self-serving, also is that about 94 percent (Tr. 1371) of Continental sales are in cities with a population of less than 162,000 (Ft. Wayne, brought into the case by complaint counsel), and that Continental concentrates on towns under 100,000[5] (Tr. 1471) with an emphasis on communities much under 100,000. This again does not warrant, or add weight to, the conclusion that most of Continental's distribution is to retailers. In the examiner's opinion a catalog sent to a small town or community is, for the recent years concerned here, just as likely, or more likely, to be sent to or for the ultimate consumer, than to a retailer, let us say, for instance, the one general store in a small, isolated community using the catalog as a counter-salesman.

## I

## Fictitious Price System

### *Highest Prices, National Prices*

The complaint herein alleges the dissemination of the Continental catalog and merchandise in various States of the United States.

The complaint, Six, further alleges misrepresentation by the catalog's use of "Retail" prices in that they "are not the actual retail prices but in fact are in excess of the price or prices at which said merchandise is generally sold at retail in the trade areas where such representations are made." It may be noted that the complaint refers to "the"

[4] The facts will be further detailed below, with page references to the record, under subcaption *A Retail Catalog.*

[5] Mr. Grawoig at first testified the number was 50,000 and that the orders for names expressly excluded "anything beyond 50,000" (Tr. 1349: 1–3). The examiner requested him to produce orders with any number limitation but none were produced (Tr. 1472).

trade areas, which bears the meaning of all trade areas where such representations are made, namely all the areas in all the states where such representations are made, not merely the local trade area of one or more catalog readers.

Secondly, the complaint, Six, alleges misrepresentation in that the "differences between respondents' said coded and 'Retail' prices do not represent savings from the generally prevailing retail price or prices," but makes no stated reference to trade areas.

There is no reference in the complaint to any specific trade area. Furthermore, there is no reference to areas or localities generally except for two uses of the words "trade areas" without further description. Thus, technically speaking, there was no necessary burden on complaint counsel to supply proof as to any particular areas, even though he did supply such proof for two or three city areas, *i.e.*, following the practice established in numerous pre-ticketing misrepresentation cases, which are uniquely local in nature.

The complaint, Two, is directed to "various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances." (It may be noted at once here that complaint counsel's specific area retail proof at the hearing did not include jewelry and hardware, and for practical purposes did not include cameras, so that this proof is limited to three of the six product lines named in the complaint.)

The complaint, Two, also alleges distribution to both "retailers for resale" and to "individual members of the public."

The complaint, Eight, alleges deceit of a substantial segment of the "purchasing public," *i.e.*, ultimate consumers.

The main question in this case is whether the use of the word "Retail" in the catalog is a misrepresentation as charged, *i.e.*, in excess of the price at which the article of merchandise generally sells at retail. The alleged misrepresentation as to savings between the coded price (catalog's actual retail price) and the "Retail" price is secondary, flowing out of the main misrepresentation charged.

Under the law as announced in the preticketing cases, in respect to the nature of a list price representation, there can be little doubt that each "Retail" price of the catalog herein is a representation that it is the usual and customary price in the trade area where the representation is made. *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838 (7th Cir. 1961). The same rule has been announced in a case where the list price was advertised in the local District of Columbia newspapers. *Matter of George's Radio and Television Company, Inc.*, 60 F.T.C. 179 (1962). *Giant Food, Inc.*, 61 F.T.C. 326 (1962). (*Aff'd* C.A.D.C.—June 13, 1963.)

As for the Continental catalog, obviously national rather than local in circulation, in contrast to preticketing for instance, it also follows, in the examiner's opinion, particularly as to national brand products, that each "Retail" price is a representation as to the usual and customary price throughout the country, or most of it, not merely in the area of a particular catalog reader. Incidentally, it also follows that said price is a representation that there is substantially such a usual and customary price throughout the country, or most of it.

Of course, such a representation, if made, does not accord with fact, as the Commission in its expertise knows and respondents themselves hardly deny.

Moreover, the evidence in this case clearly demonstrates that such is not and could not be the fact, since respondents' own expert, Dr. Boyd, testified—generally and irrespective of local areas, although specifically as to the lines of merchandise involved herein—that the manufacturer's suggested retail price, which is Continental's "Retail" price, is the highest retail price, charged by "some" retailers, and is set by the manufacturer high enough to top all other prices. Citations to the record are given below.

Dr. Boyd's testimony may be first considered in the light of certain testimony given, incidentally to be sure, by three Milwaukee retailers called by complaint counsel. This Milwaukee testimony is, of course, fairly local in substance and context, but it has definite undertones as well as some express content suggesting a country-wide situation, at least in sufficiently competitive areas.[6]

One Milwaukee retailer, Mr. Anderson, testified that he fixed his own retail prices by just looking at the various coded catalogs and charging $2 to $5 less than their "Retail" price (Tr. 944:4, 12). These catalogs included the Continental catalog (Tr. 945:21), which he checked (Tr. 948:5, 8), Majestic (Tr. 946:7), Millway (Tr. 954:7), and others. These catalogs all have basically the same "Retail" prices; as well as the same coded prices (Tr. 948:23), at least "within a few pennies" (Tr. 972:24), which the witness called "wholesale" prices (Tr. 950:2, 3).

Originally Continental and the other catalogs circulated only among retailers who alone knew the code (Tr. 951:18–22). But the catalogs took over throughout the country (Tr. 952:3), *i.e.*, obviously as consumer catalogs. They encouraged people to give the names of their friends, and never checked who the latter were, nor did they care (Tr. 954:5–11). Thus the catalogs came to circulate among ultimate consumers (Tr. 956:6–12).

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[6] See also the testimony of Mr. Needham, a Fort Wayne retailer. He testified to a historical markup of 40% (Tr. 937:2), for typewriters, which he felt was still now reflected in Continental's "Retail" price (Tr. 938:15–25).

The testimony of Mr. Anderson suggests that the "Retail" price of any of the coded catalogs, including Continental's, would be unrealistic not only in Milwaukee but also in other highly competitive centers.

Another Milwaukee retailer, Mr. Rohr, testified as to coded catalogs, although not specifically as to Continental. He keeps the various catalogs at his store (Tr. 1012:24). People come in and say they can get a desired article at a stated price from one of the other catalogs (Tr. 1013:12–16), and he would beat this price slightly.

Mr. Rohr testified that the catalogs of the different houses have a coded price which is explained right in the catalog itself (Tr. 1014:2–4), and he would sell pennies below that price. He was asked if he was guided by the "Retail" price. His answer was, "No", except that people ask him how much it retails for: "They perhaps want to know how much they are saving—they consider it a savings, you know; but *it really has no bearing, really, on what you have to sell it for* * * *". (Tr. 1014:19–24, our emphasis.)

As to whether the "Retail", or manufacturer's retail price, was charged by any store in the city or suburbs, Mr. Rohr answered: "It is conceivable that there might be one black sheep floating around that is going to pay full price. I don't know for sure" (Tr. 1040:14–16).

A third Milwaukee retailer, Mr. Raynor, testifying as to coded catalogs generally, stated as to the "Retail" price therein: "Well, the retail price doesn't mean very much these days" (Tr. 1074:12), that it has not meant anything for three, four or five years (Tr. 1074:19), and that no one would dispute this (Tr. 1074:24; 1075:1). He also testified (sporting goods just happened to be the subject) that the retail price would be the same in different catalogs, and the coded price the same or a few cents off (Tr. 1076:9–17).

Complaint counsel did also adduce from these and other witnesses some specific proof as to prevailing prices in Milwaukee and Ft. Wayne, which will be referred to later. But the examiner, on the general testimony referred to above and on generally known facts, set forth in articles [7] on historic mark-ups alluded to by him at the hearing (Tr. 959:11, 16), held that as a general matter, entirely apart from specific local areas, enough had been shown to indicate prima facie that the manufacturers' suggested retail prices, and therefore Continental's "Retail" prices, are unrealistic (Tr. 1098:3), and have been so since the advent of discount and other competition commencing in the 50's, in any area having such modern competition (Tr. 1098:5). He accordingly ruled that the burden of going forward shifted to the respond-

[7] Harkrader, Fictitious Pricing and the FTC, St. John's Law Review, December 1962, pp. 1, 4, 5, 6, 16, 17; also various citations therein to Fortune and other business periodicals.

ents to explain (Tr 1099:3) or prove the contrary. On the following day the examiner also took official notice to the same effect (Tr. 1176), but expressly limited (Tr. 1176:7) to the same result of shifting the burden of going forward (Tr. 1250:1–17).

The examiner explained in detail the above picture, as to these retail prices, as he saw it (Tr. 1101–1104). Significantly, respondents' counsel apparently agreed, stating (Tr. 1104:20–23):

MR. ROTHSCHILD: In the first place, I think that your general description is probably accurate of the marketing situation in the large metropolitan areas—and not supported by the evidence in this case. * * *

Counsel's qualification as to lack of support by the evidence obviously related to his contention that the specific area retail evidence introduced by complaint counsel was insufficient.

The examiner accordingly urged him to go forward with the facts through Dr. Boyd, respondents' proposed expert (Tr. 1099:6–15), and through Mr. Grawoig, which he undertook to do (Tr. 1112:1–3). Both witnesses were not due to testify for several days due to the long weekend allowed to enable respondents to prepare their defense.

Actually, as will be seen, the expert definitely testified that the suggested retail prices are only the highest prices obtained by some retailers, under an outdated historic mark-up system. In effect he thus stigmatized these prices as being unrealistic even without stating, at least explicitly, any limitation of this situation to large metropolitan cities. Mr. Grawoig, incidentally, did not go into this general question, although he did supply statistics, above referred to, as to the catalog's preponderating circulation in small communities, and among "firms" (now equated with retailers) rather than individuals.

The expert also testified, or attempted to testify, as to the consumer understanding of suggested retail or list price, namely, that it does not mean the usual and customary price in the area, that the consumer in competitive city areas is so subjected to list pricing that he does not compute any savings from it, and the like. However, the examiner refused to receive any such testimony, on the ground that the expert was not an expert on consumer understanding (Tr. 1195:23; 1256:6) nor had he conducted research or consumer interviewing on these matters (Tr. 1210:25), and on the ground that the expertise of the Commission as expressed in adjudicative cases must be regarded as superior to the expert's judgments on consumer preference (Tr. 1197:5; 1256:14).

Dr. Boyd testified—quite generally and apart from any reference to specific local areas—that the manufacturer's suggested retail or list price is "the price that the high cost retailer will charge", and that it is "more or less the upper limit which some retailers will charge" (Tr.

1188:14–18). He stated that this is so as to the price of a "national manufacturer" (Tr. 1191:22). Asked if this was so as to the price "retailers all over the country would be charging", he answered in the affirmative "speaking generally" (Tr. 1192:1–4). Asked if they assumed it is "the highest retail price going", and "throughout the continental United States", he answered "Yes" to both questions (Tr. 1192:5–10). He gave as an example of a retailer obtaining this highest price, a "neighborhood drug store" (Tr. 1203:19), apparently removed from the center of town competition, and a "full service retailer" (Tr. 1203:22) in a good-sized area (Tr. 1204:20), apparently in the midst of competition. Another example would be a shop in a small isolated area.

Dr. Boyd testified that the manufacturers' suggested prices herein, although prices of "integrity" (Tr. 1212:1), were based on historical markups (Tr. 1214–5) which were once realistic, *i.e.*, before the advent of discount houses and today's competition. He testified that the markup might be, for instance, 30 to 35 percent for a high cost retailer of small appliances (Tr. 1215:10) and up to 40 percent for high cost camera retailers (Tr. 1215:20).[8]

Dr. Boyd further testified that the manufacturer has continued with his historical markup, even though discount houses and others have come into the picture charging substantially less than the list price. He states (Tr. 1217:18 to 1218:10) as follows:

> Now, through time the manufacturer has been faced with a very serious problem, because into our economy has been injected the discount house. The manufacturer has continued with his suggested retail prices, because he sells through many different kinds of stores. He sells through the small store who has high margin. He sells through stores such as ones here in Chicago, discount houses. He sells through full service stores. He sells through catalog houses. * * * So that a manufacturer is in this dilemma, using all different kinds of stores to sell his product, some high cost, some low cost; so that he has a problem of setting a list price that will accommodate the needs of the high cost retailers.

In giving this testimony, Dr. Boyd explicitly referred to "manufacturers of the kinds of items that we are dealing with here" (Tr. 1217:12).

Incidentally, Dr. Evans, another expert expressly relied on by respondents, has testified that there is no such thing as a usual and customary retail price in today's retail market, apart from resale price maintenance.[9] Of course, if this is true respondents are in violation for representing that there is indeed a usual and customary retail price.

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[8] "Usually forty per cent" is the historical retail markup according to the St. John's Law Review article (p. 4), *supra*.

[9] RX 21. Transcript of his testimony (1089:18; 1090:13) in *Majestic Electric Supply Company, Inc.*, D. 8449 (FTC) [64 F.T.C. 1166].

Nationally there is no resale price maintenance. Locally there is in various states but often not enforced or effectively policed by the sellers, as to which respondents here offer no evidence.

Although much of Dr. Boyd's testimony as to list prices was given without reference to specific products, it is clear that his testimony definitely comprehended the products in this case. He expressly testified that he had examined the prices in the Continental catalog (Tr. 1212:12), *i.e.*, with particular reference to list prices of the products involved herein, including the various brands of cameras, typewriters, appliances (also shavers) and sporting goods (Tr. 1212:9–12). Moreover, on other occasions he made specific references in his testimony to products involved herein.

As already fully indicated, it is absolutely clear that Dr. Boyd was testifying as to the general retail market in the country rather than as to any specific trade area. He did testify that as one gets farther away from the large city and closer to "semi-isolated communities", there is a tendency to approach suggested list prices in actual sales (Tr. 1225:6–8). He also testified that "much" list pricing goes on in small "isolated" towns, as to which, however, he did not know what percentage (Tr. 1225:16) nor did he give any measure.

It thus seems tolerably clear, without more, that it has been proved in this case on general evidence, irrespective of specific local area evidence, that the respondents have misrepresented by their use of "Retail" prices.

First, they have misrepresented that the "Retail" prices in the catalog are the prices at which the items of merchandise are "generally sold at retail in the trade areas where such representations are made" (Complaint, Six)—such representations being made wherever the catalog circulates throughout most of the states of the Union, as a consumer reader of the catalog in any particular area might well understand and be misled thereby. This is true where respondents deal directly, through the catalog, with ultimate consumers or, what amounts to the same thing, with purchasers for ultimate consumers. It is also true where respondents deal with retailers who actually obtain the "Retail" price from ultimate consumers on the catalog's representation, chargeable to respondents, that it is the price at which an item is generally sold throughout all the areas of the United States in which the catalog circulates. On this false representation the consumers may be induced not to make even an attempt to shop elsewhere or in a different manner, if only by writing to respondents and asking them to send a catalog directly to them or writing to other mail order houses which make available to consumers the coded or lower price.

Secondly, respondents have also misrepresented that their "Retail" prices are the prices at which the items are generally sold in any trade areas having the modern type of retail competition of today, including discount houses, in respect to such items. The items chiefly involved here are well known national brands, so that they are obviously sold all over the United States and must be sold in any number of trade areas having the modern type retail competition. These modern type trade areas would include not only cities of size but smaller communities, as it is well known that the "retail revolution", commencing in the 1950's, has pushed into all but truly remote and isolated locations. In this second aspect the misrepresentation is one made only to ultimate consumer purchasers directly.

It also follows, of course, and is equally clear, that it has been proved that respondents have misrepresented the amount of savings as being the difference between the coded price of the catalog and the "Retail" price thereof. This again is true where respondents deal with ultimate consumers or purchasers for ultimate consumers. It is also again true where they deal with retailers, say country stores in isolated areas using the catalog as a countersalesman, but selling at something off the "Retail" price.

It should be emphasized that the dissemination of list or suggested retail prices is not held here to be illegal per se, but that the "Retail" prices in this case are illegal because they constitute a false representation as to the usual and prevailing price—locally, nationally, or both—and as to there being a country-wide usual and prevailing price.

The effect of Dr. Boyd's testimony, as above described, was not only to indicate definitely that respondents' "Retail" prices are unrealistic, but to keep the burden of proof from shifting back to complaint counsel. Even if his testimony is strictly construed to attest only to the likelihood, and not the fact, that actual retail prices would generally be lower than the catalog's "Retail" prices, the burden would by reason of his testimony still remain with respondents to prove that actually, for some reason or other, the likelihood has not materialized, or could not reasonably materialize.

Respondents have not met this further burden by Mr. Grawoig's testimony that most of their business is done with smaller communities, since this hardly means that list prices are generally charged in smaller communities or that the strong breath of modern competition has not reached these communities by reason of modern communication, including the mail bringing competing catalogs. Nor have they met this burden by putting on the stand Mr. Pillman who testified that, while he was an employee of respondents and after getting instructions from respondents' counsel (Tr. 1315: 3; 1314: 20), he one day toured four small towns, each under 10,000 population, and received full list price quotations on various items of merchandise contained in the catalog. He went to only one shop in each town (plus a camera shop in one town), not even trying the drug store (Tr. 1320: 3). He never, so far as the record shows, told the salesman he could buy it for less from a specific source such as a catalog, and in a number of places did not even say he could buy it for less (see Tr. 1302: 2, 3; 1309: 24, 5). He was identified at one shop, at least, as a professional shopper (Tr. 1326: 13). He testified to all the various prices and tag listings without notes (Tr. 1318: 4), saying he had kept notes but threw them away (Tr. 1318: 14).

The above result, reached here in part I of this decision, is consistent with the result reached in part II, below, holding that the specific area proof—as to Milwaukee and Fort Wayne, selected by complaint counsel—is insufficient to show that respondents' "Retail" prices were not the prevailing prices in those areas.

The specific area proof, adduced by complaint counsel, is found to be insufficient because of technical (although altogether substantial) deficiencies—irrespective of any probability that adequate specific proof is or is not obtainable.

Actually, the specific area proof, as far as it goes, lends some support to the present part of the decision. This point is not being pressed here, although it is being presented.

The specific area proof is rejected by the examiner for a number of reasons, which are fully developed in part II, and may be summarized here as follows:

First, the specific area proof is pretty well limited to each city proper. All of the retailer witnesses as to each city were from the city proper. Complaint counsel offered no evidence as to actual retail prices in the suburbs of these cities, even though he himself had his witnesses testify that the trade area is the city plus extensive suburbs.

Secondly, although the retailer witnesses testified that their retail prices were fixed by competition and competitive conditions, in most instances there was only one witness for a product, and the testimony in general fell short of what seems indicated in order to make an appropriate finding in reference to prevailing retail prices—particularly in each full trade area, as distinguished from the city proper.

Thirdly, the specific area proof is limited to 49 possible items, actually covering only three of the six lines of merchandise mentioned in the complaint. Although this coverage might under other circumstances be deemed sufficient, it seems inadequate in this case in view of a substantially larger number of items, including an additional merchandise line, originally proffered by complaint counsel, and in view of the six lines mentioned in the complaint, which presumably figured in the Commission's finding of sufficient public interest.

On this summary it seems fairly clear that the specific area evidence must be rejected by the examiner as inadequate. However, it also seems that with a little more evidence, probably not too hard to get, the result might be different.

Actually, respondents, except for challenging the technical sufficiency of the specific local area evidence to prove a case in and of itself, do not seem to be seriously challenging the contention that their "Retail" prices are higher than those generally prevailing in cities like Milwaukee or Fort Wayne, or in larger cities. Their general defense on the real merits rests rather on the theory, as has already been indicated, that most of the catalog's circulation and sales therefrom are in communities smaller even than Fort Wayne, and they point out that their catalog circulation in Milwaukee, at least, is very small.

Accordingly it may be possible to regard the local area proof adduced by complaint counsel as at least a sampling demonstration, considering the strong probabilities of the validity of the general testimony of Dr. Boyd and some of the retailer witnesses as to the unreality of respondents' "Retail" prices, or list prices. The sampling would be limited, of course, to each city proper, Milwaukee (pop. 750,000) and Fort Wayne (pop. 180,000), and by the more serious consideration that the area proof, strictly by itself, is below the recognized standards of legal proof.

* * * * * * *

In the examiner's opinion the requirements of proof, at least in connection with area, are somewhat different for a catalog case such as this than for the typical preticketing case. The difference has been obscured, perhaps, by the fact that preticketing cases have established the substantive law that list price, by preticketing or otherwise, is a representation of prevailing price.

In a preticketing case the list price is, of course, affixed to the merchandise or packaging itself. It is thus quite ruggedly local in meaning and application. In a catalog case, the list price is lodged in a catalog circulated across the country, and therefore as a representation of value to the reader it is national, or substantially national, in meaning, as well as local.

Accordingly, in the typical preticketing case specific local area evidence seems to be more or less of the essence in proving the general allegations of the complaint,[10] whereas it may not be necessary in a cata-

[10] See *Rayex Corporation* v. *Federal Trade Commission*, 2 Cir., May 7, 1963, C.C.H. ¶ 70,774, as to a strict statement as to local area proof, in a preticketing case [7 S. & D. 696]. (C.C.H. reference is to Trade Regulation Reports.)

log case involving a representation of a country-wide price irrespective of inevitable local area differentials in one place or the other.

The general proof in the case at bar—supplemented, if necessary, by what local area proof there is—creates far more than a suspicion that the catalog's "Retail" price is deceptive. It shows that the "Retail" price is fictitious as an actual going price generally, as represented, and is deceptive in its essence.

### *A Retail Catalog*

It may be appropriate at this point to say more about the retail nature of respondents' catalog. A mail order catalog such as this, with a circulation of 300,000 (Tr. 90: 23) outside Illinois, and yet allegedly not designed for dissemination among ultimate consumers rather than retailers, seems to be a fairly strange animal. However, respondents' able counsel for understandable reasons attempts to minimize the retail function of respondents' catalog. The picture he draws almost suggests that the catalog and its merchandise directly reach ultimate consumers quite fortuitously or in such dribbles as to be of little significance for the purpose of regarding it as a catalog for consumers.

Nevertheless, as already pointed out, the answer (Par. 2) here itself admits the allegation of the complaint that both ultimate consumers and retailers are served, and the answer expressly includes as such consumers certain types of firms purchasing for consumers and not retailing to them. Mr. Grawoig's testimony adds cooperatives as another type of purchaser for consumers.

Moreover, Dr. Boyd, respondents' expert, testified (Tr. 1259:25) that Continental is "certainly similar to a discount seller at retail." He agreed that it may be called a "discount catalog house" (Tr. 1260:2) and a "discount retailer" (Tr. 1260:7). He agreed that Continental's comparative pricing in its catalog was not significantly different from that of "retail stores" (Tr. 1211:5–9). Of catalogs generally, including that of Continental, he declared that they provide a "convenience for some customers who want to do some shopping from their homes" (Tr. 1228:7), and that they are "the equivalent of a store in many cases" (Tr. 1228:12). Mr. Grawoig, in his testimony, affirmed that the Continental catalogs reach a lot of consumers. However, he qualified this by stating: "We also reach a great many more dealers" (Tr. 1373:24), although he was not able to produce figures on any retailers or dealers, and stated that they did not check on this (Tr. 1470:5–9).

It is thus clear that at the very least the catalog has a dual aspect, and that its retail aspect as a direct vehicle to consumers is one at least of definite substance. This means, of course, that a finding is justified that it is a retail catalog for the direct use of ultimate consumers, even though it may also be a wholesale catalog for some retailers who use it and purchase from respondents at the same coded price as ultimate consumers, which is the one price at which respondents sell to anybody (Tr. 108:1–11).

It is not without significance, too, that Continental sells directly to consumers at the coded price in its nine retail stores in the Chicago area (Tr. 106:20–24)—even though this does not, of course, involve interstate commerce.

In circulating catalogs, Continental orders names, say 100,000 at a time, from concerns which sell lists of names (Tr. 1344–5). But it does not ask for retailers (Tr. 1457:21–23), that is, names of retailer outlets as such, but buys all kinds of names. It does not investigate whether or not the names it gets are such retailers (Tr. 1470:7). It prefers business concerns, or professional people—including lawyers—who could hardly be regarded as potential retailers. Although Mr. Grawoig testified that they do not order individuals, the extensive list of categories of names ordered by Continental lists, among many others, "individuals" (RX 26b, line 56).

Mr. Grawoig also testified that Continental takes credit unions, employees' organizations (Tr. 1457:4–7). They also like premium and gift business (Tr. 1458:12), which is not business with a retailer but with a concern dealing with its employees and making the merchandise available to employees for the coded price.

Accordingly, even if Mr. Grawoig's opinion were accepted as testified to, that 85% of the mailing list and merchandise orders are from business firms and cooperatives, this hardly means that they are from retailers.

Moreover, anyone who writes in for a catalog will get one, no matter who he is (Tr. 1352:9–12). If he buys anything he will be put on the mailing list. If he adheres to a certain norm of purchases, which is hardly rigorous, he will be kept on the mailing list (Tr. 121:10–13).[11] Complaint counsel produced as witnesses ultimate consumers of this type who received catalogs and purchased directly.

Actually, the catalog setup is such as vividly to suggest to the examiner that it is designed to lure much ultimate consumer business by making prospective purchasers believe that they are somewhat craftily inducing Continental to give them a special status as trade customers to which they may strictly not be entitled. For instance, a one or two man business or professional concern may easily regard it as

[11] The test is the amount bought, the number of times a customer buys, and the last date bought. An amount of $25 over the year may be acceptable (Tr. 123 : 7–19).

a bonanza that each member may buy for himself or family use at what seems to be a trade price.

The format of the catalog clearly demonstrates its retail aspect as a direct vehicle for ultimate consumers, as well as any wholesale aspect, with full emphasis on the retail.

Taking the 1961 catalog (CX 1) and perusing *almost* all of its 646 pages, one might well assume that this is just a wholesale catalog designed for the use of retailers, say, retailers using it as a counter-salesman, with the code price known only to the retailer as the price he will pay, and the "Retail" price read by the consumer as the price, or about the price, he will pay.

However, there are a number of yellow pages in the center of the catalog which scream for attention and which boldly bid for the business of the ultimate consumer. These pages also explain how the coded price may be deciphered, how it is available for ultimate consumers, and how this "wholesale" catalog, as it is expressly called, is for the use of ultimate consumers or those buying for them.

These yellow pages are set up in high-pressure style, with illustrations, color, and striking captions, so that there cannot be the slightest doubt that they are directed to ultimate consumers or to the members of non-retailer small firms who will buy for themselves personally, or to firms who will permit their employees to buy through them or using their name, and the like.

The yellow pages open up with the caption "BIG 6 VALUE DIVIDENDS" (p. 351), and this is quickly explained as "*consumer* dividends" (our emphasis). The 15,000 items of the catalog are presented, it is stated, "for your every shopping need" (p. 351). The catalog is described as a "department store in a catalog * * * your personal shopping center." It is further stated: "When you deal with Continental, you have the same friendly feeling that you had when you shopped in the old-fashioned 'General Store' " (p. 352). "You needn't stir from your desk or arm chair * * *" Again, "your department store in a catalog" (p. 353). "You shop in comfort, in privacy, and at leisure * * *" There is also a conditional money-refund guarantee (p. 356), obviously to the consumer, providing for "cash" refund if "for any reason you are not completely satisfied."

Interspersed with all the above are repeated references to "wholesale catalog" and "lowest wholesale prices" as well as "wholesale pricing policy"—all calculated to represent to *ultimate consumers* that they are getting the merchandise for wholesale.

The pitch to ultimate consumers is made absolutely explicit in a detachable card (p. 366) captioned in bold type "confidential information for our customers", explaining how to read the coded price, which is definitely stated to be the real price, *i.e.*, "your cost." There are instructions alongside this detachable card stating "Please tear it out and hold in your files for reference."

On the reverse side of the card is a statement declaring that the coded prices are available to retailers and also to firms, agents, groups, etc. Ultimate consumers as such are not expressly included in this statement of availability, but the examiner regards the statement as a "come-on" to ultimate consumers to jump for the opportunity of buying under a purported trade status.

There are even solicitations for other consumer customers: "Your colleagues and friends will want to see Continental's catalogs." This is another announcement on the same page, p. 366, and detachable self-addressed cards are provided there for them, requiring no postage.

The 1962 catalog (CX 8), entitled "Fall 1961 through 1962", has comparable center pages, although white in color (with red illustrations), and fewer in number than in the 1961 catalog. The pages contain less copy and illustrations, and no references to "wholesale." These center pages *start* with the confidential card making available the coded price, as well as the self-addressed cards for "your business friends" and "interested associates" to whom catalogs are to be sent.

The latest catalog (RX 22 A), 1962-3,[12] also has the explanatory pages, although in front, together with the detachable card explaining the code and the self-addressed cards for "business friends" and "interested associates." This is followed by a page display showing a man, wife and child, with the caption "Your dollars are BIGGER at Continental." There is another page inviting consumers to buy directly at the Continental catalog stores in and around Chicago.

Even Mr. Grawoig, after somewhat crudely asserting and reiterating (Tr. 1490-93) that these inserts are not appeals to ultimate consumers, finally seemed to admit to the contrary, conceding as to a representative excerpt that it was addressed to "ultimate consumers, concerns, retailers" (Tr. 1493:16).

Incidentally, Mr. Grawoig's prior assertions that the contents of the inserts are not appeals to ultimate consumers make it impossible for the examiner (see Tr. 1487:13) to accept literally and at face value his other testimony, particularly the statistics produced by him, which were prepared by others who did not appear at the hearing to be cross-examined.

It is true that the Continental catalog goes back to the 1920's (Tr. 1343) and it may well be, therefore, that the catalog originally concentrated almost entirely, as claimed by respondents, on retailers. But we are now dealing with the 1960's. In the 1930's Continental, except for

[12] The allegations of the complaint, strictly speaking, do not cover these years.

relatively few items, was not even in the general merchandise business, but was the largest distributor in the United States of automobile parts and accessories, sold directly to dealers (Tr. 1375–6). It was not until the 1940's that Continental got into general merchandise as its main line. It was not until about 1950 that a coded price, in place of an uncoded one, was used with the "Retail" price (Tr. 1343–4). It was not until about 1960 that the catalog included referral cards to send to friends or associates (Tr. 1352:7). In other words, the Continental catalog, in its present form and function, seems to coincide, more or less, with the springing up of discount retailing in the United States commencing with the close of World War II.

## II

### LOCAL AREA EVIDENCE

As heretofore observed, the complaint herein, TWO, specifies six lines of merchandise, *i.e.*, "various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances."

In his original presentation at the hearing, complaint counsel offered proof of only four of the six lines, limiting his proof to cameras, typewriters, sporting goods and appliances, and thereby eliminating jewelry and hardware.

In his original presentation, complaint counsel offered retail proof as to 89 items. These appear to have been selected from 266 items,[13] as to which the respondents prior to the issuance of the complaint had been requested to submit detailed information, as they did. (Tr. 1396–7.)

In the original presentation, complaint counsel, as already noted, pursued a formula of simply calling one retail witness to testify as to the price at which he sold an item in his area—without any further testimony or proof whatever, even as to whether the price was competitive with other prices in the area. This evidence was clearly insufficient, and eventually complaint counsel conceded that it was insufficient in his motion to reopen.

On the adjourned date complaint counsel proceeded to present further testimony. However, as to 50 of the items [14] he never offered further proof, and the examiner holds that by this fact alone he must be deemed to have failed in his proof as to these items. Moreover, on rehearing he offered proof as to only 49 items, of which 39 were old items dealt within the original presentation and 10 were new items.

[13] 118 on RX 16, 99 on RX 10, and 49 on reopening—a total of 266, as compiled by respondents' counsel.

[14] Computed by the examiner, *i.e.*, the difference between 89 and 39 (on rehearing).

The examiner agrees with the respondents that it is the proof on the 49 items which should govern, *i.e.*, the proof thereon at the reopened hearing supplemented by any proof in the original presentation as to the same 49 items (*i.e.*, 39 of them).

Accordingly, the examiner adopts respondents' tabulation of retail prices on these 49 items showing the prices testified to both on the reopening and the original presentation. Complaint counsel, after being given full opportunity, has pointed out no errors in this tabulation. The tabulation, with some rearrangement and rewording of captions, is included in and made part of this decision.

*Tabulation of Retail Price Testimony*

| Item | Page | "Retail" list price | Coded Price | Fort Wayne witnesses | | | Milwaukee witnesses | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | Original | On reopening | | Original | On reopening | | |
| | | | | No. 1 | No. 2 | No. 3 | No. 1 | No. 2 | No. 3 | No. 4 |
| TYPEWRITERS | | | | | | | | | | |
| Smith-Corona: | | | | | | | | | | |
| Sterling | 287 | 104.50 | 76.40 (74.95) | 84.50 | | 89.95 | 84.50 | 75.00 | 73.00 | 79.00 |
| Skywriter | 287 | 78.49 | 59.96 | *79.00* | | | 62.50 | 58.00 | 57.00 | 61.00 |
| Galaxie | 287 | 149.27 | 109.88 | 139.00 | [1] 119.50 | 127.00 | 115.00 | 105.00 | 105.00 | 105.00 |
| Royal: | | | | | | | | | | |
| Futura | 286 | 142.13 | 109.95 (99.95) | 125.00 | 119.50 | 128.00 | 115.00 | 100.00 | 105.00 | 105.00 |
| Royalite | 286 | 53.11 | 49.95 | *53.55* | [1] *49.95* | | 49.50 | *55.00* | 47.50 | 49.00 |
| Remington: | | | | | | | | | | |
| Quiet Riter | 286 | 126.99 | 106.96 | | [1] *119.50* | 127.00 | 115.00 | 100.00 | | |
| Monarch | 286 | 94.90 | 79.95 | 94.90 | 89.95 | 89.95 | | | | |
| ELECTRIC SHAVERS | | | | | | | | | | |
| Remington: | | | | | | | | | | |
| Lektronic | 316 | 35.95 | 22.85 | 23.88 | *35.95* | 29.95 | 24.99 | 22.50 | 26.90 | 25.95 |
| Auto-Home | 316 | 28.95 | 18.30 | 19.88 | | | 19.88 | 19.50 | 22.90 | 23.50 |
| Roll-A-Matic | 316 | 26.95 | 17.15 | 17.88 | 19.88 | 22.95 | 17.88 | 19.00 | 21.90 | 19.75 |
| APPLIANCES | | | | | | | | | | |
| Sunbeam: | | | | | | | | | | |
| Grill | 372 | 39.95 | 29.56 | | 33.33 | | 32.00 | 30.76 | | |
| Opener | 379 | 25.95 | 19.20 | | 23.88 | | | | | |
| | | | (15.33) | | | | 20.80 | 21.38 | | |
| Toaster | 382 | 29.95 | 22.16 | *29.99* | 25.99 | | 23.95 | 24.61 | | |
| Mixmaster (Chrome) | 384 | 59.95 | 44.36 | | | | | 47.75 | | |
| Mixmaster (White) | 384 | 49.95 | 36.96 (35.12) | | 42.99 | | 39.95 | 37.85 | | |
| Egg Cooker | 378 | 17.95 | 13.26 | | 15.33 | | | *17.95* | | |
| Portable Mixmaster (Chrome) | 384 | 24.50 | 18.13 | | | | 19.60 | 19.95 | | |
| Portable Mixmaster (Colors) | 384 | 22.50 | 16.65 | | 18.99 | | 17.95 | 17.95 | | |
| Frypan Tilt-Medium | 386 | 24.95 | 18.46 | | | | 18.75 | 19.95 | | |
| Frypan Tilt-Large | 386 | 28.95 | 21.42 | | | | 22.50 | *28.88* | | |
| Westinghouse: | | | | | | | | | | |
| Roaster | 374 | 49.95 | 36.96 | | | | 39.95 | 44.95 | | |
| General Electric: | | | | | | | | | | |
| Blender | 377 | 39.95 | 29.56 | | | | 29.95 | 34.95 | | |
| 9-Cup C Maker | 380 | 31.95 | 23.64 | 27.95 | 29.99 | | 25.60 | | | |
| Peek-A-Brew | 380 | 19.95 | 14.76 | | 17.99 | | 15.95 | | | |
| Toast-R-Oven | 383 | 34.95 | 25.86 | | 31.99 | | 26.50 | 31.95 | | |
| Portable Mixer W/ | 384 | 19.95 | 14.76 | 16.95 | 17.99 | | 15.95 | 18.95 | | |
| Frypan | 386 | 28.90 | 21.39 | | | | 21.55 | 24.70 | | |
| Sharpener | 378 | 19.95 | 14.76 | | 17.99 | | | *19.95* | | |
| Automatic Toaster | 383 | 21.95 | 16.24 | | | | | 17.88 | | |
| Knife Sharpener Attachment | 384 | 4.95 | 3.66 | | | | | 4.00 | | |

See footnote at end of table.

*Tabulation of Retail Price Testimony*—Continued

| Item | Page | "Retail" list price | Coded Price | Fort Wayne witnesses: Original No. 1 | Fort Wayne witnesses: On reopening No. 2 | Fort Wayne witnesses: On reopening No. 3 | Milwaukee witnesses: Original No. 1 | Milwaukee witnesses: On reopening No. 2 | Milwaukee witnesses: On reopening No. 3 | Milwaukee witnesses: On reopening No. 4 |
|---|---|---|---|---|---|---|---|---|---|---|
| SPORTING GOODS | | | | | | | | | | |
| Wilson: | | | | | | | | | | |
| Kramer Racket | 521 | 18.00 | 11.99 | 15.95 | | | 15.40 | 14.95 | | |
| 3 Snead Woods | 528 | 41.00 | 30.99 (30.66) | 35.00 | | | 31.50 | 29.95 | | |
| 8 Snead Irons | 528 | 75.00 | 55.89 (54.49) | 56.00 | | | 56.00 | 52.50 | | |
| 3 Berg Woods | 528 | 41.00 | 30.99 (30.65) | 31.50 | | | 31.50 | 29.95 | | |
| 2 Berg Woods | 528 | 27.50 | 19.95 | 21.00 | | | 21.00 | 21.90 | | |
| 5 Berg Irons | 528 | 47.00 | 33.60 | 35.00 | | | 35.00 | 32.95 | | |
| 4 Snead Championship Woods | 529 | 82.00 | 57.99 | 62.00 | | | 62.00 | 58.00 | | |
| 3 Snead Championship Woods | 529 | 61.50 | 43.89 | 46.50 | | | 46.50 | 43.50 | | |
| 8 Snead Championship Irons | 529 | 114.00 | 79.99 | 84.80 | | | 84.80 | 79.95 | | |
| 4 Snead Signature Woods | 529 | 104.00 | 77.74 (75.69) | 78.00 | | | 78.00 | 72.00 | | |
| 8 Snead Signature Irons | 529 | 145.00 | 107.49 (107.48) | 110.80 | | | 110.80 | 99.00 | | |
| Snead Wedge | 529 | 14.25 | 9.97 (9.89) | *14.50* | | | 10.60 | 11.95 | | |
| 4 Palmer Woods | 528 | 68.00 | 52.00 | 52.00 | | | | 49.50 | | |
| 3 Snead Signature Woods | 529 | 78.00 | 57.99 (56.69) | 58.50 | | | 58.50 | 54.00 | | |
| 6 Snead Championship Irons | 529 | 85.50 | 60.89 | | | | 63.60 | 59.50 | | |
| Graham Football | 516 | 7.70 | 4.79 | | | | | 4.95 | | |
| Low Cut Football Shoes | 516 | 14.00 | 9.49 | | | | | 10.95 | | |
| High Counter Football Shoes | 516 | 14.00 | 9.49 | | | | | 10.95 | | |
| 8 Palmer Irons | 528 | 96.00 | 72.00 | | | | | 69.50 | | |

The price stated for a witness is the highest price testified to by the witness for any of the years covered by him. (Some witnesses testified to prices, *i.e.*, actual retail prices, in 1960, 1961, and 1962; others to such prices in one or two of these years.)
Such stated price if also italic is the same or approximately the same as respondents' "Retail" or list price (as can be checked by referring to the "Retail" list price column).
If a coded price is followed by another coded price in parenthesis the latter indicates a change in respondents' coded price (actual retail price) while its catalog CX 8 was in use. (See RX 14.)
Milwaukee witness No. 2 as to appliances represents 2 witnesses from the same store.

[1] Plus tax.

On reopening, complaint counsel also, as already noted, reduced the number of cities presented by him in the original presentation from three to two, namely Milwaukee and Ft. Wayne. He dropped Gary, even though the reopened hearing was held in nearby Chicago. In explanation, he states in his submission papers that he wished to save expense to the Government and that proof of even one area would be sufficient.

In explanation of his reduction of the items on reopening to 49, complaint counsel states in his submission that proof as to even one item could be sufficient to show a deception practice here—a contention which has altogether alarming possibilities.

This drop to 49 items is not only a serious matter as to number of items but goes far beyond this. For instance, on reopening, complaint counsel decreased his product lines to three, one-half the number specified in the complaint; he did this by dropping cameras completely and limiting his proof to typewriters, sporting goods and appliances (including electric shavers). Moreover, Spalding sporting goods were dropped completely by him.

For convenience, these three product lines covered at the reopening will be considered here in the six following categories, covering all 49 items: (1) Westinghouse appliances. (2) Wilson sporting goods. (3) Sunbeam appliances. (4) GE appliances. (5) Electric shavers. (6) Typewriters. As will be immediately shown, there were eliminations on reopening within the three merchandise lines retained, *i.e.*, apart from the complete dropping of cameras: (1) Westinghouse items were reduced from 6 [15] items (2 Ft. Wayne, 4 Milwaukee) to 1 item, and said item limited entirely to Milwaukee. (2) There was no evidence as to Wilson sporting goods from Ft. Wayne, such evidence (19 items) being limited to Milwaukee. (3) As to Sunbeam appliances, only 5 items were covered in both of the two cities, although 10 items in all. (4) As to GE appliances, only 3 items were covered in both of the two cities, although 9 items were covered in all. (5) As to electric shavers, only 2 items were covered in both cities, and only 3 items in all. (6) As to typewriters, there was a showing as to 5 items as to both cities, and 7 items as to all.

Moreover, on reopening, counsel largely continued with his original policy of one witness per item of merchandise per city, except that he produced two or three witnesses for typewriters and shavers. However, as will be shown below, he did definitely adduce testimony as to the competitiveness of the retail prices testified to, in respect to the various items.

As to number of witnesses the situation is as follows: (1) As to Westinghouse appliances, there was one Milwaukee witness as to the one item (also testified to at the original hearing [16]). (2) As to Wilson sporting goods, one Milwaukee witness testified as to 15 items (also testified to at the original hearing) as well as to 4 new items. (3) As to Sunbeam appliances, there was one witness from Ft. Wayne as to 6 items (1 of them testified to originally) and one witness from Milwaukee as to 10 items (8 testified to originally). (4) As to GE appliances, there was one witness from Ft. Wayne on 5 items (2 testified to originally) and one from Milwaukee on 7 items (4 testi-

[15] Perhaps this should be 5 (with corresponding reduction in the figures in parenthesis).

[16] *I.e.*, by a witness from the same city. Same (2) through (6), of this paragraph, *i.e.*, as to parenthetical material.

fied to originally). (5) As to electric shavers, there were two witnesses from Ft. Wayne as to 2 items (both testified to originally) and three witnesses from Milwaukee as to all 3 items (all testified to originally). Respondents apparently regard the number of witnesses in respect to shavers as respectable. (6) As to typewriters, there were two witnesses from Ft. Wayne and three from Milwaukee (all items testified to originally except one in each of two cities), with testimony from both cities as to 5 of the 7 items. Respondents apparently again regard the number of witnesses as respectable and there is no doubt that the typewriter evidence is the most substantial offered by complaint counsel.

* * * * * * *

Not only was complaint counsel's evidence on reopening limited to two cities, rather than three, but there was very little coverage of the actual trade areas including suburbs.

The witnesses came from the city area proper of each of the two cities. Complaint counsel himself carefully adduced from them testimony that the trade areas for each city range from 20 or 25 miles to from 40 to 50 miles from each of the two cities (Tr. 725–6, 756, 780, 856:16, 912:11, 986:13, 1031:4).

Moreover, the retail witnesses with hardly any exception came from the very center of each of the two cities and the downtown shopping area—not from suburbs, the outlying areas, or the towns and villages comprehended in the trade areas as defined in their testimony.

Respondents' counsel was assiduous in adducing testimony on cross-examination as to the existence of many retailers of the particular items other than those who testified to them. This testimony was adduced on all six categories, although not too strongly on typewriters. The testimony covers appliances, to wit, Westinghouse, Sunbeam and GE appliances (Tr. 521–23, 658, 756–7, 871–2), electric shavers (Tr. 538, 621–2, 828–9), Wilson sporting goods (Tr. 599–601), and typewriters (Tr. 532, 981–2). There is little doubt about the multitude of retail outlets. Appliances, including electric shavers, and even typewriters to some extent, can be bought in drug stores, and sporting goods need not be bought in sporting goods stores. Moreover, all the 49 items can be bought outside the city limits of Milwaukee and Ft. Wayne, the two cities concerned.

The retail witnesses had little, and nothing specific, to say about prices in outlying parts of the full trade area. At least four witnesses, one from the large Ft. Wayne department store, expressly stated that they knew nothing about prices in outlying districts (Tr. 876:20–25; 936:14–17; 1000:7–10; 1039:15–18). One from price-vigilant Gimbels, Milwaukee, admitted that the store's basic shopping is confined to the large stores (Tr. 762: 1–4), and "although we are all over town", he said, "it would be impossible to have somebody in every place all the time" (Tr. 762–3). The witness from the Ft. Wayne large store said that in comparing the store's prices he was basically thinking of "department stores such as we are" (Tr. 831:24; 832:13; 833:23).

Moreover, although respondents' counsel does not make a point of this, there is no evidence of the total dollar or total unit amount of the sales of any item by a retailer in the area, however defined, nor of the total dollar or unit amount of all retailers selling an item in the area at about the same price, nor of the total dollar or unit amount of all retail sales in the area of an item. Nor was there any other evidence, except here and there, on which one might determine even an approximate percentage relationship of sales at a retailer's price to all sales of the item in the area.

Respondents' counsel does argue strongly against the quality of the retail price testimony on reopening, and contends that the testimony does not differ much from the kind offered at the original presentation, which showed merely the price at which one retailer sells an item—even considering answers elicited by complaint counsel that prices were determined by "competition", or that they were "competitive" on the basis of shopping or reading advertisements. A meticulous analysis of the evidence, which will be made below, sustains this argument.

The examiner will now discuss further, and decide specifically, the various points indicated above relating to the technical sufficiency of the local area evidence.

*Numerical Quantity of Evidence*

First, the facts as to number of items and of lines of merchandise have been fully set forth above.

As to number of items, respondents' position logically is that even the entire 49 items presented on rehearing would not be "many" within the meaning of the complaint, Six. The examiner does not agree. The total number of items advertised in the catalog is not controlling. A violation as to 49 items, and even less than 49 items, is a violation as to "many" items. How many is "many" is indeed a vexatious question. But considering that these are national brand items, in great demand and well-known in our economy, 49 should definitely be regarded as many, particularly in proceedings designed to protect both competitors and consumers. Moreover, since they are national brand items, it can easily be assumed that the violation practice probably extends to all or most of the fifty national brands admittedly featured by the catalog, embracing a countless number of items. The possible assumption is indulged in here only to illustrate the adequacy of 49 items, or even less, for purposes of proof. It also must be recognized that there are some practical limitations as to proof in respect to number of items, and there must be a rule of reason. Moreover, if 49 are regarded as too few, 149 or 549 might also be regarded in the same way.

Nevertheless, inasmuch as complaint counsel originally undertook to prove a substantially larger number, selected from a still larger number, the examiner cannot say that he is over-impressed by evidence of 49 at a maximum.

As to the number of merchandise *lines* presented at the reopening, and comprehended within the 49 items, the examiner is even less impressed, and is inclined to rule that the presentation is insufficient by reason of insufficient coverage of the various lines of merchandise.

Only three of the six merchandise lines named in the complaint by the Commission, and presumably supporting its finding therein of sufficient public interest, are covered in the proof. An important brand like Spalding sporting goods is dropped completely, and proof as to Wilson sporting goods is confined to one city. Proof of Westinghouse appliances is reduced to one item in one city.

Complaint counsel not only fails to meet standards of proof at least indicated in the complaint by the Commission, but he fails even to meet his own standards of proof indicated by him, a Commission attorney, in his original presentation.

There is also respondent's further contention that, even if the number of merchandise items and lines might in some sense be regarded as sufficient, nevertheless they are not representative of respondents' "entire operation." It is urged that there was no showing as to random selection and typicality of items; that, indeed, they were national brand items exclusively and the most competitive items; and that most of respondents' business is in small communities.[17]

The examiner rejects this contention. There is nothing in the complaint which requires the items of merchandise to be representative, desirable as it is that they should be. Moreover, as national brand items they are representative, even if they are highly competitive. If, indeed, most of respondents' business is in small communities, that does not excuse violations in larger communities, nor can it be held that competitive conditions are necessarily different in, say, the Ft. Wayne area than in smaller communities.

* * * * * * *

Secondly, as to number of witnesses, the facts have also been fully set forth above. The examiner holds that the general limitation herein

[17] In this connection respondents' counsel also points out that, according to Mr. Grawoig's testimony, the total volume of Continental's sales in commerce of all 49 items was $40,000 a year (Tr. 1428 : 18), as against total sales in commerce of about $10,000,000.

of one retailer witness to establish retail price, except for shavers and typewriters, serves to negate the value of the testimony, and does not accord with the kind of proof generally found acceptable in analogous cases. This is not because it is theoretically impossible to prove by one retailer witness that a list price is in excess of the price at which the merchandise is generally sold, presumably at or about the retailer's price, but because it is so unlikely that it can be so proved. As will be shown below the testimony of witnesses herein was not too much more than what their own prices were, together with those of some of their competitors.

*Full Trade Area Not Covered*

Thirdly, not only are only two cities covered of the three originally presented, but, more importantly, there is no coverage of the actual trade areas, including extensive suburbs as defined by the witnesses. Moreover, the proof submitted was supplied almost exclusively by retailers from the heart of each city.

The most favorable conclusion, and the examiner is willing to make it, is that, so far as concerns area, there was sufficient proof as to the two cities, Milwaukee and Ft. Wayne, limited, however, to their strict geographical boundaries.

Having himself defined the trade areas through his own witnesses, complaint counsel should be bound by the definition. However, the examiner does not agree with respondents' counsel that two areas are not enough. The complaint does not speak of "many" areas or cities. A violation in a single trade area might, under proper circumstances, be sufficient basis for establishing a violation and supporting a cease and desist order. Here we have one fairly large and one small city. As already indicated, it is no defense here that respondents may be doing most of their business in smaller communities [18] although this may bear on the issue of public interest. Comparable competitive and pricing conditions may well exist in smaller communities.

Furthermore, as pointed out above, no evidence has been supplied on which a determination may be made as to percentage relationship of sales in the trade area—at or about the price testified to for an item—to total retail sales of the item in the area. The importance of such evidence is indicated in *Sun Gold Industries*, 56 F.T.C. 1368, 1371 (1960). In the examiner's opinion the absence of the evidence is definitely fatal in the case at bar since the trade area is held to be the city plus suburbs, and the proof, whatever it is, essentially relates to the city area proper.

[18] See Matter of *Baltimore Luggage Company*, 296 F. 2d 608 (4th Cir., 1961), *affirming* FTC Docket No. 7683.

*Price Evidence Qualitatively Insufficient*

Fourthly, there is the question of qualitative sufficiency.

The examiner rejects the retail price testimony as affording a reliable basis qualitatively for determining that respondents' "Retail" prices, or the identical manufacturers' list prices, were in excess of the prices at which the merchandise sold (even assuming the testimony covers the full trade areas).

The testimony consists largely of the particular retailer's own prices, much as the testimony at the original hearing, except that in varying degrees it shows that the prices were in a general way determined "competitively" or by "competition." The strongest, or least unsubstantial, of all this testimony is that in relation to the prices of Gimbels-Schuster, Milwaukee, but this too is insufficient. Much of the testimony is from discount houses, which of itself is not invalidating, to be sure, but the testimony hardly relates to the prices of other retailers generally.

In order to substantiate the qualitative sufficiency of this "competitive" evidence as to prices, complaint counsel in his answering submission cites a truly large number of page references in the record. In deference to counsel's earnestness, and in the interest of a complete factual foundation for making a determination, the examiner has compiled, mostly by quotation, all of the pertinent testimony on the cited pages, and some additional pages as well. The compilation, which is complete and definitive, is as follows:

*Gimbels (Schusters) Milwaukee.* Leading department store, Milwaukee. Their prices, *i.e.*, of appliances, set "by what is going on in the particular market" (Tr. 725:13). "* * * somebody would advertise something in the newspaper. That is the price we would put on it, or through our shoppers we would put the price on whatever the market is selling the thing for" (725:18). What determines your prices? "Well, competition entirely. In other words, we base our prices on what other people sell their things for. I am talking about department stores and other stores in the Milwaukee area." (753:10) As to small appliances, "we also have shoppers that go out and shop competition * * * we are jumping around with prices all the time." (753:22) "* * * we will shop in Milwaukee discount houses, we will shop other department stores, we will shop people that are near us." (754:11) "Most of the time we would meet the price." (754:19) What determined your prices on electric appliances? "* * * we did periodic shopping * * * making tours of the different competitors * * *" (780:3) We "meet all of the prices that were sold in a similar type store in the city itself." (780:9)

*Wolf & Dessauer*, Fort Wayne. Large department store. How do you set your prices for electric razors? "Primarily the competitive position within the town." (824:23) How do you ascertain other prices, "* * * with an ad., competitive ad. or something of that nature * * * or a price suggested as what will be the going price from salesmen covering our territory." (825:2) When you talk about meeting competition, are you talking about other department stores? "Yes, sir." (830:2) Are prices of non-department stores the same as yours? "Well, we do competitive shopping from time to time * * * they are approximately the same or slightly higher." (830:6) Do you shop drug stores and hardware stores? Not as often as we would the department stores." (830:10) What determines your competitive price? "Through my personal shopping and through other competition advertisers." (855:24) Principal competitors are Stillman's Department Store and the Haag Drug Store. But "anyone who sells small appliances has to be a competitor." (856:24) "We check the variety stores, chain stores, drug stores, plus other department stores in our area, and the discount stores." (857:5) Whose advertisements do you check? "Anyone who advertises like merchandise that I am carrying." (857:11)

*Erlien & Sons, Inc.*, Milwaukee. Mainly jewelry; typewriters and razors only 1% of their business (892:12); five employees (891:11). How do you determine your prices of typewriters and razors? "Well, we go according to what the competition sells it for." (890:9) How do you ascertain this? "Well, we check prices in stores, catalogs and newspapers." Who is your competition? "Mainly department stores right now and the catalogs." (890:17) How do the prices of competitors compare "Sometimes they are higher and sometimes they are lower, depending on the sale conditions and deals and so forth." (890:21) Does any other type of business compete with you as to typewriters? "Well, there is the discount stores now." (891:17) Do you meet their prices? "Yes, I do." He does not know what percentage of the typewriter business is handled by the department stores (892:7–9), or by his store and major competitors. (892:17–20) Do you ever do any store to store personal Saturday shopping? "Occasionally." (892:23) A couple of dozen stores handle typewriters. (893:2) Do you shop all of them? "No." Why not? "I don't have the time." (893:6) Do they all advertise? "I don't believe so." How many competitors do you have as to Remington shavers? "That I could not honestly answer because the shavers are handled in all the drug stores and all over, so I wouldn't know exactly." (893:15) "I know that Remington shavers are sold in drug stores and some clothing stores and I know that they never meet the prices like some of the other stores do." (894:14) They charge higher prices? Yes, "the smaller dealers usually charge higher prices * * *" (894:20) Did you ever lower your prices, on shavers and typewriters, to meet those of the large department stores? "Yes, sir." (908:8,15)

*Needham's Typewriter Company*, Fort Wayne. What determines your prices? "I would say basically competition." (911:24) How do you determine competition? "In Fort Wayne this is not too difficult; we even have an association * * * not that we fix prices, but just everybody knows what everybody else sells for." (912:1) What is your competition? "In Fort Wayne, typewriter stores, Sears & Roebuck, department store, one probably, I would say basically that's competition." (912:17) How about the trading area? "Oh, boy * * * nearly every small town of approximately 5000 or over will have a typewriter store * * *" (912:22) In Fort Wayne proper, a dealer is apt to handle only one type of typewriter, "everybody doesn't have every franchise." (913:14–19) Are your prices on portable typewriters based on competition of typewriter stores? "I would say that I do not shop these stores basically" (914:24), but "I base my prices on portable typewriters with the knowledge in catalogs which is all we see in Ft. Wayne, there being no what we call discount houses that handle typewriters * * * we would base our prices on being $10, $15 higher than a catalog would offer the same machine at, roughly, because we feel that we have a little more to offer than they do. That's all. I don't pay too much attention to what other people are selling at, to be honest with you." (915:1–10) "People will come in and flop the page down out of a catalog in front of us and say 'I can buy it for this price; what'll you do.'" (917:7)

*Art Anderson*, Milwaukee. A discount house (978:7–10). How do you fix your price for razors? "Well, I usually establish what the going price is for the average * * * discount house that is in the competition area." (941:9) "I would sell them at just about their price or a little less." (941:14) "I always charge maybe two or three per cent less than the going price in the area." (941:23) How do you ascertain this going price? "Oh, I could, by looking at our catalog, like we have many catalogs in Milwaukee, at department stores, * * * and just by general shopping around with other places of business that were similar to me in nature." (942:3) "And advertisements in the newspapers." (943:5) How did you determine your prices for typewriters? "I just looked at the individual catalogs and I charged them to $5 less than what the catalogs did." (944:6) Were catalog companies your biggest competition? "They were my biggest competition, yes." (944:15) "Well, I would say any catalog that came into the industry of Milwaukee was a competitor." (945: 5) "I received Continental, but there were several others," (945: 21)—including Majestic (946: 7)."I would scan any catalog I had that was available, in immediate hand-reach" (948: 17), "because they all had basically the same wholesale and retail price in there." (948: 23) Were your prices higher or lower than Erlien's? "Sometimes he was higher, and sometimes he was lower." (977: 25)

*Rohr Jewelers*, Milwaukee. Sells portable typewriters. How do you determine your prices? "Well, my competitors' prices in the downtown area were established, and then I would set my prices accordingly." (1011: 11) His competitors were catalog houses (1011: 19) and retail establishments, mainly department stores (1011: 22). Were office supply places competitors? "I never checked into them. I never worried about those places." (1011: 24) He keeps all the catalogs at his store (1012: 24), including that of Millway and General Merchandise, but not Continental, although he has heard of it. (1012: 10, 14, 19) If a customer quoted a catalog price, *i.e.*, the lower or coded price (1014: 2, 8) "you would have to fall in line with that particular price", (1013: 16) and usually sell "pennies below" the price (1014: 12). He might also read a Gimbels advertisement on shavers (1015: 6), or a customer might quote him an alleged Gimbels price on typewriters (1015: 12–15). What type of stores in Milwaukee sell typewriters? "Well, I would say, mainly your * * * department store." (1015: 18)

*Dewey Sporting Goods Company*, Milwaukee. How do you determine your prices? "Well, we determine our prices by the competition." (1069: 20) What is your competition? "Well, our main competition is from these socalled discount houses, and discount catalog houses." (1069: 22) How about sporting goods companies? "Well, we have to compete with them; if they advertise a certain price, we try to be within striking distance of it." (1070: 22) How many retail outlets for sporting goods are there "in Milwaukee"? "Well, including small ones * * * maybe 25 or 30." (1071: 3) How do you determine your competitors' prices? "We both shop them and we also watch their advertising and check their catalog prices." (1071: 20) How much of the sporting goods business does your company and two other companies (named) have of "Milwaukee trade area" business? "I would say around a third." (1072: 8) The discount houses and catalog houses have most of the balance (1072: 15), smaller stores having the rest. In competing with catalogs he uses the lower or coded price (1074: 4) and charged "a little lower" (1074: 9). Customers "constantly" (1075: 9) bring up the catalog prices. As for the catalogs they also "use them in conjunction with shopping some of the other stores" (1075: 22). The catalogs they use have the same sporting merchandise and practically the same coded prices (1076:16), but he has never seen Continental.

## III

### "WHOLESALE" PRICES

Respondents ceased using the "wholesale" representations commencing midsummer 1961. Repeated assurances have been given that they are willing to bind themselves not to use them, for instance, at the prehearing conference (Tr. 34:20), and in Mr. Grawoig's testimony (Tr. 1412:12–14). Nevertheless, respondent's counsel contends in his main submissions (see p. 47) herein that there is not sufficient proof to sustain the allegations of the complaint as to the "wholesale" representations, or to support a cease and desist order in connection therewith.

The pertinent parts of the complaint as to the use of the word "wholesale" may be completely summarized as follows:

Complaint, Four, quotes the references in the catalog to "wholesale catalog", "lowest wholesale prices", and to "coded price", *i.e.*, respondents' actual retail selling price described in the catalog as "wholesale" (Five, first sentence.)

Five also alleges that by means of such statements and pricing methods respondents represent:

> that they are wholesalers who sell all of their merchandise at wholesale prices; that the socalled coded prices, at which the merchandise is offered for sale, are wholesale prices;

and Six alleges that this is misleading for the following reason:

> In truth and in fact, respondents do not sell, or offer to sell, all of their merchandise at wholesale prices. To the contrary, the prices of *many* of their articles of merchandise are in excess of wholesale prices and the said coded prices of such articles are not wholesale prices but are in excess thereof. (Our emphasis.)

The following observations may be made as to these allegations in the complaint:

(1) There is no reference to areas, trade areas, or other bounds—*i.e.* in connection with wholesale prices.

(2) The deception according to the first sentence of Six is that respondents do not sell their merchandise at wholesale. The deception according to the second sentence of Six is that the prices are "in excess of" wholesale prices. As will be set forth below, the examiner holds that for all practical purposes, so far as concerns ultimate consumers, their not obtaining the merchandise at wholesale (first sentence) is the same thing as having to pay "in excess of" wholesale prices (second sentence).

(3) Six (second sentence) also alleges a deception in respect to "many" items of merchandise, so that complaint counsel's proof must comprehend "many" items.

Complaint counsel produced his supplier witnesses, as to wholesale prices, at the original presentation—the reopening being reserved, of course, for retail items. Accordingly, complaint counsel's proof as to wholesale prices did not go through any such process of reduction as took place with retail items, lines, or areas.

Complaint counsel devotes his Ninth Proposed Finding to the wholesale aspects of the complaint's charges:

(1) He recites no areas in his proposed finding but in his comment thereon mentions the "areas of Illinois, Indiana and Wisconsin", *i.e.*, where he refers to the testimony of wholesalers called by him as to their wholesale prices for items in the catalog. These state areas would include, of course, all three cities brought into this case—Milwaukee, Fort Wayne, and Gary—together with their suburbs.

(2) Complaint counsel adopts, in his Ninth Proposed Finding, the above quoted wording of the complaint, Six, but combines both sentences together.

(3) By adopting the wording of Six in his proposed finding, including its reference to "many" items, he recognizes his burden of wholesale proof as to "many" items, but of course no greater burden, and he contends that he has met this burden. He introduced evidence as to 90 items.[19]

The supplier witnesses testified that the same prices [20] are charged by their firms to all dealers, irrespective of the possibility that they may be wholesalers, except that Eastman Kodak gives a standard and modest quantity low net price to certified wholesalers irrespective of quantity (R. 193:25), and except that, although not testified to, Royal McBee may do the same with its special wholesalers covering the Rocky Mountain area found not feasible or profitable to cover directly. (Tr. 169:11–18)

The supplier witnesses, moreover, generally defined a dealer as a retailer selling to ultimate consumers, and referred to Continental as a dealer. The suppliers represented by these witnesses in this particular testimony are Remington Rand (Tr. 136:6; 138:22); Royal McBee (158:5, 23); Eastman Kodak (193:3; 195:14); Spalding (221:19, 22);

[19] This revised number, 90, as per stipulation of counsel, June 13, 1963.

[20] Typewriters (Tr. 139:6; 161:20–25; 177:4–12)—Cameras (Tr. 193ff, Eastman; 327:18–21, Bell & Howell)—Sporting goods (R. 223:8, Spalding; 275, Wilson)—Appliances (R. 474:21, Westinghouse; 499:23, GE).

also, although not selling[21] to Continental, Westinghouse (471:20) and GE (493:8).

The suppliers represented by these witnesses are the manufacturers, except as to General Electric (Tr. 498:6) and Westinghouse (Tr. 470ff) they are wholly owned subsidiaries of the manufacturers.

All these suppliers do their own distributing to retail dealers, with the two main exceptions alluded to above: Eastman Kodak sells to certified wholesalers, *i.e.*, wholesale drug houses and wholesale photofinishers (Tr. 193:14), and most drug stores buy through such intermediate source (Tr. 197:9). Royal McBee, a rather lesser exception, sells its typewriters (portable) to wholesalers in Rocky Mountain areas it finds not feasible or profitable not to cover directly (Tr. 169:11–18). There are also other exceptions: Smith Corona sells to dealers some of whom apparently resell to retailers regularly (Tr. 184:16, 21) and, of course, all suppliers sell to dealers who *may* resell to retailers.

Complaint counsel has presented a chart of the prices testified to by the suppliers. The chart has not been objected to by the respondents, although ample opportunity has been afforded to them, and it is incorporated in this decision, although somewhat rearranged for convenience.

*Tabulation of Wholesale Price Testimony*

| | CX 8 catalog page | Coded price | 1961 | | 1962 | |
|---|---|---|---|---|---|---|
| | | | Actual price | Rec. page | Actual price | Rec. page |
| SPORTING GOODS | | | | | | |
| Wilson's Sporting Goods: | | | | | | |
| Otto Graham Football | 516 | 4.79 | 3.33 | 276 | 3.33 | 277 |
| Football helmet | 516 | 4.79 | 3.60 | 277 | 3.60 | 277 |
| Football shoes (low) | 516 | 9.49 | 6.90 | 277 | 7.20 | 278 |
| Football shoes (high) | 516 | 9.49 | 6.90 | 277 | 7.20 | 278 |
| T.V. Leather basketball | 517 | 14.69 | 10.60 | 278 | 10.60 | 278 |
| Top notch basketball | 517 | 14.49 | 10.85 | 278 | 10.85 | 279 |
| Harvey Kuenn glove | 518 | 14.69 | 10.80 | 279 | --- | --- |
| Nelson Fox glove | 518 | 17.59 | 15.00 | 279 | 13.00 | 279 |
| Mickey Vernon glove | 518 | 8.89 | 6.60 | 280 | 6.60 | 280 |
| Harwick flight racket | 521 | 6.47 | 4.80 | 281 | 4.80 | 281 |
| Zephyr racket | 521 | 4.97 | 3.60 | 281 | 3.60 | 282 |
| Jack Kramer pro racket | 521 | 11.99 | 9.00 | 282 | 9.00 | 282 |
| Sam Snead Blue Ridge 3 Woods | 528 | 30.99 | 20.70 | 282 | 20.70 | 282 |
| Sam Snead Blue Ridge 8 Irons | 528 | 55.89 | 37.20 | 282 | 37.20 | 283 |
| Sam Snead Blue Ridge 6 Irons | 528 | 41.89 | 27.90 | 283 | 27.90 | 283 |
| Patty Berg 3 Woods | 528 | 30.99 | 20.70 | 283 | 20.70 | 284 |
| Patty Berg 2 Woods | 528 | 19.95 | 13.80 | 284 | 13.80 | 284 |
| Patty Berg 6 Irons | 528 | 41.89 | 27.90 | 284 | 27.90 | 285 |
| Sam Snead Championship 4 Woods | 529 | 57.99 | 40.50 | 285 | 40.50 | 286 |
| Sam Snead Championship 3 Woods | 529 | 43.89 | 30.50 | 286 | 30.50 | 286 |
| Sam Snead Championship 8 Irons | 529 | 79.99 | 56.40 | 286 | 56.40 | 286 |
| Sam Snead Signature 4 Woods | 529 | 77.74 | 52.00 | 286 | 52.00 | 287 |
| Sam Snead Signature 8 Irons | 529 | 107.49 | 72.00 | 287 | 72.00 | 287 |
| Sam Snead Wedge | 529 | 9.97 | 7.05 | 287 | 7.05 | 288 |
| Hol-Hi golf balls (dozen) | 530 | 9.99 | 9.50 | 288 | 9.50 | 289 |

[21] The record indicates merely that these particular subsidiaries of GE and Westinghouse do not supply Continental.

*Tabulation of Wholesale Price Testimony*—Continued

| | CX 8 catalog page | Coded price | 1961 | | 1962 | |
|---|---|---|---|---|---|---|
| | | | Actual price | Rec. page | Actual price | Rec. page |
| SPORTING GOODS—continued | | | | | | |
| Spalding Sporting Goods: | | | | | | |
| John Unitas football | 516 | 5.69 | 4.20 | 222 | 4.20 | 222 |
| John Arnett, Jr. football | 516 | 4.89 | 3.00 | 222 | 3.00 | 223 |
| John Unitas shoulder pads | 516 | 4.89 | 3.60 | 223 | 3.60 | 223 |
| 172 "Pro-bilt" basketball | 517 | 8.79 | 6.60 | 223 | 6.60 | 224 |
| "Speed win" basketball | 517 | 11.29 | 8.40 | 224 | 8.40 | 224 |
| Davis cup racket | 521 | 15.47 | 10.20 | 225 | 10.20 | 225 |
| Gonzales signature racket | 521 | 7.99 | 6.00 | 225 | 6.00 | 225 |
| Walter Burkemo 4 Woods | 529 | 33.79 | 20.05 | 225 | 20.05 | 225 |
| Walter Burkemo 3 Woods | 529 | 25.35 | 18.75 | 226 | 18.75 | 226 |
| Walter Burkemo 2 Woods | 529 | 16.89 | 12.50 | 226 | 12.50 | 226 |
| Walter Burkemo 8 Irons | 529 | 46.79 | 34.80 | 226 | 34.80 | 226 |
| Walter Burkemo 5 Irons | 529 | 29.25 | 21.75 | 226 | 21.75 | 226 |
| Walter Burkemo Wedge | 529 | 6.59 | 4.50 | 227 | 4.50 | 227 |
| Walter Burkemo Putter | 529 | 5.99 | 4.35 | 227 | 4.35 | 227 |
| Fay Crocker 3 Woods | 529 | 25.35 | 18.75 | 227 | 18.75 | 227 |
| Fay Crocker 2 Woods | 529 | 16.89 | 12.50 | 227 | 12.50 | 227 |
| Fay Crocker 7 Irons | 529 | 40.95 | 30.45 | 227 | 30.45 | 228 |
| Fay Crocker 5 Irons | 529 | 29.25 | 21.75 | 228 | 21.75 | 228 |
| TYPEWRITERS | | | | | | |
| Remington typewriters: | | | | | | |
| Quiet-riter | 286 | 106.96 | 78.50 | 137 | 72.50 | 138 |
| Monarch | 286 | 79.95 | 55.00 | 138 | 59.00 | 138 |
| Royal typewriters: | | | | | | |
| Royalite | 286 | 49.95 | 39.80 | 158 | 43.11 | 159 |
| Futura 800 | 286 | 109.95 | 88.13 | 162 | 88.13 | 163 |
| Smith-Corona typewriters: | | | | | | |
| Sterling | 287 | 76.40 | 59.50 | 174 | 62.30 | 174 |
| Skywriter | 287 | 59.96 | 46.50 | 175 | 48.30 | 175 |
| Galaxy | 287 | 109.88 | 85.00 | 176 | 85.00 | 176 |
| Pacemaker | 287 | 149.60 | 113.70 | 178 | 113.70 | 178 |
| CAMERAS | | | | | | |
| Eastman-Kodak cameras: | | | | | | |
| Motormatic | 268 | 87.60 | 73.00 | 194 | 73.00 | 194 |
| Retina Reflex | 268 | 199.90 | 165.70 | 200 | 175.67 | 200 |
| Electric Eye | 268 | 72.50 | 59.67 | 199 | 59.67 | 199 |
| Retina Automatic III | 268 | 103.90 | 86.33 | 200 | 93.00 | 200 |
| 504 Projector | 271 | 75.60 | 66.00 | 201 | 66.00 | 201 |
| Zoom 8 Reflex | 272 | 159.60 | ----- | ----- | 143.00 | 201 |
| Zoom 8 8mm | 273 | 87.60 | 73.00 | 201 | 73.00 | 202 |
| 8mm Projector | 277 | 99.60 | 83.00 | 208 | 83.00 | 208 |
| Brownie "500" Projector | 277 | 74.96 | 61.43 | 209 | 61.43 | 209 |
| Brownie "AIS" Projector | 277 | 47.96 | 33.43 | 208 | 33.43 | 209 |
| Bell & Howell cameras: | | | | | | |
| Infallible Electric Eye | 267 | 46.96 | 34.98 | 326 | 34.98 | 326 |
| Duo-Power Zoomatic (spool load) | 272 | 199.96 | 164.34 | 326 | 145.17 | 326 |
| Duo-Power Zoomatic (magazine load) | 272 | 221.46 | 174.49 | 327 | 158.37 | 327 |
| 8mm Zoomatic (spool) | 273 | 176.96 | 141.87 | 327 | 135.37 | 327 |
| 8mm Zoomatic (magazine) | 273 | 193.96 | 149.47 | 328 | 155.07 | 328 |
| 8mm Zoom | 273 | 91.96 | 73.94 | 328 | 73.94 | 328 |
| 8mm Lumina Zoom | 276 | 155.96 | 117.17 | 329 | ----- | ----- |
| 16mm camera | 277 | 289.96 | 233.30 | 329 | 233.30 | 329 |
| APPLIANCES | | | | | | |
| Westinghouse appliances: | | | | | | |
| Spin jet cleaner | 350 | 52.95 | 51.95 | 481 | 51.95 | 482 |
| Mobile cleaner | 350 | 49.95 | 48.27 | 482 | 48.27 | 482 |
| 10 quart roaster | 374 | 36.96 | 34.97 | 483 | 35.96 | 483 |
| General Electric appliances: | | | | | | |
| Automatic grill-waffler | 372 | 17.72 | 16.77 | 490 | 16.77 | 490 |
| 2 speed blender | 377 | 29.56 | 27.97 | 491 | 27.97 | 491 |
| Sharpener | 378 | 14.76 | 13.97 | 492 | 13.97 | 492 |
| 9 cup stainless coffeemaker | 380 | 23.64 | 22.37 | 493 | 22.37 | 493 |
| Peek-a-brew | 380 | 14.76 | 13.97 | 494 | 13.97 | 494 |
| Toast-r-oven | 383 | 25.86 | 24.47 | 495 | 24.47 | 495 |
| Portable mixer | 384 | 14.76 | 13.97 | 496 | 13.97 | 495 |

The following may be stated generally as to the submissions of the respondents' counsel in respect to the proof as to the "Wholesale" representations: (1) No point seems to be made by him that area coverage as such is insufficient. (2) The contention is made that the proof is insufficient to show that respondents' coded prices (*i.e.*, their actual retail prices) have been in excess of all wholesale prices. (3) No point as such seems to be made that the number of items covered are not "many", *i.e.*, for the purpose of wholesale proof.

Accordingly, the only one of these three points to be resolved is, (2), whether the proof is sufficient to show the coded prices are in excess of wholesale prices, or all wholesale prices.

Respondents' counsel attacks this proof mainly because of the instances in which the supplier represented by the witness as only one of the suppliers (or wholesalers) to retailers.

For instance, he stresses that the witness for GE and the witness for Westinghouse [22] each testified that the wholly owned distributor company represented by him was only one of such distributing companies for the parent company. But the Westinghouse witness, after testifying to competition with other distributing companies of Westinghouse (476:14), testified that the prices he had testified to for his company were the "maximum prices" charged (477:6). And the GE witness testified that his was "the only company-owned distribution in this area." (Tr. 498:25) The examiner accordingly is not swayed by the argument as to GE and Westinghouse distribution.

Respondents' counsel similarly stresses the sale by Eastman Kodak to wholesale drug houses and photo-finishers, through which the majority of drug stores get their merchandise. The examiner regards this a substantial factor to be considered—however, not too substantial, since drug stores obviously do not carry the variety of stock of a department or camera store.

Respondents' counsel also refers to Royal McBee's wholesale customers. However, these are the customers in the Rocky Mountain areas not feasible or not profitable to cover directly. These obviously do not concern the area involved in this case, in the examiner's opinion.

Respondents' counsel also refers, by record page reference, to those Smith Corona dealers who apparently resell to dealers as a regular practice. The evidence on this is hazy and without details, but the examiner believes that it presents something substantial to consider in respect to the wholesale price situation.

[22] Respondents' counsel also makes the statement that the Westinghouse price on each item is identical with respondents' coded price. This statement appears to be incorrect. See chart.

Respondents' counsel also cites Mr. Grawoig's testimony (Tr. 1424–26) that GE distributors, at least in Chicago, vary their prices according to various conditions (Tr. 1425:15). In the examiner's opinion all that this testimony can support is the conclusion that GE Chicago distributors (wholesalers) will cut prices, in other words, that their prices would be lower, presumably, than those testified to by the GE witness herein. As such, they do not affect the wholesale price question in this case. It has already been noted that the GE witness's company is the only company-owned distribution in the area considered.— Respondents' counsel also asked Mr. Grawoig the leading question as to whether the GE situation as above testified to him applied to "Westinghouse, Sunbeam, Remington, Smith Corona." Mr. Grawoig's answer "Yes, it is very competitive" (1426:19) can, of course, be given no special weight.

Respondents' counsel also points out that no retailer called by complaint counsel testified as to wholesale cost to him, which is true. However, although such evidence would have been desirable, the examiner does not regard it as indispensable.

Respondents' counsel keeps reiterating that the catalog is primarily for retailers, 85 per cent of its business being with retailers. The examiner rejects this completely unsupported conclusion, as he has already fully made clear in the earlier part of his decision under the subcaption *A Retail Catalog*.

A review of all the pertinent evidence leads the examiner to the following conclusions:

(1) The proof is sufficient as to local areas, *i.e.*, the proof relating to Illinois, Indiana and Wisconsin comprehends the full trade areas of Greater Milwaukee, Fort Wayne and Gary, with suburbs, here.

(2) A finding is fully warranted, generally, that respondents do not sell to ultimate consumers at wholesale prices, but at prices in excess of wholesale prices. The examiner holds that the meaning of wholesale price to a consumer is the price at which retailers regularly purchase an item in the area. As to the allegation in the second sentence of Six of the complaint, that respondents' prices are "in excess of wholesale prices", the examiner holds that this is simply a more precise way, or another way, of stating, as the first sentence does, that respondents do not sell "at wholesale prices." The consumer, told that he is obtaining a wholesale price, expects to pay that price (what a retailer would have to pay), not in excess of it.

It is quite clear on the evidence here that the price as to the brand items was generally uniform to all retailers, including respondents, and that generally retailers could buy the items of merchandise herein at the prices respondents paid. There are some product weaknesses in the evidence, notably as to Eastman cameras sold to drug stores via intermediate wholesalers, but in respect to most of the products presented this evidence is sufficient.

(3) A finding is also justified that "many" of the prices are not wholesale prices but are in excess of wholesale prices. The items are certainly "many" if regarded as representative of other national brand items in the catalog like them.

Accordingly, it is found that respondents' representations to ultimate consumers as to "wholesale" price and "wholesale catalog" have been proved to be false, and that they violate the law, as epitomized in the Guides Against Deceptive Pricing, October 2, 1958, Par. VII, expressly pertaining by its wording to a

"wholesale" price, or other such expression, which represents or implies that the consuming public can purchase the article at the same price that retailers regularly do, * * *.

QUESTIONS AS TO AN ORDER

Respondents request that if an order is issued against them its effective date be postponed so that they will not be subject thereto unless operators of comparable catalogs are subject to similar orders. This request may have substantial merit. An order against respondents, in effect prohibiting them from publishing a dual-price catalog while their catalog competitors do, may well put them out of business or otherwise subject them to irreparable injury while these catalog competitors simply take over their trade, or a large part of it. Of course, as found in this decision, respondents have been violating the law. But so far as concerns consumers they have not been an altogether pernicious influence, and their coded or actual retail prices are ofter lower than going retail prices, even though not affording the full saving from their "Retail" or list prices. They operate a high grade catalog, with high grade products, affording an excellent distribution system to those customers in remoter and smaller localities. Although their "Retail" prices are fictitious under the adjudicated cases, and therefore the savings represented from "Retail" prices are false, nevertheless it is true that the public is beginning to pay less attention to such list prices. For this and other reasons the postponement of the effective date of the order need not bear so adversely on consumers as it would otherwise.

However, the question of postponement of the effective date of the order is for the Commission proper to pass on, rather than the examiner. The hearing examiner's order is not effective in any event until approved by the Commission.

There may be a question as to whether the individual respondents should be named individually in any order herein issued, or merely as officers of the corporation. However, they are not only the officers, but, as the answer admits, they formulate, direct and control the corporation's policies, acts, and practices. Furthermore, they together own all the stock of the corporation, as the evidence shows.

The five individual respondents are two brothers, a son of each of them, and the son-in-law of one (Tr. 1341,2). This is thus just a family corporation, making it at least reasonably possible that any order herein could be circumvented by a transfer of ownership to or in behalf of the individuals. Under these circumstances, it seems reasonable that respondents should be restrained individually just as they would be if they were members of a partnership owning the business.

As to the contents of the order there is the question as to whether its application should be limited to national brand products as was the proof, instead of applying to merchandise generally. The examiner thinks not. The catalog is largely composed of national brand products, as proclaimed in its pages. The respondents do not ask for a limitation to national brand products, and it is doubtful that they would be any more pleased or relieved with such a limitation than without it. Moreover, an order need not be limited to the exact items, or exact kind of items, proved.

There is also the question as to whether the order should extend to the use of the word "wholesale", since respondents have discontinued this practice and state they will not renew it. However, they discontinued the practice only in 1961, after direct investigation began, and in a publication which would continue for some time to operate as a vehicle of the misrepresentation. Moreover, although respondents have stated that they would not renew the practice, in their submissions after the hearing they actively defend it. The question goes to the discretion of the Commission, and the examiner definitely believes that the order should extend to the use of the word "wholesale." See *Spencer Gifts, Inc.* v. *Federal Trade Commission*, 302 F. 2d 267, 8 (CA 3d, 1962), where discontinuance took place even prior to investigation.

* * * * * * *

The examiner's ultimate Findings of Fact follow immediately. Except as contained therein or found above all proposed findings of fact are hereby disallowed. The non-finding or disallowance of a proposed finding of fact does not necessarily mean that the fact has not been proved as a fact in the general sense.

The Conclusions of Law follow thereafter, and then the Order proper.

If there are any pending motions or other questions they are decided only as may be consistent with the decision herein. Any undetermined quotations from the catalog, i.e., other than those set forth in the admissibility of the evidence.

Complaint counsel in his proposed findings follows the wording of the complaint almost literally except that he breaks up the paragraphs and assigns additional numbers to them—and except that he substitutes quotations from the catalog, i.e., other than those set forth in the complaint.

The examiner, after some deliberation and considering the extent of the factual findings in the decision proper, has also decided to follow the wording of the complaint, with slight changes, including some additions to the catalog quotations set forth in the complaint. However, the examiner retains the same numbering as in the complaint, although in Arabic form.

In addition, the examiner has added supplementary findings or finding material after each of the numbered findings following the wording of the complaint, wherever he has deemed this appropriate.

## FINDINGS OF FACT

1. Respondent Continental Products, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 2030 South Michigan Avenue, Chicago, Illinois.

Respondents Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig, and Paul M. Mayer are individuals and officers of the said corporate respondent. They formulate, direct and control the policies, acts, and practices of said corporate respondent, including those hereinafter set out. The address of each individual respondent is the same as that of the corporate respondent.

These individuals are all of the same family, including respondent Paul M. Mayer, by marriage, and together they own all of the stock of the corporation.

2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various articles of merchandise, including jewelry, cameras, typewriters, hardware, sporting goods and appliances, (1) to retailers for resale and to (2) individual members of the public.

The thrust of the proof herein is as to sales to individual members of the public, that is, to individual consumers and to firms, organizations, or others purchasing for individual consumers, or permitting themselves to be used as a conduit for such purposes. However, there are sales to retailers, for instance, in remote areas, who resell at retail to ultimate consumers. Such retailers pay respondents exactly the same price as ultimate consumers or those buying for ultimate consumers.

There was no proof in this case, whether general or specific, as to prices of jewelry or hardware. The types of merchandise as to which there was any proof were in all instances rather well-known national brands. Respondents feature well-known national brands in their catalogs and circulars, through which they advertise their merchandise.

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

4. Respondents, in the course and conduct of their business and for the purpose of inducing the purchase of their merchandise, have advertised the same by means of catalogs and circulars, disseminated by and through the United States mails to prospective purchasers located in various States other than the State of Illinois. Among and typical, but not all inclusive, of the explanatory statements appearing in respondents' catalogs and circulars are the following:

* * * a wholesale catalog * * * at the lowest wholesale prices * * * a great department store in a catalog * * * general wholesale merchandise * * *
Prices shown are retail prices established by the manufacturer or recommended by us. Your cost is hidden in the stock numbers.
Confidential—Your Net Low Cost is Hidden in the Stock Number—Retail prices * * * have been suggested by the manufacturer as list prices for dealers who are buying for resale. You pay only the coded price.
26–89537–1356 * * * Retail 22.50
* * * We are offering our customers the greatest collection of values ever compiled in the pages of wholesale catalog * * *
* * * that the prices listed are as low or lower than any other wholesale catalog.
2. Wholesale only (CX 1, order blank).

In addition, the catalogs and circulars contain other material—wording, illustrations, and solicitations—clearly indicating that respondents definitely appeal to ultimate consumers, and the like, to purchase from them, *i.e.*, at the coded price, supposedly designed for retailers.

5. Respondents, for each article of merchandise described in their catalogs and circulars, set forth two prices; one, a so-called coded price and the other, a higher price, designated as "Retail." By means of such pricing methods and the aforesaid quoted statements, and others

of like import not specifically set out herein, respondents represent, directly or by implication, that they are wholesalers who sell all of their merchandise at wholesale prices; that the so-called coded prices, at which the merchandise is offered for sale, are wholesale prices; that the prices designated as "Retail" are the prices at which the merchandise is usually and customarily sold at retail; and that the difference between the coded price and the "Retail" price represents savings from the usual and customary retail price in the trade areas where the representations are made.

The "Retail" price stated is the very same as the list price or suggested retail price of the manufacturer of each of the national brand items of merchandise involved herein.

The representation that the coded price, respondents' actual selling price to consumers, is a "wholesale" price or that respondents, when selling to or for consumers, are wholesalers, is the less important part of this case. Respondents have discontinued this practice, although only after they definitely knew the Commission was investigating.

"Trade areas where the representations are made" constitutes, it is hereby found, most of the states of the Union, *i.e.*, wherever the catalogs and circulars are distributed. In particular, the "Retail" prices of the national brand products are, as hereby found, represented to be substantially the prevailing retail prices in all these states.

6. In truth and in fact, respondents do not sell, or offer to sell, all of their merchandise at wholesale prices. To the contrary, the prices of many of their articles of merchandise are in excess of wholesale prices and the said coded prices of such articles are not wholesale prices but are in excess thereof. The prices designated as "Retail" prices, for many of their articles of merchandise, are not actual retail prices but in fact are in excess of the price or prices at which said merchandise is generally sold at retail in the trade areas where such representations are made. The differences between respondents' said coded and "Retail" prices do not represent savings from the generally prevailing retail price or prices. The statements and representations set out in paragraph 4, and the implications arising therefrom, are therefore false, misleading and deceptive.

That the coded prices are not wholesale prices, or what for consumers is practically the same thing, that they are not in excess of wholesale prices, was proved herein by complaint counsel by specific area evidence comprehending the full trade areas of Milwaukee, Fort Wayne, and Gary.

The allegations as to "Retail" prices were not technically proved by complaint counsel on such specific local area evidence. The actual local areas, as testified to by complaint counsel's witnesses, were not covered, only the city areas proper, and then minus Gary. Only 49 items were covered, on rehearing, largely by one witness for each, and with technically insufficient proof in connection with actual prevailing price.

However, the examiner finds, on certain testimony of complaint counsel's witnesses and particularly on the testimony of respondents' chief expert witness, that respondents' "Retail" prices are fictitious, that they are not even intended or designed to represent actual prevailing prices, and that, absent a contrary showing from respondents, the prices cannot possibly represent actual prevailing retail prices in all the states involved.

7. At all times mentioned herein respondents have been, and are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

8. The use by respondents of the aforementioned false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true, and into the purchase of substantial quantities of respondents' products because of said mistaken and erroneous belief.

## CONCLUSION OF LAW

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

## ORDER

*It is ordered*, That respondents Continental Products, Inc., a corporation, and its officers, and Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig and Paul M. Mayer, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Using the word "wholesale", or any other word or term of similar import or meaning, in connection with the direct or indirect solicitation of sales to individual members of the public or other consumers, to describe a price which is higher than the usual and customary price at which the merchandise is sold by wholesalers to retailers in the trade areas where the representations are made.

(b) Using the word "retail" or any other word or term of similar import or meaning to describe a price which is in excess of the generally prevailing price or prices at which the merchandise is sold at retail in the trade areas where the representations are made.

(c) Representing, directly or by implication, that any saving is afforded in the purchase of respondents' merchandise from the usual and customary retail price unless the price at which said merchandise is offered constitutes a reduction from the price or prices at which said merchandise is generally sold at retail in the trade areas where the representations are made.

(d) Misrepresenting in any manner the savings available to purchasers of respondents' merchandise or the amount by which the price of merchandise has been reduced from the price or prices at which it is generally sold at retail in the trade areas where the representations are made.

## Opinion of the Commission

APRIL 23, 1964

Respondents herein, a corporation and its officers engaged in the sale of merchandise through catalogs, have been charged with violating Section 5 of the Federal Trade Commission Act by making false and deceptive representations as to the prevailing retail prices of their merchandise and the savings afforded their customers and by falsely representing that the prices at which they sell to the public are wholesale prices. The examiner held in his initial decision that these allegations had been sustained and included in his decision an order prohibiting the challenged practices. Both sides have appealed. Respondents have taken exception to the examiner's findings and conclusions and counsel supporting the complaint has appealed from the examiner's failure to make certain findings. This matter is now before us for review.

As to the charge that respondents' "Retail" prices were deceptive, the examiner in effect found these prices were fictitious and not even intended or designed to represent actual prevailing prices. In making this finding the examiner apparently relied on the testimony of respondents' own expert as "supplemented by what local area proof there is" to the effect that the manufacturer's suggested retail price, which is Continental's "Retail" price, is the highest retail price charged by "some" retailers but is set high enough by the manufacturer to top all other prices. If the evidence supported the examiner's finding, the conclusion that respondents engaged in a fictitious use of the term "retail price" would follow even under the Guides Against Deceptive Pricing issued January 8, 1964. However, the Commission does not believe that the record sufficiently supports the examiner's finding in this respect.

We agree with the hearing examiner, however, that the record supports the allegation that respondents have falsely and deceptively represented that the prices at which their merchandise was sold to the public were wholesale prices. Although respondents now contend that they have abandoned the use of the word "wholesale" or similar terms in the operation of their business, we can find no satisfactory basis in the record for concluding that there may not be a resumption of this practice.

To the extent indicated herein, respondents' appeal will be granted and in all other respects it is denied. The appeal of the counsel supporting the complaint is denied. The initial decision will be modified to conform with this opinion.

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

## Decision of the Commission and Order to File Report of Compliance

Respondents and counsel in support of the complaint having filed cross-appeals from the initial decision of the hearing examiner, and the matter having been heard on briefs and oral argument; and the Commission having rendered its decision granting in part and denying in part respondents' appeal, denying the appeal of counsel supporting the complaint, and directing modification of the initial decision:

*It is ordered*, That the initial decision be modified by striking therefrom the following portions:

The second full paragraph on page 365 beginning with the words "In a general way" and ending with the words "proved his case";

That part of the section entitled "FICTITIOUS PRICE SYSTEM" beginning on page 367 with the words "The complaint herein" and ending on page 377 with the words "deceptive in its essence";

All of that section entitled "LOCAL AREA EVIDENCE" beginning on page 381 with the words "As heretofore observed" and ending on page 393 with the words "has never seen Continental"; and

Page 399 beginning with the section entitled "QUESTIONS AS TO AN ORDER" and ending on page 405 with the words "where the representations are made."

*It is further ordered*, That the initial decision be modified by adding thereto the following:

The evidence is insufficient to support the allegation in the complaint challenging respondents' use of the term "Retail" price.

*It is further ordered*, That the order to cease and desist in the initial decision be modified to read as follows:

ORDER

*It is ordered*, That respondents Continental Products, Inc., a corporation, and its officers and Garrison Grawoig, Allen Grawoig, Earl W. Grawoig, Richard N. Grawoig and Paul M. Mayer, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of merchandise to the ultimate consumer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication that said merchandise is being offered for sale at wholesale prices.

*It is further ordered*, That the allegations of the complaint that the respondents falsely and deceptively represented that the prices designated as "Retail" in their catalogs were the prices at which the merchandise referred to was usually and customarily sold at retail and that the difference between their coded price and "Retail" price represented savings from the usual and customary retail prices in the trade areas where the representations were made, be, and they hereby are, dismissed.

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

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

Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

# CANNON MILLS COMPANY

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

*Docket 7494. Complaint, May 15, 1959—Decision, Apr. 24, 1964*

Order dismissing, for failure to prove a prima facie violation, complaint charging a North Carolina manufacturer of finished textile products, such as sheets and towels, with discriminating in price in violation of Sec. 2(a) of the Clayton Act by selling finger-tip towels to some customers in the Portland, Oreg., and Washington, D.C., areas at lower prices than it charged their competitiors.

## COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating, Section 2(a) of the amended Clayton Act (15 U.S.C., Sec. 13), hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located at Kannapolis, North Carolina.

Respondent directs and controls the sales and distribution policies of its wholly owned sales subsidiary, Cannon Mills, Inc., of 70 Worth Street, New York City.

PAR. 2. Respondent is engaged in the business of manufacturing, distributing, and selling finished textile products, such as sheets and towels. Respondent's gross sales for the year ending December 31, 1957, were in excess of $175,000,000.

PAR. 3. These products are sold by respondent through its wholly owned subsidiary, Cannon Mills, Inc., 70 Worth Street, New York, New York, for use, comsumption, or resale within the United States, and respondent ships or causes them to be shipped and transported from the state of location of its principal place of business to purchasers located in States other than the State in which the shipment or transportation originated.

PAR. 4. Respondent maintains a course of trade in commerce, as "commerce" is defined in the amended Clayton Act, in such products among and between the States of the United States.

Respondent maintains and operates a manufacturing plant at Kannapolis, North Carolina. From this plant it ships and sells, or causes to be shipped and sold, throughout the United States, to various purchasers located in the several States of the United States, including Oregon.

PAR. 5. In the course and conduct of its business in commerce, respondent is competitively engaged with other corporations, individuals, partnerships, and firms in the manufacture, distribution, and sale of the products stated above.

PAR. 6. In the course and conduct of its business in commerce, respondent is discriminating in price between different purchasers of its products of like grade and quality by selling to some purchasers at higher and less favorable prices than it sells to other purchasers competitively engaged in the resale of its products with the non-favored purchasers.

For example, respondent has participated in the periodic advertising and promotional plans of Fred Meyer, Inc., of Portland, Oregon, occurring annually for many years. During September and October of 1956, respondent participated in the annual coupon book program, for the participation in which respondent sold finger-tip towels, style No. 7205, to Fred Meyer, Inc., at $1.55 per dozen. The normal price for the same goods of like grade and quality to competing customers at the same time was $1.65 per dozen on quantities of 500 dozen or more and $1.75 per dozen for quantities of less than 500 dozen.

PAR. 7. The effect of respondent's discriminations in price, as alleged, may be substantially to lessen, destroy, or prevent competition or tend to create a monopoly in the line of commerce in which respondent and its purchasers are engaged.

PAR. 8. The foregoing acts and practices of the respondent, as alleged, violated Section 2(a) of the amended Clayton Act (15 U.S.C. Sec. 13).

## ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This case is before the Commission on the appeal of complaint counsel from the initial decision of the hearing examiner, filed December 3, 1963. While finding a *prima facie* violation by respondent of Section 2(a) of the Clayton Act, as amended, the examiner dismissed the complaint on the ground that respondent had succeeded in its cost-justification defense. Upon examination of the record, the Commission has concluded that the evidence of record is insufficient to prove the requisite adverse effects on competition. Since a *prima facie* violation was not proved, it is unnecessary to reach the merits of respondent's cost-justification defense. Accordingly,

*It is ordered*, That the initial decision of the examiner be, and it hereby is, vacated.

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*It is further ordered*, That the complaint be, and it hereby is, dismissed for failure of proof on the issue of probable injury to competition.

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IN THE MATTER OF

## PERMANENTE CEMENT COMPANY [1] and GLACIER SAND & GRAVEL COMPANY

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

*Docket 7939. Complaint, June 14, 1960—Decision, Apr. 24, 1964* [2]

Order requiring a large cement manufacturer with headquarters in Oakland, Calif., and doing extensive business on the West Coast and in the Pacific area to divest itself within one year of all the assets of a competitor acquired in 1958 and restore it as a going concern; it is further ordered that Count II of the complaint be remanded to the hearing examiner for further proceedings as directed.

### COMPLAINT*

The Federal Trade Commission, having reason to believe that Permanente Cement Company and Glacier Sand & Gravel Company have violated, and are now violating, the provisions of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950, hereby issues its complaint pursuant to Section 11 of the aforesaid Act (U.S.C. Title 15, Sec. 21), charging as follows:

### COUNT I

PARAGRAPH 1. Respondent Permanente Cement Company, hereinafter sometimes referred to as "Permanente", is a corporation organized and existing under the laws of the State of California, with its office and principal place of business located in the Kaiser Center, 300 Lakeside Drive, Oakland, California.

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[1] Now known as Kaiser Cement & Gypsum Corp.

[2] Superseded by an order of the Commission dated Mar. 23, 1965.

*Reported as amended and supplemented by an order of hearing examiner dated Aug. 5, 1964.

Subsequent to the filing of the complaint herein the name of respondent Permanente Cement Company was changed to Kaiser Cement & Gypsum Corporation.

PAR. 2. Respondent Glacier Sand & Gravel Company, sometimes hereinafter referred to as "Glacier", is a corporation organized and existing under the laws of the State of Washington, with its entire stock being owned by respondent Permanente, a large percentage of whose stock is owned, either directly or indirectly, by companies engaged in general contracting businesses which purchase and utilize cement, aggregates and concrete in their operations, and several of which companies' officials are on the Board of Directors or respondent Permanente. Respondent Glacier's office and principal place of business is located at 5975 East Marginal Way, Seattle, Washington.

PAR. 3. The Olympic Portland Cement Co., Ltd., hereinafter sometimes referred to as "Olympic", at the time of the acquisition referred to hereinafter, was a corporation, organized and existing under the laws of the United Kingdom, with its office and principal place of business located at Roman House, Cripplegate Buildings, London, E.C. 2, England. It operated a cement plant at Bellingham, Washington, and maintained storage facilities in Seattle, Washington, and its principal place of business in the United States was located at 1425 Dexter Horton Building, Seattle 4, Washington.

PAR. 4. Respondent Permanente is engaged in the manufacture and sale of cement. It also has subsidiaries engaged in steamship and trucking activities; it, likewise, operates through one of its other subsidiaries, Kaiser Gypsum Company, Inc., Oakland, California, which is engaged in the manufacture and sale of gypsum, plaster, wallboard and insulating board, and which also sells crude gypsum rock to other cement and gypsum manufacturers. Respondent Permanente also operates through still another subsidiary, respondent Glacier, which, in the area in and around Puget Sound, is engaged in the production and sale of aggregates (sand and gravel), crushed rock and the manufacture of readymix concrete, as well as other related construction material. Readymix concrete comprised 62% of respondent Glacier's business in 1956 and 58% in 1958.

Respondent Permanente was organized, and has operated, as part of the various Kaiser Industries, with a large proportion of its stock being held by Kaiser Industries Corporation and by Henry J. Kaiser Company, a wholly owned subsidiary of Kaiser Industries Corporation.

In 1957, respondent Permanent, in terms of productive capacity, was the second largest producer of cement on the West Coast. Its principal distribution areas comprise the Pacific Coast, the States of California, Oregon, Washington, Hawaii, and Alaska, and also British Columbia, Midway, Guam, Philippine Islands, and Indonesia.

Respondent Permanente, as hereinafter explained, is unique among the manufacturers of cement, because of its ability to distribute the cement, which it manufactures or produces, over such a wide area. It has two manufacturing plants, one located about sixteen miles south of San Francisco, California, and the other at Lucerne, near San Bernardino in Southern California. The wide-range distribution of Permanente, throughout the aforementioned states and countries has been at least partly achieved through extensive use of water transportation, as opposed to rail, in shipping, by means of its steamship facilities such as bulk cargo ships and LST barges, from its aforementioned plants in California to its distribution facilities in Seattle and East Pasco, Washington, in Portland, Oregon, in Anchorage and Fairbanks, Alaska, and in the various Pacific Islands.

The net sales of respondent Permanente for the eleven months ending December 31, 1957, were $50,756,000, of which $31,838,887 were attributable to sales of cement. During 1956 its net sales were $43,555,000, of which $26,877,512 were attributable to sales of cement.

As of December 31, 1957, respondent Permanente's assets were valued at $74,916,030, including current assets of $20,465,182; its net earnings for the eleven month period ending December 31, 1957, were $6,559,825.

The sales and operating revenues of respondent Permanente for the year ending December 31, 1959, were $77,164,000, or an increase of 15% over what they were for the previous year.

Respondent Permanente increased its cement division sales 11% during 1959.

As a result of improvements made by respondent Permanente at most of its producing plants, on January 1, 1960, it had a total cement capacity of 13,100,000 barrels annually. The West Coast total cement capacity, as of January 1, 1960, was approximately 60,000,000 barrels.

PAR. 5. Olympic, at the time of its acquisition by respondent Permanente, as hereinafter described, manufactured and sold cement. Its sales of cement in 1957 amounted to $4,217,910, representing shipments of 1,102,757 barrels. In 1956 its sales of cement amounted to $2,601,651, representing shipments of 665,527 barrels.

In October 1956, Olympic completed the installation of a new kiln, which increased its annual capacity from 900,000 to 1,750,000 barrels. Also in 1956 Olympic added a $650,000 distributing plant in Seattle, Washington, which has a storage capacity of 40,000 barrels.

For the year ending December 31, 1957, Olympic showed a profit after taxes of approximately $500,000, thus making its net profit per barrel of production 45.4¢.

Olympic, at the time of its acquisition by respondent Permanente, as hereinafter set forth, sold the cement manufactured by it in the State of Washington, principally west of the Okanagon River in that state in Alaska, and in Vancouver, British Columbia, Canada.

PAR. 6. In the regular course and conduct of its business, respondent Permanente ships, or causes to be shipped, cement from its plants manufacturing same to customers thereof located in States of the United States other than the States in which such plants are located, as well as to customers in Canada. Respondent Permanente has been, and is, engaged in commerce, as "commerce" is defined in the Clayton Act.

In the regular course and conduct of its business, respondent Glacier ships, or causes to be shipped to it for use at its plant in the State of Washington, cement which is manufactured or produced in one or more States of the United States other than the State of Washington. Said cement is utilized by said respondent in the manufacture of concrete. Respondent Glacier has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Act.

Likewise, Olympic, at the time of its acquisition by respondent Permanente in 1958, and for several years prior thereto, in the regular course and conduct of its business, shipped, or caused to be shipped or sold for shipment, cement, manufactured at its plants to customers located in States other than those in which such cement was manufactured or made, and to customers in Canada. Olympic, therefore, at the time of its acquisition by Permanente in 1958, was engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 7. On or about July 30, 1958, respondent Permanente acquired 98% of Olympic's capital stock at $8.50 per share for a total consideration amounting to $8,757,465. Since its acquisition of Olympic, respondent Permanente has operated Olympic as a wholly owned and controlled subsidiary.

PAR. 8. Cement is the basic substance used in making concrete. It has qualities and properties which distinguish it from other building materials, such a numerous metals, stone, clay products, timber etc. Cement possesses qualities of plasticity, tenacity and great strength, together with the ability to bind together various other materials. Cement usually is a compound of lime, silica and alumina, and has the property, when mixed with water, of forming a paste which coheres and sets.

Cement is very heavy in relation to its volume. As a consequence, generally, transportation costs for it place a limit on the area in which it may be distributed from a given point. The only exception to this rule is where it is possible to ship by water, which costs less than to ship by truck or rail. Therefore, except where water transportation is available, as is true of respondent Permanente, cement rarely is shipped more than 300 miles from the point of production. As a consequence, the relevant market for the sale of cement tends to be regional rather than national.

PAR. 9. Within the geographical area, commonly designated as western Washington, before its acquisition by respondent Permanente, Olympic competed with said respondent Permanente in the sale and distribution of cement.

The relevant area or section of the country, insofar as this Count is concerned, is located in the western section of the State of Washington and may be defined roughly as being bounded on the north by the Canadian border, on the east by the Okanagon Valley and the Columbia River, on the south by the Columbia River, excluding the Portland, Oregon, trade area, and on the west by the Pacific Ocean.

In 1958, the total capacity of Olympic for the manufacture or production of cement in said western Washington area or section was 1,750,000 barrels annually, and that of respondent Permanente to supply cement to this area, was approximately 1,500,000 barrels annually, which together represented approximately 49.6 percent of the total available capacity for that area. Two other cement manufacturers competed therein.

PAR. 10. The effect of the aforementioned acquisition of Olympic by respondent Permanente may be substantially to lessen competition or tend to create a monopoly in the manufacture, sale and distribution of cement, a line of commerce in which both Olympic and respondent Permanente were engaged, in the aforesaid defined section of the country, western Washington, in violation of Section 7 of the Clayton Act in the following ways, among others:

1. Actual and potential competition between Olympic and respondent Permanente in the manufacture or production of cement and its sale and distribution, in the aforedescribed area, has been eliminated;

2. Olympic has been eliminated as an independent competitive factor in the manufacture, production, sale and distribution of cement in said area;

3. Actual or potential competition generally in the production or manufacture of cement for sale and distribution in said section may be substantially lessened;

4. Olympic has been eliminated as a supplier of cement to purchasers who use cement in the preparation of readymixes, concrete or other materials or products which utilize cement in their manufacture or use;

5. The number of actual and potential suppliers of cement in this section of the country has been, or may be, materially reduced;

6. Entry of new manufacturers, sellers or distributors of cement in said section of the country may be inhibited or prevented;

7. Competition may be reduced in said section of the country by the further concentration in an integrated company, such as respondent Permanente, of the production, manufacture and sale of cement, with that of the production or manufacture and distribution and sale of materials or products which employ cement in their production or use;

8. There may be a further increase generally in the concentration in the hands of a few companies of the manufacture, sale and distribution of cement.

9. There may be a substantial reduction of the quantity of cement available for sale in this section of the country.

PAR. 11. The foregoing acquisition, acts and practices of the respondent Permanente, as hereinbefore alleged and set out, constitute a violation of Section 7 of the Clayton Act (U.S.C. Title 15 Sec. 18), as amended and approved December 30, 1950.

## COUNT II

PAR. 12. All the allegations of Paragraphs One, Two, Four and Six hereof are hereby realleged and incorporated herein by reference, and made a part of this Count II as though each is set forth herein.

PAR. 13. On March 2, 1959, respondent Glacier acquired all of the assets of Pacific Building Materials Company and Readymix Concrete Company for a consideration of approximately $1,425,000.

PAR. 14. Pacific Building Materials Company, hereinafter sometimes referred to as "PBM", was incorporated in the State of Oregon in 1911, under the name "Pacific Lime & Gypsum Co.", which name was changed to "Pacific Building Materials Company" on April 25, 1952.

Readymix Concrete Company, hereinafter sometimes referred to as "RMC", was incorporated in the State of Oregon in 1928.

PAR. 15. At the time of the aforementioned acquisition, PBM was engaged in the dredging of sand and gravel (aggregates) and the processing and sale of such materials and RMC was engaged in the production of wet-mix concrete, produced by mixing PBM aggregates and purchased cement.

The production and sales activities, facilities and personnel of PBM and RMC were so integrated at the time of the acquisition that the two companies were generally referred to as one company and will be hereinafter jointly designated as "the company".

At the time of the acquisition, the company's fixed assets included two readymix concrete plants in Portland, Oregon, and one in Vancouver, Washington; two sand-and-gravel producing plants located in Portland, Oregon; a floating sand plant operating in the Columbia River; a twenty-five acre island in the Willamette, with estimated reserves of from five to seven million cubic yards; and approximately 90 trucks, 57 of which are for transporting readymix concrete.

In 1957 approximately 58% of the aggregate production of the company was sold and 42% was utilized by the company's three readymix concrete plants.

In 1957 the company's wet-mix sales amounted to $2,543,000, and its aggregates sales amounted to $809,000, or total sales of $3,312,000.

Approximately three-fourths of the company's wet-mix sales were made to contractors, with the balance to home builders, industrial companies, public utilities, and other users of such products. The company's principal customers of aggregates were building, highway mason and plaster contractors, and producers and users of wet-mix concrete. As of September 30, 1958, the total fixed and current assets of the company were $1,740,904.

PAR. 16. In the regular course and conduct of its business, the company shipped, or had shipped to it at its readymix concrete plants, cement which was manufactured or produced in States of the United States other than the State in which was located the company's plant receiving such shipment. The company also shipped, or had shipped, products which it produced or manufactured, to purchasers thereof located in States of the United States other than the State in which the shipped product was produced or manufactured.

The company, at the time of its acquisition, was engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 17. Within the marketing area of Portland, Oregon, which is roughly defined as comprising metropolitan and surburban Portland, Oregon, and adjacent rural areas thereto, as well as within the marketing area of Vancouver, Washington, the company competed at the time of the acquisition, hereinbefore described, in the sale and distribution of the products produced or manufactured by it, with one or more other companies engaged in the production and manufacture of one or more of the products produced or manufactured by the company.

The company, at the time of its acquisition, was the largest supplier of aggregates to the construction industry within the Portland, Oregon, marketing area; likewise, it was the largest supplier of wet-mix concrete in said area.

Few, if any, of the companies competing with the company in this area at the time of its acquisition were owned by, affiliated with, or in any way connected with, any manufacturer or producer of cement in the same manner, or to the same degree, as respondent Glacier now is with the company.

There were approximately fifteen other companies competing with the company at the time of the aforesaid acquisition in the sale and distribution in said area, of aggregates, brick mortar and lime putty, building materials, or readymix concrete, but, with the exception of possibly two other companies, the other competitors were significantly smaller than the company in their capacity to produce, manufacture and sell said products.

PAR. 18. The relevant area or section of the country, insofar as Count II hereof is concerned, is the Portland, Oregon, area, which, roughly, may be defined as consisting of metropolitan and suburban Portland, Oregon, with the rural areas adjacent thereto.

PAR. 19. The effect of the aforementioned acquisition of the company by respondent Glacier, acting either independently or collectively with respondent Permanente, as a subsidiary or division or affiliate of that respondent, may be substantially to lessen competition or tend to create a monopoly in the manufacture or production, sale and distribution of concrete portland cement and of aggregrates (sand and gravel), as lines of commerce in the aforedefined Portland, Oregon, area, in violation of Section 7 of the Clayton Act in the following ways, among others:

1. By a tendency to reduce the actual or potential competition from manufacturers or producers in these lines of commerce, who are not, directly or indirectly, affiliated with cement producers or consumers;

2. The number of actual and potential suppliers of said lines of commerce in this section of the country may be substantially reduced;

3. Entry of new manufacturers or producers, or sellers, or distributors of said lines of commerce in said section of the country may be inhibited or prevented;

4. Competitors of respondent Glacier, in the manufacture and sale of concrete, may be discouraged from making improvements in their business, due to the direct or indirect affiliation of said respondent with respondent Permanente; and

5. By tending to further integration, either directly or indirectly, of the manufacture and sale of concrete with the manufacture and sale of cement not only in the aforedefined Portland, Oregon, area but in the Nation as a whole.

PAR. 20. The foregoing acquisitions, acts and practices of the respondents, Permanente and Glacier, as alleged and set out in both Counts hereof, constitute a violation of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18, as amended and approved December 20, 1950).

*Mr. Daniel H. Hanscom* and *Mr. Michael G. Kushnick* supporting the complaint.

*Mr. Gordon Johnson*, *Mr. Max Thelen, Jr.*, *Mr. Paul R. Haerle* and *Mr. Fielding H. Lane* of *Thelen, Marrin, Johnson & Bridges*, San Francisco, California for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

NOVEMBER 28, 1962

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PRELIMINARY STATEMENT

This proceeding tests the validity, under Section 7 of the Clayton Act, of two acquisitions by Permanente Cement Company (Permanente), a cement and related building materials manufacturer organized under California law. The first acquisition was horizontal in character and was consummated by the purchase of 98 percent of the stock of a cement manufacturing subsidiary of a British company. The second, in which Permanente's wholly owned subsidiary, Glacier Sand & Gravel Company (Glacier), a Washington corporation, took title to the assets, had aspects of forward vertical integration and market extension. It was consummated by an asset purchase of two Oregon companies under common ownership. One of these companies dredged sand and gravel (collectively described in the business as aggregates) and the other combined such aggregates with purchased cement to form ready-mix concrete.

The Federal Trade Commission filed its complaint on June 14, 1960 in two counts. The first count relates to the horizontal stock acquisition by Permanente of Olympic Portland Cement Company, Limited (Olympic), the United Kingdom corporation, and the second, to the vertical asset acquisitions of the two Oregon companies, Pacific Building Materials Company (PBM) and Ready-Mix Concrete Company (RMC) by Glacier and Permanente.

The Complaint, in addition to identifying the parties, stating the jurisdictional facts and describing the acquisitions, alleges detailed facts concerning the size and connections of the parties, the relevant market, the line of commerce and the effects contemplated. As to each count, it charges that the effect may be substantially to lessen competition or tend to create a monopoly in specified ways.

The hearing examiner then in charge of hearing the matter, Harry R. Hinkes, determined that Glacier was not concerned with Count I. Respondents filed their answers on October 10, 1960 after this decision. In answering, Glacier adopted the answers of Permanente to paragraphs common to Counts I and II, and Permanente the answer of Glacier as to the allegations of Count II. Thus, while Permanente answered Counts I and II and Glacier only Count II, Glacier's answer as to Count II is identical with Permanente's. Respondents followed this same practice in their filed requests for findings.

The answers admit the acquisitions, the formal facts identifying the corporations and some of the statistical data. Denied, however. are:

1. Jurisdiction over the activities of Glacier because of its "local" character.

2. Olympic's status as a corporation subject to the Act, because it was a British corporation.

3. Considerable of the statistical data required to establish the universe and the share of the merging companies in the market.

4. The existence of cement aggregates and ready-mixed concrete as lines of commerce.

5. The appropriate markets.

6. The effects of the mergers.

By Pre-Trial Order dated April 7, 1961, the undersigned hearing examiner summarized the results of pre-trial hearings held by Hearing Examiner Hinkes. This order, among other things, required prehearing disclosure of documents and witnesses.

Hearings commenced in June of 1961 and continued more than a year at widely separate places and with several long intervals of time between hearings.[1]

As tried, respondents strenuously attacked the Commission's statistical data, sought to establish a different geographical area for the markets, and to broaden the concept of the line of commerce by reference to many substitute products. They also sought to establish the reasonableness of acquisitions and the lack of injury to competition by tracing the history of Permanente's origin and it growth, vicissitudes in supplying cement by water and by emphasizing the acquisitions of other independent cement and ready-mix companies made by multiplant operators of size comparable to or larger than Permanente. At the last group of hearings, respondents offered the testimony of experts who had analyzed the evidence and sought to draw inferences based on economic and transportation expertise.

Proposed findings and conclusions were filed September 10, 1962 and counterproposals October 10, 1962. The Commission extended the hearing examiner's time to file this decision to December 10, 1962.

On the basis of the entire record, the following findings of fact, conclusions therefrom and order are made. All proposed findings and conclusions not adopted in terms or in substance are rejected as erroneous, argumentative or immaterial.

## FINDINGS OF FACT

### I. Findings Applicable to Both Counts

A. *Description of Companies*

Permanente Cement Company (hereinafter referred to as "Permanente") is a California corporation with its principal office located at

[1] Intervals were due, among other things, to counsels' and the hearing examiner's other engagements, to the convenience of one of respondents' experts and to the health of one of the attorneys.

Kaiser Center, 300 Lakeside Drive, Oakland, California. The stock of Permanente is publicly traded and held. There are 10,500 stockholders among which are companies in the general contracting business using cement aggregates and concrete. The Permanente Board of Directors include some officers of such general contractors.

Permanente is engaged in manufacturing and selling cement. Its subsidiaries, Permanente Steamship Corporation, Permanente Trucking Company and Kaiser Gypsum Company, Inc. are respectively engaged in steamship, trucking and manufacturing activities. The last-named subsidiary produces and sells gypsum, plaster, wallboard and insulating board, among other products.

Permanente markets cement in Alaska, British Columbia, Washington, Oregon, California, Nevada, Arizona, Hawaii and the Pacific Islands.

In Northern California, Permanente operates a plant known as the Permanente Plant approximately 45 miles south of San Francisco and 12 miles west of San Jose. This plant, originally constructed for the production of the cement requirements of the Shasta Dam, was increased periodically so that it now has a capacity of 8,500,000 barrels annually.

Shortly before the acquisition hereinafter described, and in April 1957, Permanente constructed the Cushenbury Plant in the Lucerne Valley of California with an original capacity of 2,700,000 barrels annually which was expanded in 1961 to 5,400,000 barrels. In 1957, Permanente operated distribution plants at Fairbanks, Alaska; Anchorage, Alaska; Seattle, Washington; Pasco, Washington; Portland, Oregon; Redwood City, California; Honolulu, Hawaii, and Long Beach, California.

Following the commencement of this proceeding, Permanente constructed a cement plant in the Hawaiian Islands having a rated capacity of 1,700,000 barrels and, in early 1962, announced the construction of a new cement plant in the vicinity of Helena, Montana which would have a rated capacity of 1,400,000 barrels.

The Seattle distribution plant in 1946 had a storage capacity of approximately 100,000 barrels, with a dock capable of handling cement from ocean-going vessels and facilities for loading trucks and barges. In February 1950, Permanente opened a distribution plant which it had rented and later purchased from the Santa Cruz Cement Company. It now has a storage capacity of 102,000 barrels. Permanente first utilized the facilities during the period January 1949 to February 1950 to supply cement to dams in Oregon and on the Columbia River. Prior to opening its Portland facilities for commercial business, it established a storage and distribution facility of 30,000 barrel-capacity in Anchorage, Alaska which it served by LST barges from its

Seattle facility. It subsequently established facilities at Fairbanks and Kodiak Island, Alaska.

In July 1954, Permanente opened a distribution facility in East Pasco, Washington, having the capacity of 22,000 barrels which is supplied primarily by barge from Portland, Oregon. The Portland and Seattle facilities, as well as the Hawaiian Islands, were supplied by Permanente primarily through two steamships—the SS Permanente Cement (formerly the SS Santa Cruz Cement) and the SS Permanente Silverbow. These ships have a combined capacity of approximately 100,000 barrels. The smaller which is some forty-two years old has a tonnage of 7,776 dead weight tons and a maximum speed of between ten and eleven knots. The SS Permanente Silverbow is eighteen years old; its dead weight tonnage is 10,617 tons and its maximum speed between sixteen and seventeen knots.

Kaiser Industries Corporation, a Nevada corporation, holds 9% of Permanente's stock directly and 30% through a wholly-owned subsidiary, the Henry J. Kaiser Company.

Glacier Sand & Gravel Company, hereinafter referred to as "Glacier", is a Washington corporation with its principal office located at 5975 East Marginal Way, Seattle, Washington, and is another wholly-owned subsidiary of Permanente.

Glacier produces and sells ready-mix concrete, aggregates and other similar material, and has production facilities at Seattle and Steilacoom, Washington.

Olympic Portland Cement Company, Ltd., hereinafter referred to as "Olympic", was a United Kingdom corporation and had its principal office at Roman House, Cripplegate Buildings, London E.C. 2, England, and its principal United States place of business at 1425 Dexter Horton Building, Seattle 4, Washington.[2] At the time of its acquisition, hereinafter referred to, it operated a quarry and cement plant at Bellingham, Washington, and maintained storage facilities in Seattle, Washington. Olympic secured its cement from a quarry located about 30 miles northeast of Bellingham and transported the limestone by rail. From its organization, Olympic has been managed by Balfour Guthrie & Co., Ltd., a managing agent engaged in a variety of other business unconnected with cement. The rated capacity of Olympic's mill immediately prior to the acquisition, hereinafter described, based on calcining capacity, was 1,750,000 barrels. In view, however, of the inbalance between its calcining capacity and its other

[2] This finding is based on respondents' admission contained in its answer which is construed to deny only that Olympic is within the coverage of § 7, not its corporate status. Pelly testified it was licensed to do business as a Washington corporation. (R 2325) (R followed by a number refers to the transcript page; CX to Commission exhibits and RX to Respondent exhibits.)

facilities, its effective capacity was between 1,250,000 and 1,750,000 barrels. About two years prior to the acquisition, hereinafter referred to, Olympic established a distribution facility at Harbor Island in Seattle, having a 40,000-barrel capacity. This facility was supplied by barge from Bellingham which had truckloading facilities but no rail load-out facilities. A rail spur was available and the Bellingham plant was served with three railroads.

Olympic's sales force consisted of a sales manager and two salesmen. It had approximately 35 regular customers in addition to its business secured from bids on large contract jobs.

During the period 1950–1958, Olympic made substantial sales to Permanente, Oregon Portland Cement Company, two companies in British Columbia, Balfour Guthrie of Canada, Ltd. and Evans, Coleman & Evans. The two last-named companies were distributors or sales agents for British Columbia Cement Company and Balfour Guthrie of Canada, Ltd. was also affiliated with Olympic's managing agent. The sales of all of these together aggregated over one-third of its total shipments during the years 1951, 1954 and 1955. Immediately prior to the acquisition in 1957, such sales dropped to 5% and, in 1958, the year of the acquisition, were substantially all made to Permanente.

Pacific Building Materials Company (hereinafter referred to as "PBM") was incorporated in the State of Oregon in 1911 under the name "Pacific Lime & Gypsum Co." Its present name was adopted on April 25, 1922. At the time of its acquisition, later described, it was engaged in the dredging of sand and gravel (commonly referred to in the concrete business as aggregates) and the processing and sale of aggregates and other building materials.

Readymix Concrete Company (hereinafter referred to as "RMC") was incorporated in the State of Oregon in 1928. At the time of its acquisition, later described, it was engaged in the sale and distribution of concrete produced by mixing PBM's aggregates with purchased cement and water.

Although separately incorporated, PBM and RMC were treated by their owners as a single enterprise. While PBM has sold some of the aggregates produced by it, RMC has used PBM's aggregates almost exclusively [3] in producing ready-mixed concrete. After the asset acquisition, Glacier formed the acquired companies into a division referred to as the Pacific Building Materials Division and sometimes herein as PBM/RMC.

[3] On occasion when it has shortages, it purchases aggregates from one of its competitors. It, in turn, supplies competitors when for some reason they have shortages.

B. *Products Involved*

*Cement* is a basic substance used in the making of concrete. It is a compound of lime, silica, alumina, gypsum and other ingredients which, when mixed with water, form a cohesive substance. Generally essential [4] to the manufacture of cement is an adequate supply of limestone rock of appropriate specifications. This rock is quarried, crushed and then placed in a kiln where it is heat-processed with other material into a clinker. The clinker is then ground and finished into a powder which is stored in a bin or silo until shipped as bulk cement or sacked and shipped. There are three principal types of Portland cement as well as a low alkali and a masonry type. Masonry cement plays no part in this case. High early cement is a fast-setting cement utilized in particular applications where prompt setting is required. Low alkali cement is also required in certain other applications. Cements often will qualify under the specifications of more than one type, and low alkali cement may also be one of the other types.

*Aggregates* is a term used to describe a variety of types and sizes of sand, gravel and crushed rock. River aggregates are those dredged from sedimentary deposits in rivers and streams or islands in rivers and streams. Pit aggregates are those stripped, dug or quarried from deposits in places other than rivers or streams.

*Concrete* is a mixture of aggregates and cement to form a mortar which has a variety of uses, primarily in paving and building. Characteristics of concrete can be varied by varying the proportions of cement and the types of aggregates. A five-sack mix which is a common mixture, for example, consists of five sacks of cement to the cubic yard of finished concrete. There are numerous methods of mixing concrete. Except for very small jobs, the quantities of cement and aggregates are measured out in a batch plant. In some cases, the batch plant will weigh and mix the dry ingredients and water will be added later. In other cases, the concrete will be mixed at the batch plant with water and then transported to the place where it is to be poured. This is sometimes called pre-mixed or pre-shrunk concrete. In recent years, the ready-mix truck has been utilized almost exclusively in jobs where plants are readily accessible and where the contractor has no compelling reason to utilize other means of mixing his concrete. This truck has mounted on its body a cylindrical tank or mixer which revolves under power and thus keeps the concrete mixture agitated while in transit from the batch plant to the job.

In some very large operations, particularly those in remote sections or where rigid control of time of pouring is essential, the contractor may erect his own batch plant and use other means of transporting

[4] Some substitutes for limestone such as oyster shells or marl may be used. (CX 135)

concrete. This is true also in paving and airplane runway operations where special paving mixers are used. Concrete is sometimes used in pre-cast or pre-formed shapes. Pipe, block and even beams can be manufactured in plants where pressure and special mixes may be used. In some applications, concrete is reinforced with steel bars which supply tensile strength, and, in other applications, pre- or post-tensioned concrete members are manufactured with steel wire providing a degree of flexibility requisite to certain types of structures.

C. *Commerce*

Permanente sells cement in California, Nevada, Arizona, Utah, Oregon, Washington, Alaska, Hawaii, and also in British Columbia, Midway, Guam, the Philippines, Mexico, Indonesia, as well as various other countries. Permanente has manufacturing plants in Santa Clara and San Bernardino Counties in California, and transports cement by water from plants and distribution facilities in California to Seattle and Pasco, Washington; Portland, Oregon; Anchorage and Fairbanks, Alaska; Honolulu, Hawaii; Guam and other locations, utilizing both its specially equipped steamships SS Permanente and SS Silverbow, LSTs and barges.

Olympic sold cement primarily in the State of Washington and in the western portion of that state. It also made some sales to Oregon, British Columbia and Alaska.

Glacier purchases cement from cement manufacturers located both inside and outside the State of Washington, mixes it with aggregates dredged by it and sells the resulting concrete primarily within the immediate vicinity of Seattle. It makes no sales of consequence either of aggregates or concete for delivery to locations outside the State of Washington. It was purchased by Permanente as an outlet for its production and thus is a wholly-owned extension of Permanente's interstate business. After the acquisition, hereinafter described, it established a division in Portland-Vancouver to take over the business of RMC and PBM which it managed as a single separate entity.

PBM was engaged in dredging sand and aggregates from locations in the Columbia and Willamette Rivers. Some of its aggregates were shipped from locations in the State of Oregon to locations in the State of Washington, and it solicited business for the sale of aggregates in both states.

RMC was engaged in both Vancouver, Washington and Portland, Oregon in the business of supplying ready-mixed concrete to locations primarily in and around Vancouver, Washington and Portland, Oregon. Little or no concrete was shipped from locations in the State of Oregon to locations in the State of Washington, but it solicited business for the sale of concrete in both states. It also purchased some of its cement from manufacturers located outside the States of Washington and Oregon.

Both acquired and acquiring companies under both counts of the complaint were thus engaged in interstate commerce, as that term is used in the Clayton Act.

D. *Permanente's History*

Permanente was formed under the guidance of one of the companies in the Henry J. Kaiser galaxy [5] by a number of companies engaged in major construction work, because they regarded the price of cement in Northern California as unreasonably high. The incident which spawned the company was a successful bid for cement to be used in the Shasta Dam. (CX 1b, p. 8.) After winning the bid which had been made—although they had no cement plant—the group constructed a plant in time for the completion of the job. That plant was the base plant of Permanente. Throughout most of the war years, Permanente was primarily engaged in producing cement for contractors working for the United States or working for some agency of the United States or its allies. Much of the cement used in the islands of the Pacific originated with Permanente and it increased its capacity to meet war needs. It also utilized an efficient technique for shipment of cement in bulk by specially constructed or modified steamships.

As the war drew to a close, the government demand for cement fell off sharply and Permanente surveyed the Pacific Coast for likely markets in which to sell their surplus. West Washington and the developing region in the Puget Sound area centering on Seattle received first attention. Cement for that region was supplied principally by three relatively small concerns. The first and most important, Superior Portland Cement Company, had two plants; the Diamond Plant, in Seattle itself, and the Concrete Plant, about 100 miles north in the Cascade Mountains. The second was Northwestern Portland Cement Company which had a plant at Grotto, and the third was the Olympic Plant at Bellingham, a little north of the Concrete Plant on Puget Sound. Cement was sold in this Seattle region at a differential above the price in Northern California. This differential permitted Permanente to ship cement to Seattle by water at a cost well under the going price.

Accordingly, even prior to the conclusion of hostilities in World War II, Permanente made plans to enter the Seattle market. As soon as

[5] Kaiser Industries Corporation and Henry J. Kaiser Company were products of the guiding genius of Henry J. Kaiser. Directly or indirectly they engage either through subsidiaries or affiliated companies in construction, engineering, sand and gravel operations, cement and steel manufacturing, automobile and truck production, aluminum manufacture and fabrication.

practicable thereafter, Permanente acquired land on the Duwamish Waterway in Seattle which flows into Puget Sound, for the purpose of opening a distribution facility to be served by water from its California Plant through shipping techniques developed during the war years. It also purchased one of the largest ready-mix plants (Glacier) in the area to be assured of an outlet for its cement. Thereafter, it opened up storage and distribution facilities in Portland, Oregon, on the Willamette River, and in Pasco, Washington, located at the confluence of the Snake and Columbia Rivers. For a time, it used the Superior Cement Company's Diamond Plant in Seattle but after about a year a successful stockholder lawsuit required it to relinquish this property.

As Permanente reported to its stockholders in its 1959 Annual Report, (CX 1b, p. 8) "Twenty years ago Permanente Cement Company was formed. It had no plant, no markets, not a single customer on its books. Today the firm is one of the largest producers of building materials in the West".

Much of Permanente's accomplishments after the war resulted from a program of vigorous marketing. "It included the development and distribution of the full line of portland cement types resulting in the company being the first Western producer to offer the full line of regular and special cements. It included: complete service to contractors, on time delivery, technical assistance and an expanded force of experienced sales representatives. It also included making special use of Permanente's unique experience in long-distance distribution of bulk cement. Above all, it included the Henry Kaiser confidence in the future of the West". (CX 1b, p. 12)

In addition to the Kaiser confidence in the West, Permanente possessed Kaiser's connections. While the effect of these connections cannot be quantitatively evaluated, the membership of its Board of Directors included representatives of large constructing interests who had invested in its stock. These circumstances, we infer, must have had some favorable impact on the advancement of its business. So also its present connection with Kaiser Services, Inc., both as occupant of the Kaiser Center and as stockholder and beneficiary of its centralized services, must be considered in evaluating it as a prime factor in the cement industry on the Pacific Coast.

During the period 1950–1958, Permanente transported some 16,500,000 barrels of cement from its Permanente plant to its Seattle and Portland facilities. It served its Pasco facilities from Portland primarily by barge up the Columbia River. During the same period of time, Permanente made extensive purchases ranging from a low of 85,000 barrels in 1956 to a high of something over a million the previous year. These purchases were for the purpose of supplementing the production of its Permanente mill, in some instances, and, in others, for the purpose of remedying deficiencies, delays and changes in scheduling which made its transportation facilities for cement to Alaska, Washington, Oregon and the Hawaiian Islands incapable of supplying adequate logistical support for its most efficient sales team.

E. *Developments in Cement Distribution in the Northwest*

There has been an accelerated development in the character of the cement business due, in part, to Permanente's challenge to the industry in connection with the Shasta Dam and in part to the actions of the Federal Trade Commission. Prior to Permanente's entrance into the business, cement was sold at delivered prices and by rail to or through selected distributors. A detailed description of how the business was conducted at that time may be found in the Commission's letter to the Senate (Exhibit 169) and also in the various opinions issued in the case of *Federal Trade Commission* v. *Cement Institute, et al*, 37 F.T.C. 87, 157 F. 2d 533 (7th Cir. 1946) 333 U.S. 683 (1948).

As part of its activity to break into the cement market in the Pacific Northwest, Permanente was extremely active in developing a number of practices which heretofore had been shunned by the cement industry. Presumably, the industry shunned these practices by reason of its members' desire to maintain collectively the basing point system later declared illegal in the cited case. Permanente utilized water shipments by its special ships and barges to reduce transportation costs, installed facilities and encouraged its customers to receive bulk deliveries by proprietary trucks. It provided technical services and sales aids. It also sold to substantially all comers, thus cutting across the previously existing systems of selective distribution. As a result of Permanente's activity in Washington, contrary to practices in other parts of the country, bulk deliveries, deliveries by barge, and truck deliveries developed.

Sales of cement are accomplished through building material dealers where small amounts are involved, but generally cement is sold either to contractors, plants, or to ready-mix producers who, in turn, sell it as concrete to the construction industry and to other people who may desire it. The salesman's job is to keep abreast of the needs of his customers on whom he calls, to supply information concerning available jobs and to seek to secure his customers' orders. Except in the case of masonry cement, with which this proceeding is not concerned, the great bulk of cement sales are direct from producer to ready-mix producers and contractors.

F. *The Ready-mix Business in the Portland-Vancouver area*

The ready-mix business is conducted by acquiring, dredging or quarrying aggregates of sand, gravel or crushed stone, mixing this in appropriate proportions [6]—depending on the needs of the users—with cement purchased from one of the producers. This material is usually mixed in the ready-mix producer's batch plant, heretofore described, and then placed in the ready-mix truck which has also been described. Sales of ready-mix are, in large part, made to building contractors.

In the Portland-Vancouver area, salesmen and often executive officers of the ready-mix companies call on the larger contractors and offer their services. In many instances, contractors have regular ready-mix producers from whom they customarily buy. Orders, particularly for small amounts, are made by the contractor calling the dispatcher for the ready-mix concern. In such cases, the charge is that contained on the price list then in force.

Price lists are issued by the larger ready-mix producers. They contain the prices for each type of mix and also conditions of delivery. There is a free zone which is a nine-mile circle within which there is no surcharge made for delivery. Beyond that zone, prices are set by additions. There are other conditions stated on the ready-mix price lists which include surcharges for extra waiting time and for special services such as the use of hot water. The price of ready-mix to the smaller customers has tended to be the price which appears on the printed price lists. However, during periods when price wars arose, there were major variations sought from the conditions and from the prices. Many firms engaged in the business in the Portland-Vancouver market issued no new price lists after January of 1958, although concessions were granted.

Contractors engaged in large building projects, even though they had regular relations with particular ready-mix concerns, were well aware of market conditions and endeavored with a considerable degree of success to secure the lowest prices then pertaining. In many instances, two prices resulted; one, to the regular call-in customer, and the other to the major contractor who tended to seek and secure a lower price for the large quantities he utilized.

G. *Organization of Ensuing Findings*

In the interest of clarity, we shall first take up what has been proved concerning the purchase of Olympic, as alleged in Count I, and then the purchase of PBM and RMC as alleged in Count II. In doing so, no inference should be drawn that the hearing examiner

[6] Mixes varied from 4 to 6½ sacks of cement to a cubic yard, with the 5-sack mix being the most common. The cost of the cement is by far the greatest element in the cost of the mixture.

regards the two purchases as unrelated. It is true that Glacier was not concerned in the first acquisition. However, Glacier's acquisition by Permanente and Permanente's acquisition of Olympic form a significant background against which the PBM/RMC purchase was made. It would be wholly unrealistic to fail to recognize that Permanente utilized the purchase of Glacier in 1944 as a "springboard of experience" in the Pacific Northwest. (CX1b, p. 13) Moreover, it would be equally unrealistic to suppose that after Permanente had acquired Olympic, the pressure of its added capacity did not have some effect on its desire to secure another captive market for cement in the form of ownership in one of the two largest ready-mix plants in the Portland, Oregon area.

## II. The Olympic Purchase. (Count I)

There is no dispute that Permanente purchased 98% of the capital stock of Olympic at $8.50 per share on or about June 30, 1958 and that the gross consideration amounted to approximately $8,570,000.[7] The dispute is solely whether the acquisition tended substantially to lessen competition or to create a monopoly in any line of commerce in any section of the country. Permanente assumed management on October 1, 1958 and on April 30, 1959 liquidated Olympic and assumed title to its assets.

### A. *The Line of Commerce*

Cement has characteristics of a physical nature and differences of price that clearly distinguish it from substitute products.

There are various types of cement which conform to recognized specifications or relate to specific uses. However, as treated by the industry and by respondent, the line of commerce is cement (other than masonry cement) regardless of type or special characteristics.

Respondent has demonstrated that there are many uses of cement where other products such as steel, wood, plastic, and aluminum, among others, can be substituted.[8] This does not in any way detract from the fact that cement is clearly distinguishable from the other products which compete for the consumer's dollar, and that competition in it is capable of being restrained or substantially lessened. Our next inquiry is to place this line of commerce in a section of the country.

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[7] As Mr. Marsh, Permanente's president, pointed out to the Permanente Board of Directors at the June 20, 1958 meeting, since Olympic had $1,860,000 working capital, the cost of obtaining the fixed assets would amount to about $6,441,000 or $3.70 per barrel of annual capacity. (CX 58a) (CX 1c, p. 13)

[8] See RX 148.

B. *The Section of the Country and Competition Therein*

In determining what section of the country means with respect to this merger, we consider first the characteristics of the marketing of the product in general and any peculiarities which may exist in the particular instance.

Generally, cement, as a heavy commodity of relatively small intrinsic value, must be marketed with special attention to the cost of its transportation to the customer. Hence, cement is not normally sold at a great distance from its point of production; as, otherwise, the transportation cost would be prohibitive.

On the Pacific Coast and particularly in the Pacific Northwest (Northern California, Washington and Oregon) there were several peculiarities which require special comment.

First, is the topographical factor. The Coast and Cascade Ranges form a natural barrier between the east and west portions of the Pacific Ocean mainland States with resultant climatic effects and transport problems. Then, the great waterways; Puget Sound, the Columbia River Net and San Francisco Bay provide water access to many of the principal cities in the Northwest.

The next factor flows naturally from the geographical factors. It is the character of the demand for cement. Over the past decade and, in the anticipated future, a large proportion of the demand for cement east of the mountains has arisen from public and quasi-public works. A series of dams have been built and more are planned which will provide both power and water for the arid lands from which moisture is screened by the mountain ranges. In addition, the defense program with air fields, missile bases and atomic projects has required cement. These various projects call for commitments to deliver vast quantities of cement over extensive periods of time. On the other hand, the population has increased in the area. This has called for increased building of all sorts, for roads and bridges, as well as industrial and residential housing. This latter demand, while increasing, is handled through the normal channels of distribution and in major part through the paving contractor and the ready-mix concrete producers. Thus, the demand is of a two-fold character; on the one hand, the tremendous project type and, on the other, the increase in development of normal types of cement structures.

Before leaving the demand side of the market, one other circumstance is significant. That is that there is a seasonal demand for cement commencing in April or May, increasing to a peak in July and August and then tapering off to November. Passing now to the supply side, there are also peculiarities to be taken into consideration.

In cement, supply capacity exceeds consumption to a substantial degree.[9] The pressure of surplus capacity was particularly critical in in the case of Permanente in California at the close of World War II. Permanente had its war-expanded facilities in California—a technique of transporation by water, good management, a good product and little else. Hence, of necessity, it had to search for sales location where customers would be available and to develop a top sales organization. It also had to search for new means of selling its cement against the established competition in Washington and Oregon which price-wise were the most attractive areas for Permanente. This price circumstance is the next characteristic for consideration.

Despite excess capacity, price was extremely rigid during the five-year period prior to the acquisition of Olympic by Permanente. So far as Permanente was concerned, it required a fairly stable high price in Oregon and Washington to permit it to absorb the cost of transporting cement from its California plant to its distribution facilities in Oregon and Washington. Thus, despite its desire to sell, Permanente did not offer price reductions but rather service competition[10] to its regular customers in these areas. This is to be distinguished from the special projects on which it bid. There was price competition in that field. In general then, price in Oregon and Washington to the ordinary run of customers, tended to remain at a differential above the prices in California. With these peculiarities of the cement business in the Pacific Northwest in mind, we turn next to the available capacity and to the competitors as they existed in the period of time preceding the merger and analyze where they sold cement.

The market survey of the proposed Olympic stock purchase, prepared by Permanente's management for its Board of Directors' consideration, analyzes the competition and determines that Olympic will have 25.7% of the productive capacity located in the State of Washington and 11.9% of the capacity of the Northwest. Included in the Northwest, as the survey tabulates it, are Washington, Oregon and British Columbia, with total barrels for competitors listed as follows: (in millions of barrels) Washington 6, Oregon 3 and British Columbia 4.

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[9] Comparison consumption 1957 and capacity in million barrels including Permanente imports:

| | *Consumption* | *Capacity* |
|---|---|---|
| Washington | 5 | 8½ |
| Oregon | 2½ | 4⅛ |

(Source CX 18b.)

[10] Respondents' expert differed with the hearing examiner and took the position that respondents' offer of special fringe benefits such as f.o.b. delivery at plant to customers' trucks was price competition. However, as later pointed out, there were few, if any, formal price reductions.

One of the crucial questions in the case is how extensive an area is covered by the market. It appears to be the position of respondent that all of this capacity and the capacity of plants in Alaska and Northern California as well [11] must be taken into consideration in determining the competitive picture or the market as it exists today. This, respondent contends, casts light on the reasonable probabilities as they existed at the time suit was brought.

Counsel supporting the complaint, on the contrary, contends that not even the entire State of Washington should be considered as the section of the country. It is their position that the relevant market is that area in which Olympic, prior to the acquisition, customarily sold cement and that the competitors to be considered are those who normally sold cement in the same area. Thus, counsel supporting the complaint says, in effect, that the relevant market (or in statutory language, section of the country) extends from the Canadian Border south to the freight break-off point between Portland or Vancouver and Seattle; thence, east to the west side of the Columbia River; up the Columbia River extending to the Canadian Border, and along the Canadian Border west to the Pacific Coast.[12]

This position disregards the fact that while the freight rate to normal customers precludes effective competition beyond the specified perimeter, when large projects such as dams are involved, cement mills are willing to accept lower returns for such large quantity sales. In that way, they may keep their mills fully occupied and reduce unit costs. Moreover, in numerous instances, special freight rates are filed for particularly large projects so that the freight factor is not fixed. In addition, as counsel for respondent skillfully reiterated, the freight break-off point is not constant, and it is incorrect to pick one side of the Columbia River when there are so many projects like bridges and dams that extend across it, or are near it.

Despite these infirmities, the area defined in the complaint includes almost all of the actual sales [13] made by Olympic [14] and it thus is an appropriate approximation of the market which is relevant to measure

[11] On occasion, counsel seemed to argue that even plants as far away as Houston, Texas, should be considered competition because, in a few instances, the SS Keva Ideal of Ideal Cement made deliveries from Houston to the Pacific Northwest. Some of these shipments, however, were in the nature of hauling ballast on trips in which a transfer of machinery was involved. In its proposed findings filed September 10, 1962, respondent, in Finding No. 33, suggests Oregon and Washington; in Finding No. 36, Oregon, Washington, Alaska and British Columbia, and in Finding No. 38, adds Northern California. On final argument, it elected Finding No. 36.

[12] While phraseology in the complaint is more complicated, as well as more accurate, this description provides, in general, the Commission's position.

[13] See CX 120a–b. Less than 4% of shipments from either Bellingham or Seattle were made to order than West Washington as defined in the complaint.

[14] See *Crown Zellerbach* v. *F.T.C.*, 296 F. 2d 800 (9th Cir. 1961) *cert. denied*, 370 U.S. 937 (1962).

the reduction in competition between Olympic and Permanente.[15] Moreover, as an anlysis of the operations of other companies demonstrates, the Commission's definition reflects reasonably well the area in which West Washington plants make a major proportion of their shipments and into which there are relatively few shipments by competitors located outside. We now turn to the Washington companies.

The other cement companies operating in the Washington area listed on Permanente's Management Recommendation to its Board of Directors [16] included two plants each of Ideal Cement Company (Ideal) and Lone Star Cement Corporation (Lone Star) and one plant of Lehigh Portland Cement Company (Lehigh). Thus, the conditions had radically changed since Permanente had originally established its distribution plants in Seattle, Pasco and Portland. No longer was Permanente competing with relatively small local companies like Superior and Northwest. As the management report expressed it: [17]

> Other than ourselves, Olympic is the only "independent" company operating in Washington State. As a result of recent mergers, all other plants are in the hands of large eastern multi-plant companies—Lone Star, Ideal and Lehigh. Olympic is ripe for acquisition by either a large foreign combine or a large American company not presently represented on the West Coast.

Each of these competitors will now be considered in turn; first, taking companies with plants in Washington and then those who ship into the area but do not maintain plants to produce cement there.

1. *Companies with Washington Plants*

*Ideal.*—Ideal Cement Company (Ideal) has its home office in Denver, Colorado and, at the time of the Olympic acquisition, had cement plants in Alabama, Louisiana, Texas, Arkansas, Oklahoma, New Mexico, Utah and Montana. It also had two plants each in Colorado and California. In addition, it operated two plants in Spokane and Grotto, Washington, and one in Gold Hill, Oregon. It had numerous cement terminals, including one in Vancouver, Washington. Net sales and operating revenues for 1958 were over \$91½ million, operating property net was \$108½ million and current net assets almost \$14 million. In the previous year the figures were \$78½ million income, \$88½ million operating property net and current net assets \$17 million. It had over 3½ thousand employees during both years. (RX 62)

[15] *American Crystal Sugar Company* v. *Cuban-American Sugar Co.*, 152 Fed. Supp. 387 (S.D. N.Y. 1954). Respondent's citation of *United States* v. *Bliss & Laughlin, Inc.*, (D.C. Cal. 1962) C.C.H. 1962 Trade Cases, Para. 70,292 is inappropriate, for in that case admittedly competition was national in character and the acquiring company prior to the merger sold out an infinitesimal amount in the area selected according to the courts' other findings. Moreover, the Supreme Court remanded, November 5, 1962, 31 L.W. 3155.

[16] CX 19p.

[17] CX 19k.

In 1954 (RX 64) Ideal had negotiated for the Superior Portland Cement, Inc. plants in Seattle and Concrete but abandoned the proposed merger due to objections of the Justice Department. (RX 100)

Its two present Washington plants are located almost 300 miles apart. The plant at Grotto is just west of the peak of the Cascade Mountains in West Washington, some sixty miles east and slightly north of Seattle. The Spokane, or Irvin plant, as it is sometimes called, is very close to the Idaho border about half way between the Canadian and Oregon borders. In Oregon, its Gold Hill plant is located about 60 miles from the Pacific Coast and 30 miles north of the California border.

Evidence produced by counsel supporting the complaint concerning the cement shipments of Ideal from its various facilities into the State of Washington generally supports their position that West Washington can properly be regarded as a separate market. While perhaps the line cannot be drawn with the precision of a surveyor, it need not be.[18] Vice President Matthews' testimony, backed by fifty years' experience gives the proper perspective. Tabulations were offered and received showing generally that a very large preponderance of shipments from the Grotto plant were made to West Washington, and a very large preponderance of shipments from the Spokane plant were made to East Washington.[19]

After the tabulations were received, Matthews was asked to state the factors which put the preponderance of sales in West Washington. He testified: "* * * the distances involved, and the cost of transportation, is so high that we simply can't get much farther away from our producing property profitably, so it's a small plant, and a large

[18] See *United States* v. *Bethlehem Steel,* 168 F. Supp. 596 (S.D. N.Y. 1958), page 602. See also 45 Va. L. Rev. 684.

[19] (CX 111–112) Counsel for respondent ably argued that there were serious infirmities in these exhibits, and the hearing examiner admitted them with reservations. (See R 2583 etc.) We do not regard precise figures as significant. We do regard, as significant, the fact that there is a great preponderance of sales by West Washington plants in West Washington as defined. There are areas such as the Kelso Longview Cathlamet area and the Pasco Kennewick Richland Triangle where there may be argument for inclusions or exclusions of particular towns. However, these are relatively minor and do not seriously detract from the factors which justify regarding West Washington as a separate market. We cannot precisely define its borders but we need not do so. The river net generally is quite justifiable as a boundary because mileage, either by road or by rail, is necessarily increased except at points where a bridge or ferry may connect two points. Transportation is an important factor in cost and thus tends to limit the area of effective competition. Despite the effort of regulatory authorities to so fix rates that competition between areas will be equalized, distance cannot be discounted. Permanente's extensive use of water transportation, both by ship and barge, has presumably had some recent impact as the SS Keva Ideal which was recently commissioned. Ideal has opened up deep water facilities. Oregon-Portland also uses barges. However, the fact that Permanente for many years was able to ship cement from California is further corroboration that there are separable markets. Only the differential in price between the markets enabled it to do so.

part of its output is sold in the area that happens to be the one delineated as presented to us with this information. It is not our line." (R 2586) When asked about the Spokane plant, he said: "Well, the same answer prevails, that as you get farther away from the plant you meet competitive situations, and your return becomes so small that you are limited by how far you can go. And the amount of cement that we ship in the western part of Washington from that plant is very minor for that reason. We don't have much net if we ship cement from that far." (R 2586-7)

So far as the other plants are concerned, shipments were minimal. Except for 1957, when there was a strike at the Lone Star Plant, thus calling on other plant resources, there were no shipments from the Trident Plant in Montana and, in 1957, only about four thousand barrels were shipped into Washington. Only one instance was mentioned of a shipment from Redwood City, California of some 48,000 barrels to Vancouver for distribution from the new terminal there in 1959, and there were no shipments until 1959 from Gold Hill, Oregon. Then, some 17,000 barrels were used to construct its Vancouver terminal and, in the following year, some 13½ thousand, of which two were used on the terminal.

At the time of the first group of hearings in this case in September 1961, it was brought out that in 1960 some 76½ thousand barrels of cement were shipped to Vancouver from the LaFarge Cement Company in British Columbia. These, however, were trans-shipped to Alaska without ever being unloaded. There were also some 155,000 barrels of cement from Houston, Texas shipped via the SS Keva Ideal which was using the cement as cargo on a voyage which had, for its primary purpose, the shipment of machinery to the Gulf. Further, at the time, a deep water terminal facility was being constructed in Seattle, Washington. The Vancouver, Washington terminal was contemplated and publicly announced prior to Permanente's purchasing Olympic, and the Seattle terminal was a substitute for a terminal originally proposed for Tacoma, Washington. Both of these had capacities of putting through about 1¼ million barrels per year. The Vancouver facility had 120,000 barrels of storage, and the Seattle some 186,000 barrels. At the time of the conclusion of the hearings, both these facilities were in full operation and were capable of receiving shipments by oceanship and loading barges for shipment to Alaska and up the Columbia River.

At the time of the acquisition of Olympic, to sum up, Ideal had two plants of approximately equal size (650,000-barrel capacity) and about equal efficiency at opposite east-west ends of Washington, and, in addition, in contemplation, two terminal facilities—one at Vancouver and the other in Seattle. It could utilize its other plants located in Gold Hill, Oregon and Redwood City, California, to supplement its supply and could also ship from its plant in Montana or purchase cement from Canada. Actual shipments, however, at the time of the acquisition, were primarily from the Grotto plant located near Seattle into the West Washington area, and relatively little was shipped from other plants for consumption in that area.[20]

At present, as Mr. Matthews testified, as part of respondents' case, the coast mills in Washington (Grotto) and Oregon (Gold Hill) are the primary sources for their areas, and the Redwood City mill is a standby or secondary source. Although the terminals in Vancouver and Seattle are equipped for the receipt of Ideal's ocean-going shipments, it is still regarded as impractical for Ideal to ship from the Irvin or Montana mills to the coastal regions. (R 4536)

Even under the present conditions, it seems clear that there is a difference between the markets in West Washington, East Washington and Northern California because Ideal is able to maintain a different price in each plant. This would not seem to be compatible with the existence of a single market covering the entire area. Moreover, even today, the Irvin plant of Ideal does not permit proprietary trucks to load in its plant. On the West Coast, Permanente inaugurated truck bulk loading by proprietary trucks, and other firms felt constrained to follow. In light of the changes required by the Permanente practice in the coastal plants and terminals of Ideal, this factor also corroborates the position of counsel supporting the complaint that there is a clear distinction between the market in West Washington and that in East Washington. We turn now to the next largest cement producer in the area.

*Lone Star.* Lone Star Cement Corporation (Lone Star, as hereinafter referred to) is the next largest producer in the area having taken over the two plants of Superior after merger plans of Ideal were abandoned, due to Justice Department objections.

Lone Star purchased a plant at Seattle on the Duwamish Waterway and another plant at Concrete Washington, on the Skagil River about thirty to forty miles east and slightly south of the Olympic plant at Bellingham.

Lone Star is a Maine corporation with its executive offices in New York, N.Y. It has twenty-one cement plants in the western hemisphere, with an annual capacity of fifty million barrels. Its plants in the

[20] (CX 111–112) See also RX 91–96 for distribution from nearby plants of Ideal. We note that almost all of the shipments from Canada on Exhibit 91 were actually transshipments to Alaska (R 4524–7) without unloading, and the shipments to Vancouver from Houston were out of the normal run due to peculiar circumstances.

United States (exclusive of those in the northwest) are located in Kansas, Texas (3), Louisiana (2), New York, Pennsylvania, Indiana, Virginia (2) and Alabama (2). It also had extensive holdings in Cuba and in South America.[21]

In 1958, its domestic productive capacity was 36.9 million barrels; its capital assets, some $7.7 million; its billings, less discounts, $97 million, and its net income $13.7 million.

The annual capacities assigned to the two Northwest plants were 1.2 million barrels for the Seattle Plant and 1.7 million barrels for the Concrete Plants.[22] The preponderance of shipments from both plants has been into the West Washington area, in which those plants are located.[23]

Mr. Willis Greer, a witness from Lone Star, explained the factors which caused the bulk of the shipments to be in West Washington as follows: "* * * the reason for it is that east of there [the north-south line of the Columbia and Okanogan Rivers] (brackets supplied) it isn't economical for us to ship. There are other mills, competitive mills, in Spokane and Metaline Falls and a terminal at Pasco; and from those points, the prices are established east of this line, making it unattractive for us to move over there to any large extent." [24] Greer also said the same would be true of shipments into the Portland trade area. "* * * There's a plant in Oswego, which is just outside of Portland, and there are two terminals in the Portland area. * * *" [25]

On cross-examination, Mr. Greer made it clear that it was not a question of losing money because Lone Star could ship almost to Spokane or to Portland without losing money but would not make a profit if it did so.[26]

Lone Star makes a distinction between its normal day-to-day business and its attempt to secure business for jobs such as the dams across the Columbia River. The former is classified as its dealer trade and the latter is specific job trade.[27] On specific jobs, the New York office decides when and what to bid.[28] In the area east of the Okanogan River, 80% of the business is specific job business. (id) "* * * the bulk of our [Lone Star's] sales which we consider our normal sales area is within this red line." [29] [area designated in CX 180 as West Washington] (brackets supplied) It considers its normal business before decid-

[21] RX 71.
[22] R 3367. (Later figures rate the Concrete Plant at 1.8 million barrels.) (3803)
[23] CX 126 and 129.
[24] R 3749.
[25] R 3749.
[26] R 3793–3797.
[27] R 4049.
[28] R 3798. (Lehigh also has a similar differentiation. R 2982.)
[29] R 3935.

ing to bid on projects. As Greer testified: "Well, we feel that our normal every day business is our bread and butter business and that this other, while we would like to have it, we would like to make money on it, our most important single factor is our day to day business to us." (id) In the West Washington area some 60% of the cement sold is sold to ready-mix people.[30]

Although on an annual basis, Lone Star appears to have a surplus capacity at both of its plants, this does not present an accurate picture of Lone Star's operation. Demand for cement is seasonal. In the season, the Seattle, or Diamond Plant, as it is sometimes called, cannot meet the demand and calls for shipments from the Concrete Plant to fill out its requirements. In slack season, however, the Concrete Plant might even be shut down.[31]

We pass now to the next largest producer, Lehigh Portland Cement Company.

*Lehigh.*—Lehigh Portland Cement Company (Lehigh) is a Pennsylvania corporation with its principal place of business in Allentown, Pennsylvania. It had one plant in the eastern part of the State of Washington at Metaline Falls in 1958. This plant has a capacity of 1.2 million barrels of cement. (RX 67) It had additional plants in New York (2), Alabama, Florida, (2), Pennsylvania (2), Virginia, Kansas, Iowa, Indiana, Illinois and Maryland.

Total capacity for all plants is some thirty-one million barrels. In 1958, its stockholders' equity was $101,570,000, its revenue $91,771,000 and its earnings $8,816,000.

Lehigh's Metaline Falls plant located in the vicinity of Spokane, ships a great preponderance of the cement also which is produces east of the north-south line of the Columbia and Okanogan Rivers. Although the preponderance is not as great as is the case of Ideal's Irvin Plant, it is sufficiently great to be persuasive that the normal market for Lehigh's Metaline Falls Plant is outside West Washington as defined by the complaint.

Moreover, its price has tended to remain constant from 1956 to 1961.[32] and only the happenstance that it changed the character of its distribution service by discontinuing a facility at Spokane caused a reduction in 1961. (R 3085)

Like Lone Star, Lehigh differentiated, as a matter of its internal sales statistics, between its sales to recurring and non-recurring customers. In the category of recurring customers, it included concrete block plants, ready-mix plants and distributors, but classified as non-

[30] R 3754.
[31] R 3742–43.
[32] R 3079.

recurring, sales to contractors to public works like Hanford and to paving contractors because of the variability of the demand and the place of delivery. (R 2982)

In the practical operation of two of the largest cement companies, therefore, we find a distinction between the large project-type of sale and the ordinary or recurring type. Hence, in determining the section of the country, we may properly differentiate between the two types of demand. It is clear that on large projects the lure of large volume and resultant lower costs causes plants to bid beyond their normal market zone. While the project factor is strenuously urged by the respondents, as especially significant, the variation in the location of future demands for such projects seems to make it of much less significance than the day-to-day demand of the more constant users in determining geographical boundaries of the relevant market for the purpose of the Clayton Act.

2. *Share of West Washington Plants' Sales Represented by Olympic's Sales.*

Considering the West Washington plants alone, *i.e.*, Ideal, Lone Star and Olympic, their total annual capacity was some 5,050 thousand barrels of which Olympic possessed some 1,500 thousand or about 29%. Total sales into the West Washington area from such plants totalled approximately 3,023 thousand barrels, and Olympic's share was 1,237 thousand barrels or approximately 40%.

Such a calculation, however, ignores the shipments made into the area by surrounding plants; hence, we describe these.

3. *Plants Shipping into West Washington Area.*

As has been observed, Ideal and Lehigh each have plants in East Washington which make some shipments into West Washington, aggregating some 83,000 barrels in 1958, the year of the Olympic acquisition. Oregon Portland Cement Company, an Oregon corporation, with its mills at Oswego and at Lime, Oregon, has also been regarded by respondents as a factor in the market. However, according to the figures produced by that company, in 1958, aggregate shipments into West Washington were less than 20,000 barrels, although the total capacity of both plants was some 2.8 million barrels, and shipments aggregating some 374,000 barrels were made into Washington State. The largest proportion was shipped into the Portland-Vancouver trade area or to particular projects.

By far, the largest outside shipper into the West Washington area was respondent, Permanente. According to the tabulation prepared by Dr. K. H. Hunter, the expert from the Federal Trade Commission, in 1958, Permanente shipped almost two million barrels into the State of Washington and some 1.63 million into West Washington.

4. *Combined Share of Olympic and Permanente.*

Recalculating to include these shipments into West Washington, we find that approximately 4.8 million barrels were shipped into the area in 1958 so that Olympic's share of the West Washington market may be calculated at some 25%. On the same basis, Permanente's share amounted to about 33% in 1958.

These calculations show a larger share of the market than management of Permanente indicated in its recommendation submitted to the Board of Directors of Permanente.[33] That calculation was based on productive capacity rather than actual shipments, and subsequent pages [34] of the recommendation make an assumption that the combined operation would secure 25% of the total Oregon demand and 28% of the total Washington demand.

While the figures may have been of value to the Board of Directors of Permanente to show how the management proposal would take care of Permanente's capacity, as well as all of Olympic's, they do not solve the questions presented by the statutory phrase "section of the country" because actual shipments rather than capacity are significant [35] and because in light of the competition which was eliminated, we must separate Washington from Oregcn and West Washington from East Washington.[36]

Even, however, if we recalculate on the basis of the State of Washington as a separate market, we find that Olympic's share of some one million barrels of the total of some 5.1 million, is over 18% and Permanente's over 30%. Thus, the combined share would be 48% of the entire State of Washington against 58%, if we calculate on the basis of West Washington alone.

Since neither party has offered proof concerning the total sales in the Pacific Northwest, which respondent seems sometimes to contend is the proper section of the country, we cannot estimate the share of the respective parties in that area. Moreover, we see no proper basis for contending that the Pacific Northwest is the relevant market, in light of the price behavior and of the marketing practices of the plants located in the State of Washington and in adjoining states.

The various cement producers, in preparing the constituent tables, utilized their judgment, to some extent, in drawing the line representing the freight break-off point and in determining on which side of the Columbia River certain shipments were made. Also, the expert

[33] CX 19p.
[34] CX 19q, r and s.
[35] See *Crown Zellerbach* v. *F.T.C.*, 296 F. 2d 800 (9th Cir. 1961) *cert. denied*, 370 U.S. 937 (1962).
[36] Permanente management itself, in its recommendation to its Board to purchase Olympic, described Seattle as a "marketing area". (CX 19f)

for the Commission adopted a rule of thumb for locating certain shipments. Moreover, certain installations like Ice Harbor Dam were excluded because of their location although within a very short distance of the line. Having these facts in mind, the table attached, as Exhibit A, with the explanations provided in the footnotes, presents a reasonably accurate general description in tabular form of the shipments made to Washington State and to the area designated as West Washington in the years 1956 through 1960, inclusive.

Having dealt with the line of commerce and the section of the country, we consider next the effect of the merger on that line in that area.

C. *Effect of Purchase of Olympic*

What impact the purchase of the only "independent" plant in the State of Washington, by what is concededly the largest West Coast producer of cement, had on competition has been the subject of widely divergent claims. Respondent's position, enunciated in its answer is that the purchase had the effect of increasing rather than decreasing competition and thus it is commendable rather than illegal. Counsel supporting the complaint see not only a substantial lessening of competition between the acquired and acquiring companies but a further concentration in the hands of a few producers of the means of production in the area and thus a tendency toward monopolization.

It is very clear that as between Olympic and Permanente there has been a complete cessation of effective competition. Both are now under single ownership and the share of each before the acquisition was substantial so that the destruction of effective competition has also been substantial.[37] This was what was intended. As Mr. Marsh wrote Mr. Kaiser, Sr., on March 6, 1958:

> If we were to purchase this company, we would at some time discontinue shipping to the Northwest when the demand for cement in Northern California had reached the point that this barrelage could be sold in this area.
>
> As you know, we obtain a higher mill net on sales in Northern California versus sales of cement in the Northwest.[38]

Hence, even though the same sales force which had previously served Olympic has been retained by Permanente to sell Olympic cement, and the brand name has been preserved,[39] there was an express plan and therefore a reasonable probability that Permanente would completely withdraw and leave the field to an expanded and wholly-owned Olympic.

Quite apart from this elimination of competition between the acquired and acquiring companies in West Washington, the effect of the

[37] Combined share on acquisition was approximately 51%.

[38] CX 148b.

[39] See Report on Corporate Mergers and Acquisitions, Federal Trade Commission, May 1955, p. 110.

acquisition has been to close the last door of opportunity for relatively small business to enter or remain in the cement business in West Washington. As already pointed out, at the time of the purchase, Olympic was the only "independent" company other than Permanente, in the latter's opinion. After the purchase, all cement producers in West Washington were multimillion dollar corporations.[40] Competition in service thereafter was intensified but the expense of the expanded service was sufficiently higher to discourage any small prospective entrant into the market. In addition, the means to enter the market with a convenient quarry no longer existed. Permanente purchased the last available suitable limestone site with Olympic's quarry and the adjoining land. The price paid for Olympic gave Permanente a per barrel plant cost substantially lower than the cost of the plants more recently constructed by its competitors. Thus, a new plant by a new entrant would start out with a disadvantageous plant cost base.

Many of the foregoing findings are seriously contested by Permanente and, in addition, it has proposed findings which it regards to be relevant and material to its legal concepts. These are dealt with in the next two sections.

D. *Respondent's Position*

In addition to its final brief of 155 pages and extensive oral argument, respondent submitted 200 numbered findings of fact and 20 concluding findings. The latter findings deal primarily with the economic proof which is the subject of separate treatment in the next succeeding section. A large proportion of the first 200 numbered findings relate facts which are included in terms or in substance in other sections of this initial decision. These require no further consideration here. We deal with the general pattern of respondent's proposed findings in ensuing paragraphs, making appropriate findings based on requests not elsewhere adequately covered.

By defining its terms, respondent characterizes the Pacific Northwest, Western Washington, Eastern Washington, Central Washington and the Columbia River Basin in a manner adapted to its economic theories. Thus, Pacific Northwest is defined to include not only Oregon and Washington, as the term was used during the trial, but in addition the State of Alaska and the Province of British Columbia. Similarly, Eastern Washington is defined to include the territory east of the Cascade Mountains, and Central Washington and the Columbia River Basin are part of Eastern Washington. These definitions are not

[40] As previously pointed out under the various sub-headings describing competitors, Ideal and Lone Star had resources of more than one hundred million dollars, and Permanente claimed its share owners' equity in 1958 as over $88½ million. (CX 1) If Kaiser Industries, its affiliate, is considered, the stockholders' equity was $211 million with $540 million in investments. (CX 139)

adopted because much of the evidence utilized some of the terms in a different sense. We utilize the definitions set forth in the complaint.

In dealing with the challenged acquisition, respondent sought a finding that Olympic was not a corporation within the meaning of the Clayton Act. The admission in respondent's answer and the testimony of Pelly, its manager, establish the contrary as Pelly testified that Olympic was qualified to do business in Washington, and it is clear that Olympic was engaged in interstate commerce.[41] The request was withdrawn during oral argument.

Passing to respondent's proposed findings concerning the relevant section of the country, there are three alternatives proposed: Washington and Oregon (Proposed Finding No. 33); Washington, Oregon, Alaska and British Columbia (Proposed Finding No. 36) and the last-described group plus Northern California (Proposed Finding No. 38). At the final argument, respondent embraced the second alternative. None of these take into consideration the area of the major overlapping sales between Permanente and Olympic. This area is covered by the general description contained in the complaint.

It is true that the freight break-off point as a description is liable to fluctuation, and it is also true that in connection with dams and bridges the use of a river as a boundary has the effect of cutting in half the cement usage on the facility. However, the area need not be circumscribed with the accuracy of a survey.

The overwhelming majority of sales of Olympic were in the general area of West Washington as defined in the complaint, so the effect of its destruction as an independent supplier or potentially independent competitive force is within that area. *U.S. v. Bliss & Laughlin, Inc.*, CCH 1962 Trade Cases, Par. 70,292 (March 27, 1962 S.D. Cal. remanded by U.S. Supreme Court, 31 LW 3155, November 5, 1962) is not at all to the contrary. In that case, there was a nationwide market, and the overlapping sales were infinitesimal in the area proposed by the government because that area was an insignificant area of sales endeavor for the acquiring company. The contrary is true in this case. In the Seattle market alone the potentiality for vigorous competition is enormous.

Respondent does not contend that Portland Cement is not an appropriate line of commerce. It next deals with Permanente's background from 1939 when it was first formed. We have elsewhere made findings adequate to present the pertinent facts without the detail presented by respondents which seems unnecessary.

[41] In its answer to Paragraph 5 of the Complaint, respondent alleges that Olympic sold cement throughout the State of Washington, the Territory of Alaska (now State) and also in Oregon and British Columbia.

Passing now to Permanente's proposed findings with respect to the introduction of competition into the Northwest, we make the following findings:

On Permanente's entering into Washington State, it made innovations in the manner of doing business which upset the practice of the cement manufacturers then operating under the Cement Institute plan of restricted competition. These innovations included permission to cement users to call for cement at the Permanente distribution facilities in their own trucks and to buy at an f.o.b. plant price. This had many advantages to purchasers including more rapid delivery, no demurrage, lack of necessity for a spur railroad line and use of small silos less than carload size, among others.

Permanente also published prices, secured bottom dump railroad cars for its customers and made barge delivery available which was less expensive. It supplied technical transportation service and technical advice concerning the best utilization of the cement sold. Aggressive sales techniques and a uniform credit policy were adopted. While there was some opposition and an effort to prevent Permanente from continuing along this course, by the time of the acquisition herein concerned, other cement companies selling in the West Washington area met many of these innovations with consequent reduction in costs to cement users. Despite these innovations, Permanente was unable to act as price leader in an upward movement against the opposition of the other producers, and it never offered a lower mill price. It was, however, able to capture an increasing share of the market.

Respondent next describes Olympic's alleged lack of competitive activity pointing out that it had few regular customers, a small sales staff, inadequate facilities and a very cumbersome management operation. Respondent also points to the fact that Olympic made substantial sales to other cement manufacturers and distributors. It was clearly the practice of Olympic to seek to secure as high a price for its cement as the traffic would bear and therefore not to offer more favorable terms and conditions except in cases where it offered competitive bids in connection with public work. That was Olympic's way of competing. Regardless of these factors, in Olympic's long history of concentrating on making sales on a quality basis to satisfied customers, it made a substantial share of all the sales made in the West Washington area, as that term is defined in the complaint, and its operation was profitable. When Permanente bought Olympic, customers were no longer afforded the same choice of suppliers they had before. Olympic was primarily a follower of the pricing policies of others in the market but this does not mean that it failed to have an impact on competition. It had recently been acquired by new owners, and it cannot be inferred that the new owners would not take more aggressive action against the sophisticated eastern plants who had recently come into the market.

Permanente next submits that it was necessary for it to acquire a local mill to survive as a competitor. We do not so find. It is true that there was a narrowing in the price differential between Northern California on the one hand and Oregon and Washington on the other. Its plant at Permanente had physical difficulties in the way of expansion and in economic transportation to tidewater, and its ocean supply line posed many problems of scheduling, securing the right types, colors and tests of cements. However, there was nothing to prevent Permanente from improving its transportation to tidewater, enlarging and refining its distribution facilities, and securing additional water transportation. It had successfully overcome, in large measure, the reluctance on the part of purchasers in West Washington to buy its California cement, and had it maintained adequate distribution facilities and additional water transportation, it would not have been required to make the purchases of cement from its competitors which it claims caused many of its difficulties. Many of these difficulties have disappeared with the opening of the Hawaii Plant which took pressure off its shipping.

Moreover, as the contemporaneous documents show, at the time of the acquisition, Permanente did not regard itself as faced with a Hobson's choice of buying Olympic or ceasing its operations in Washington and Oregon. The reports at the time indicate that it was more economically *desirable* to buy Olympic than to build or enlarge existing facilities—not that it was essential to Permanente's continuance in the area. This position is reflected to an extent in Permanente's Management Recommendation to its Board of Directors. That recommendation indicated that Olympic may be in trouble "over the short term" by reason of its adding a new kiln and that, "Permanente is the only company having the flexibility to properly exploit the production of the second kiln, and reduce production costs." [42] The management also mentions that, "With the increasing cyclical nature of our demand, and the increased sales potential in both the Seattle and Honolulu marketing areas, we no longer have sufficient ship capacity to meet our demands in both markets."(id) But significantly the report stated:

Meanwhile, our forecasts indicate that within five years we can sell another 1,000,000 barrels per year in our high-millnet Northern California market. Yet it appears impractical to further expand our plant at Permanente. Therefore, to retain our percentage of this market and not fall behind competition, we must either *build a new Northern California plant* or withdraw for home consumption a large block of barrelage presently exported to the Northwest. (Italics supplied) (id)

[42] CX 19f.

The same recommendation contains the following statement: "The acquisition of a going manufacturing facility in the Northwest is not only the best long range assurance of sales leadership in the local market, but the cheaper and more profitable way to maintain our position".

Thus, attaining long range "sales leadership" rather than merely supporting a floundering supply line appears to have been the primary design behind the acquisition. Since this was what Permanente's management had in mind, it was a reasonably probable result that the acquisition would secure "sales leadership" for Permanente in the "local market".

Permanente points to its competitive activity in the area of its operations. As we have heretofore pointed out, its competition in Washington from Ideal, Lehigh and Lone Star is sophisticated competition with large companies having ample resources and local plant facilities. In Oregon, it also has a substantial competitor in the Oregon Portland Cement Company and may have from the Gold Hill Plant of Ideal and from Calaveras. However, these concerns have had little competitive impact in the area of the overlapping sales of Permanente and Olympic prior to the acquisition, except Ideal's operation of its Grotto mill.

Since the commencement of this proceeding, both Lone Star and Ideal have made extensive improvements. Lone Star modernized its Seattle Plant's loading facilities; Ideal opened a distribution facility in Vancouver, another at Eugene, Oregon and a third at Seattle. Ideal has announced plans for a new plant in Eastern Washington, and it has placed itself in a position through the acquisition of a very large bulk cement carrier, the Keva Ideal, to transfer large amounts of cement from its several plants located on tidewater to the point of greatest demand. Lehigh has improved facilities of its Metaline Falls Plant, although that has had little sales impact on the West Washington area. The supply situation in British Columbia has recently changed by the addition of capacity to the British Columbia Cement Co., Ltd. and the LaFarge Cement Company of North America, Ltd. As a consequence, these two concerns have made recent efforts to sell cement to Permanente and to the other cement companies for delivery into West Washington and elsewhere. There were reports that LaFarge offered to make sales directly to contractors. The Calaveras Cement division of the Flintkote Company has recently opened a smaller distribution facility in Oregon which is capable of supply by reduced rail rate from its San Andreas, California Plant, and it has given some indication of a desire to enter the Portland-Vancouver market as a major factor.

Regarding supply, we find that there is at present adequate plant capacity to meet the current needs of the State of Washington and that there is available substantial capacity in Oregon and British Columbia as well as in California to supply any foreseeable deficiencies which might arise. We also find that Permanente has developed the Bellingham Plant by improving its quarrying operation at an expense of about $100,000 and its water load-out operations at a cost of about $200,000. It has also spent approximately $1,000,000 in bringing into balance and making more efficient the Olympic Plant operations. As Bellingham production has increased, shipments from Permanente's California facility have decreased roughly in proportion to total sales. Moreover, increased sales and improved operations have eliminated the previously normal seasonal shutdowns in the Bellingham Plant.

With respect to sales area and coverage, we find that Lone Star, Ideal, Lehigh and Oregon Portland make bids on large projects such as those undertaken by the Atomic Energy Commission for its Hanford Works and the Department of Interior for various dams on the major waterways, regardless of their location in Washington State. We also find that the sales divisions of the various companies do not correspond with the areas defined in the complaint. Salesmen are stationed in various parts of Washington State and are not restricted in their efforts by such areas.

As to competitive practices, we find that Lone Star, Ideal, and Lehigh do not favor and generally prohibit the use by its customers of proprietary trucking, although in Western Washington as defined in the complaint, Lone Star and Ideal permit proprietary trucks to call for cement. We do not find that this practice or the few refusals to deal have been sufficiently developed in the evidence to establish that such companies are continuing the conspiracy prohibited by the *Cement Institute* decision.[43]

[43] The hearing examiner originally obtained an impression that respondent was charging that Lehigh, Ideal and Lone Star were engaged in a continuation of the pre-existing Cement Institute conspiracy. At the final argument, respondent made its then position clear that competing mills would individually revert to the practices which were concertedly engaged in prior to the *Cement Institute* case, and that, therefore, it is not in the public interest to weaken Permanente by requiring it to divest itself of Olympic. Respondent contends that only if it remains strong and in the area will Lone Star and Ideal quote f.o.b. mill prices and permit proprietary trucking because these practices are not followed in other areas. Because Permanente has otherwise strongly entrenched itself in the area through its investment in Glacier and in wooing such large numbers of satisfied customers, its withdrawal from the area would not appear economically desirable. This is particularly true since the building of the Hawaii Plant has given respondent a substantial surplus and has lessened the burden on its shipping. Moreover, it does not appear reasonable that once having given customers the advantage of f.o.b. mill pricing and entry by proprietary trucks the competing plants could successfully withdraw such privileges without creating serious consumer ill will. We accordingly find that respondent's argument in this regard lacks substantial factual backing. See *F.T.C.* v. *Cement Institute,* 333 U.S. 683 (1948).

Concerning price, generally the prices in Washington State have not increased as rapidly as prices in many other parts of the United States. Lone Star and Ideal, however, made only one price change—a reduction (excluding the elimination of premiums on low alkaline cement at Permanente and high-early cement, October 16, 1957) between the date of their entry into the West Washington market (as defined in the complaint) and Permanente's acquisition of the Bellingham Plant. This was the reduction of the base price at Lone Star's Seattle mill of 5¢ a barrel on April 30, 1958. This matched Ideal's price at Spokane and was followed by Permanente almost immediately. Ideal's Grotto Plant, however, failed to reduce its price and retained its $3.65 price until 1962. The next base price reduction (disregarding the discontinuance of a premium on low alkali at Seattle) took place when Lone Star (possibly because of a reduction in price by Lehigh) reduced its base price at concrete by 40¢ per barrel for a three-months period. This took place about the time of bids for 200,000 barrels to be delivered to the Atomic Energy Commission at Hanford, Washington, which were later rejected.

It was not established by credible evidence that either of these price changes (as respondents suggest) were punitive in character or were, in any way, related to the pre-existing conspiratorial agreement which had been enjoined by the *Cement Institute* decisions.[44]

The next changes in price were price advances of 15¢ in December of 1960 effective January 1, 1961, and 10¢ in November 1961 effective in January 1962. Lone Star appears to have taken the lead in both these increases. Discounts were doubled by Ideal and by Lone Star in November 1961. These increases were followed by Permanente.

In one instance, in 1954, Permanente attempted to increase its prices but cancelled its increase before it ever became effective. In no instance did Permanente initiate a price reduction in its cement prices.

Respondent's proposed findings relating to sales volume are found so far as they relate that there was a strike at Lone Star's plants from May until October 1957 and that the strike seriously disrupted its shipments to customers who were served by other suppliers, including Permanente and Olympic whose share of the market was thereby increased.

Concerning competitive activity in West Washington as defined in the complaint, respondent's findings are adopted insofar as they indicate that Lone Star and Ideal are competing aggressively in that area and have become better equipped to do so by the addition of their new facilities elsewhere described. It is also found that since the acquisi-

[44] *F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948).

tion the Olympic Plant's technical services to customers had improved and that the cement is of slightly better quality.

In its brief on Count I, respondent made a vigorous attack on complaint counsel's statistical data. Respondent's contentions have been carefully examined. They do not render inapplicable the general description of the industry positions, although, as heretofore found, there are relatively minor discrepancies. Particularly unjustified was respondent's initial claim, withdrawn at the oral argument, that the figures in complaint counsel's chart (now Exhibit A herein) when compared with Bureau of Mines' data, show a variation of 119,000 barrels in 1959 and 370,000 barrels in 1960. The 1959 figure, so far as 107,000 barrels is concerned, is accounted for by respondent's belated admission that its figures to the Bureau of Mines were in error. The 1960 variation, so far as 366,000 barrels is concerned, was due to an erroneous report by Oregon, Portland Cement Company to the Bureau of Mines [45] which is explained in Footnote 8 of Exhibit A. Respondent's second complaint concerning this chart is a complaint about inconsistencies between figures it supplied. And, the charge that Permanente failed to take over the Bellingham Plant until October is drawn from a statement by Sharp that he did not move from Balfour Guthrie's office until October. This hardly bears out respondent's contentions. Subsequent criticism, particularly in light of the ample opportunity given to counsel for respondent to check and offer a revision of the statistical data, seems equally unjustified.

In like manner, counsel for respondent has completely ignored the contemporaneous recommendations of its own officers when it states that there is no probability of lessening competition. These interoffice memoranda clearly predict the total destruction of competition between Permanente and Olympic and the ultimate withdrawal of Permanente imports. To label this nothing is to neglect the most cogent type of evidence—the contemporaneous statements of the parties.[46]

Taken as a whole, the findings of respondent which have been accepted in no way detract from the facts that: there is a market for cement in West Washington; the acquisition has increased concentration in that West Washington market, and has eliminated whatever competition there was between the acquired and acquiring companies in that market.

So far as respondent's concluding findings, we deal with these under the ensuing heading which relates to respondent's economic evidence.

[45] (R 1698).

[46] *U.S. v. Corn Products Refining Company,* 234 FED. 964. (S.D. N.Y. 1916) and *U.S. v. U.S. Gypsum Company,* 333 U.S. 364, 395, 396 (1947).

E. *Respondent's Economic Proof and the Reasons for its Rejection.*

Respondent called a well-known professor of Economics and former consultant to House and Senate Committees, Dr. Vernon A. Mund, of the University of Washington [47] to expound its economic concepts on Count I, the Olympic purchase.

Based on his review of the record in this case and his knowledge and experience of the cement industry, respondent's expert expressed a series of opinions concerning what constitutes competition, the economic impact of the Olympic purchase on such competition and the relevant market.

Respondent's expert impressed the hearing examiner with his sincerity and belief in the economic concepts which he enunciated. However, his views in a number of instances were diametrically opposed [48] to those of the courts and to his own earlier writings.[49] Moreover, his studies of the cement industry prior to the *Cement Institute* case [50] had apparently convinced him that the practices there prohibited are now continuing, and that competition in an economic sense could not be preserved in the Pacific Northwest unless Permanente's action of acquiring Olympic was sustained. This position, and his admiration for Permanente's 1946 effort to break up the cement trust prior to the *Cement Institute* decision, appeared to have so dominated his thinking that he even broke from his tradition of criticizing the use of academic personalities to represent large corporations and became an ardent economic advocate on behalf of Permanente.[51] We shall hereafter discuss Dr. Mund's conclusions with our reasons for rejecting them.

At the base of respondent's economic theory is the proposition that the only type of competition which public policy seeks to preserve is price competition. This price competition, the theory continues, is anything that affords the customer a better deal from the point of view

[47] See R7878–7894 for statement of Dr. Mund's qualifications and experience.

[48] The difference in approach between an economist and the courts has been illustrated by Professor Adelman in 45 Va. L. Rev. 684 in which he criticizes Judge Weinfeld's opinion in Bethlehem Steel.

[49] Dr. Mund appeared to have changed his position from that taken in earlier writings on what constituted price competition. (See Government and Business 1960, CX 171, p. 67) and the importance of service as well as price competition. He had also previously taken the position that the concentration of corporate giants should be broken up and that full use should be made of Section 7 of the Clayton Act to condemn acquisitions in any given market, whenever a large company having a substantial share of the sales in that market acquired another company in that market, regardless of possible justification by the rule of reason. These earlier positions appear to be more in accord with the position of counsel supporting the complaint than that taken by counsel for respondent.

[50] *F.T.C. v. Cement Institute,* 333 U.S. 683 (1948).

[51] Dr. Mund, for example, had great difficulty on his cross-examination in refraining from arguing his position when questioned, although repeatedly requested to answer the question posed.

of the latter's pocketbook. Thus, Permanente's offer to permit its customers to purchase cement in their own vehicles at its distribution point was price competition, although Permanente did not, in any case, make a generally applicable price reduction. As distinguished from price competition, respondent's expert avers that there may be sales effort competition which is not protected by public policy. This sales effort competition is the calling on customers for business without offering "price competition" as defined. Respondent then contends that there is nothing in the record which indicates that Olympic "had a willingness to participate in effective competition or price competition." Hence, the argument goes, since Olympic did not engage in the kind of competition that is protected by public policy, the destruction of such competition is without significance.

The hearing examiner rejects this contention because it does not follow, as a matter of law, that sales effort competition was not intended to be protected by the Clayton Act. Moreover, Olympic's position, as a factual matter, was not as supine as pictured. Shortly prior to its acquisition, it had expanded its facilities for both production and distribution, and there was at least one case where its bid appears to have been lower than those of its competitors. In addition, it had a potentiality for price competition with Permanente which was forever foreclosed by its acquisition, and Permanente intended to withdraw when the Northern California market would absorb its production. Having disposed of the respondent's contention that there was no probable diminution of competition between Permanente and Olympic, we next study its arguments concerning the impact on competition in the industry.

Respondent's expert takes a twofold position on this. The first position is: that the acquisition makes Permanente more effective; that Permanente is a competitive company whereas others are not, and that therefore competition will be enhanced. The second position is that, as regards others in the industry, there will be no change in the number of competitors because neither Permanente nor Olympic were more than half effective before the merger; therefore, their merger will create only one fully effective competitor. We shall deal with these positions seriatim.

The acquisition of Olympic, of course, made Permanente more effective as a competitor. It also enhanced its share of the market. However, competitive efficiency is by no means the test. Monopolies often claim that their efficiency is enhanced by their position as sole producer. The test is: what impact will the acquisition have on competition in the relevant market? Certainly, an economic entity will be withdrawn from competition which might otherwise have been effective in a group as small as that composed of the producers who serve West Washington. But, Dr. Mund's theory goes even further. He expressed the opinion that Permanente would continue in the future to breathe competitive life into the cement industry, and that the other cement companies in the Washington marketing area would, in all probability, continue to operate much as they had prior to the affirmance by the Supreme Court of the *Cement Institute* case.[52] He read into the actions of some of the cement companies who were competitors of Permanente confirmation of this theory.[53] It was his position that the Lehigh and Lone Star companies, by not permitting or curtailing free access by proprietary trucks into their East Washington and perhaps other plants, were, in effect, continuing the old conspiratorial practice of fixing prices through adherence to the formula base price plus freight differential. It was also his position that Lone Star, in reducing prices throughout the state when Permanente made a local reduction, was continuing the same type of tactic that had previously been undertaken by the conspirators in the generations before the *Cement Institute* case to punish a recalcitrant producer. The letter in which this action is announced is, however, capable of a wholly different interpretation and thus is wholly insufficient to sustain a conclusion that the large cement companies are deliberately ignoring the Commission's order, even after its affirmance by the Supreme Court.[54]

The evidence clearly establishes that when Permanente entered the cement business in the Pacific Northwest in 1946, a decade before the acquisition, it introduced competition into a market which, prior to that time, was characterized by restricted competition. The basing point system was in full force and effect, and attempts by a newcomer to that area to deviate from the system had earlier produced sharp retaliation. Permanente was formed more than a decade before its entry into the Northwest for the purpose of insuring to its stockholder contractors a lower base price, and this lower base price was bid on the Shasta Dam project which resulted in the formation by the bidders of the Permanente Company.

On its entry into the Washington market following the war years, Permanente introduced innovations which were destructive of the established conspiratorial system. It offered f.o.b. plant prices; it fos-

[52] *F.T.C.* v. *Cement Institute,* 333 U.S. 683 (1948).

[53] Dr. Mund summarized his view of the economic results of the acquisition of Olympic by Permanente at pp. 8119 to 8121.

[54] RX 81, according to Dr. Mund, is particularly significant because it claims that Permanente's action in reducing its price locally below Lone Star's cost is "illegal". Dr. Mund seems to contend that the word illegal means contrary to the terms of the *Cement Institute* conspiracy. It is more accurately construed, in the writer's opinion, that Lone Star was charging Permanente with a discriminatory or below cost price out at a local level in violation of the Robinson-Patman Act.

tered bulk shipments rather than sack shipments, and, for the first time, permitted purchasers to buy cement and call for it with their own trucks without buying freight at the same time as had been required by the conspirators when the cement conspiracy was in full force and effect. Permanente's action had a real impact on competition and produced changes in the customs of the industry, albeit slowly, to conform to the competition which Permanente was offering.

One of the reasons why we cannot accept Permanente's economic theory as a whole is that its California plant had been greatly expanded to meet the defense operations and it, at times, had serious over-capacity. Yet, Permanente did not seek to extend its share of the market by reducing its mill price.[55] It sought to maintain the differential in price between the Northern California and the Oregon-Washington prices because, in this way, it could continue that phase as a profitable operation. Its judgment in this regard was amply justified and its excellent return to its stockholders was thereby assured. But it resulted in the maintenance of prices at a high level in the Oregon-Washington areas.

Dr. Mund arrived at the conclusion that the high price level in Oregon and Washington bore some relation to the high level in the States of Wyoming, Montana and Idaho, where there was only one plant in each state. He said that the differential between Northern California, on the one hand, and Oregon and Washington, on the other, indicated to him that there was a smaller supply in Oregon and Washington in relation to the supply in Northern California. This served as a magnet to pull suppliers from the excess supply area to the deficit area. He also testified that there had been a trend constituting a narrowing of the price differential between the two areas which indicated, "* * * that the real inequality of supply and demand relationships is being substantially modified, that supplies in Oregon and Washington had been increasing substantially relative to demand and the greater supplies in Washington and Oregon have had a moderating effect on pricing so that prices in Oregon and Washington had not risen as much or in the same proportion as prices had risen in other parts of the country.

The existence of Permanente in the area may have contributed to this moderation in price which was not generally characteristic in other portions of the country in which prices had tended to increase; so may have the purchase of local companies by multi-plant operators. It does not follow, however, as suggested by respondent's economist that the evidently greater competition following the acquisition of

[55] See RX 177a–177b and testimony of Mr. Herzog, R7845–7855; R7862–7864 and R7865–7866. All changes in price initiated by Permanente were increases.

Olympic was caused by the acquisition. On the other side of the coin, much greater concentration resulted and the companies competing in the area are now all giant-sized.

Explaining why Permanente did not offer list price competition, respondent's expert advanced two reasons; first, Permanente bought a substantial portion of its supply from its competitors. These purchases were made at the same price at which these competitors sold to other people. Therefore, they formed a base price below which Permanente could not sell, in addition to causing color problems. Second, as an importer from Northern California, Permanente was restricted to meeting competition and could not reduce its prices below that of its competitors because its price in Washington and Oregon, minus freight, was less than its price in Northern California. By reason of this difference in price, Permanente could only meet but could not undercut its competitors' prices because of the Robinson-Patman Act. These two factors, according to Dr. Mund, also constituted restrictions upon Permanente's acting as a full competitor prior to the acquisition. Dr. Mund infers that, following the acquisition, Permanente was placed in the position of being able to offer price competition in the form of a reduced mill net. The resulting reduced mill net was not established nor has it been established that Permanente could not, at all times, have adopted a single price applicable all over and then make reductions to meet competition. Proof that Permanente was an effective competitor is found in the sizable share of the market it possessed and in its own annual reports which praised its flexible method of shipping from a large central mill by its unique methods.

We cannot justify Permanente's activity in taking over the largest plant serving the West Washington area simply by pointing to its earlier competitive zeal a decade after its initial entry and after the affirmance by the Supreme Court of orders of the Commission, preventing its competitors from maintaining their non-competitive price structure.[56] This brings us to the second contention that neither Permanente nor Olympic were full-fledged competitors and thus their juncture did not lessen competition.

This ingenious argument runs that, because of the uncertainties of water transportation and the shortages which Permanente experienced from time to time, as well as the restrictions adverted to of limitations

[56] At final argument, respondents contended not that there was a continuing conspiracy among cement companies but that they would revert to their old practices individually unless Permanente was allowed to maintain ownership of the Bellingham mill. This loses sight of the reasons for Permanente remaining in the area, in any event, as it did when it lost the Diamond Plant. And, it fails to take into account what the West Washington customers would do if Permanente's competitors failed to continue the privileges heretofore granted.

on its ability to reduce its price, it could not, in 1958, be rated as effective competition to the multi-plant companies who possessed productive facilities in Washington and Oregon. Likewise, according to this contention, Olympic was handicapped by absentee ownership of a cartel oriented British company and a lackadaisical management. Thus, both Permanente and Olympic were merely half-competitors and, when they were joined together into a single competitor, the resulting single competitor was only equal to the constituent half-competitors. This position completely ignores the disappearance of independent sales by Olympic and by Permanente, and the fact that when the two companies were joined under a single management, this substantial independent cement supply was placed under common control. Moreover, the premise fails to take into consideration that Permanente, with the building of its Honolulu mill, no longer requires its far-reaching steamship routes. By building additional storage capacity at distribution points in the West Washington area, it is quite capable of preventing the recurrence of the type of shortage which, in the past, had required it to make purchases from competitors. This contention also loses sight of the fact that Olympic had changed its ownership just prior to the acquisition and had taken steps to increase its productive capacity. It had also installed distribution and storage capacity in the Seattle area which would tend to make it a more effective competitor. Moreover, whatever potentialities Olympic had in supplying readymix contractors, including those in Seattle who might hesitate to purchase cement from a competitor, are gone. The Seattle readymixers now have but one source of supply for cement which is not connected by ownership with a large-sized competing readymix producer. The suggestion that neither Pioneer (Lone Star's readymix producer) nor Glacier (Permanente's) have thus far attempted to abuse the relationship with a cement supplier is little guarantee to the readymix producer, who is a typical small businessman, that this condition will continue if the pressure of competition mounts. A similar situation may well arise in Portland, as Oregon Portland Cement Company has invested in a medium-sized readymix company.

It is clear also that whatever may be the economic concept, the courts have adopted the sales made as a very practical test directed toward an examination of the amount of competition which existed between the acquired and the acquiring company.[57]

Cross-examination of respondent's expert demonstrated that he had utilized a vague test of competitiveness rather than the pragmatic legal tests approved by the Supreme Court. The significance given to the sales figures of Olympic and of the cement producers which sold in the West Washington area was much less than that given to the

[57] *Crown Zellerbach Corporation* v. *F.T.C.*, (9 Cir. 1961) 296 F. 2d 800, *cert. denied*, 370 U.S. 937 (1962) and *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294 (1962).

estimate of the competitiveness of Olympic and to the possible impact which competition in Central Washington might have on prices in West Washington.[58] Thus, respondent's expert was unable to say more on cross-examination than that a substantial portion of Olympic's production was sold in West Washington, and he had no recollection that the amount exceeded 90%. Similarly, he did not recall that the Oregon Portland Cement Company sold slightly more than 1% in the area defined in the complaint as West Washington, and that the Metaline Falls and Irvin Plants sold less than 5% in the area so defined. He regarded the fact that Ideal had common ownership of the plant at Grotto in West Washington and the plant at Irwin near Spokane as a complete restraint of competition. Yet, he did not feel that it was significant that, prior to Ideal's acquisition of the Grotto Plant, there had been no substantial competition between it and the Irvin Plant at Spokane. A lack of interest in the share of the market possessed by the acquired and acquiring companies and in the percentage of shipments into the area designated West Washington in the complaint characterized respondent's position on the relevant market to which attention is now given.

It was respondent's expert's position that economic realities divided the State of Washington into three parts: West Washington which extended to the crest of the Cascade Mountains; Central Washington which included the Columbia River Basin, and East Washington which was dominated by Spokane. The political boundaries of the counties, generally speaking, recognize this division. Dr. Mund emphasized that the Columbia River Basin area, with the existence of many large governmental projects, dominated the competition in the entire State of Washington because, in that area, the East Washington as well as the West Washington mills met. Thus, even though Olympic sold little or no cement in Central Washington, respondent contends that as an economic fact competition in Central Washington must be considered in determining the market in which the effect of the merger is significant. In Dr. Mund's words, "* * * so that in a very real sense the sources of supply and demand operating in the Central Washington area served to establish prices and price relationships which would reverberate back and have their impact on prices in the West Washington area and the Eastern Washington area and other areas too." This position fails to take into account that 80% of the sales in so-called Central Washington are to the large project type

[58] Contrast Chief Justice Warren's statement: "The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market. *Brown Shoe Co., Inc.* v. *United States,* 370 U.S. 294 (1962).

installation and are generally treated quite differently from the run of the mill sale to readymix and building block producers.

This position also seems to run contrary to Judge Pope's decision in *Crown Zellerbach Corporation* v. *F.T.C.*, (9 Cir. 1961) 296 F. 2d 800, *cert. denied*, 370 U.S. 937 (1962). It attempts to substitute a concept that any competition in any area which may have an impact on prices in the area of competition between the acquired and the acquiring company automatically makes the area in which such alien competition occurs part of the geographic market to be included in the statutory section of the country. This also runs contrary to Chief Justice Warren's opinion in *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294 (1962) where he illustrates in Footnote 65:

> If two retailers, one operating primarily in the eastern half of the Nation, and the other operating largely in the West, competed in but two mid-Western cities, the fact that the latter outlets represented but a small share of each company's business would not immunize the merger in those markets in which competition might be adversely affected.

As we have heretofore pointed out, even if the entire State of Washington be considered the relevant market, the share of the two companies following the acquisition would be well in excess of a great majority of the markets analyzed in the *Brown Shoe* case. If Alaska and Hawaii also be included in the marketing area, the market share of the combined company would be further increased because for many years Permanente was substantially the sole supplier. Even after Ideal entered the Alaska market, Permanente held a dominant position.

Respondent's other attack on the geographical area was criticism of the adoption of the freight break-off point as a southern boundary in the Kelso-Kalamas area. According to Dr. Mund, the freight break-off line in no way governs the logical marketing areas for geographically separate producers, and its consideration in no way benefits the consumer. As a practical matter, the delimitation of West Washington encompassed substantially more than 90% of Olympic's sales and excluded substantially all of the sales of Oregon Portland Cement Company and the Irvin and Metaline Falls Plants in East Washington.

The doctrine of the *Crown Zellerbach* case [59] is that sales are significant—not abstract economic theory. Hence, the boundary drawn in the complaint effectively delimits the area of overlapping sales, even though sales or offers to sell outside that area may have had some impact on prices within it.

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[59] *Crown Zellerbach Corporation* v. *F.T.C.*, (9 Cir. 1961) 296 F. 2d 800, *cert. denied*, 370 U.S. 937 (1962).

Dr. Mund also asserted that the sales which Olympic made to other cement manufacturers prior to the merger should not be included in determining its share of the market because if they were counted, it would result in their being counted twice; once when the sale was made by Olympic and again when a resale was made by the other cement manufacturer.[60] This too, while it is true if we look at the share of the market solely from the demand side, is not true as a measure of the supply side or the potentialities for competition. That is to say, while Olympic, at one time, may have been willing to sell to its competitor—at a later time adopting a more aggressive sales policy—it may well either seek to increase the uses of cement, thus increasing volume or take competitors' customers.

Most important, respondent's economic expert has ignored the written statements made by respondent's responsible officers, reflecting that the real purpose of the acquisition was to insure *sales leadership* in the *local market* and to maintain its position profitably by eliminating Permanente's sales in West Washington and to achieve this purpose through expansion of the acquired company. One economic commentator recently wrote:

> * * * Indeed, the cases teach that what the acquiring company expects from an acquisition and how it expects to attain its goals represent more relevant facts than descriptive data concerning either company taken in an economic vacuum.[61]

Having disposed of the factual issues relating to the purchase of Olympic, we next deal with the facts established concerning the acquisition of Pacific Building Materials Company (PBM) and Ready-mix Concrete Company (RMC) in Portland.

### III. Acquisition of PBM and RMC. (Count II)

As was the case with the acquisition of Olympic, there is no real dispute that respondent Glacier acquired the assets of PBM and RMC on March 2, 1959. Such acquisition is admitted in Glacier's answer which was adopted by Permanente.

At issue is how Glacier's acquisition binds Permanente and whether it created a reasonable probability of substantially lessening competition in any line of commerce in any section of the country. At the outset, it seems desirable to designate the character of the acquisition and to indicate how Permanente is bound by it.

This acquisition is a forward vertical integration by Permanente and an extension of market acquisition by Glacier. Glacier's acquisition

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[60] This position was apparently abandoned at final argument.

[61] *Betty Boch Mergers and Markets.* 2nd Ed. (1962) *The National Industrial Conference Board,* p. 122. See also *U.S.* v. *U.S. Gypsum Company,* 333 U.S. 364, 395, 396 (1947) and *Brown Shoe Co., Inc.* v. *United States,* 370 U.S. 294 (1962) and Prof. Milton Handler, The Record Association of the Bar of the City of New York, p. 411 *et seq.,* October 1962.

must be so designated because the nature of the ready-mix concrete and the aggregate business in which both Glacier and the acquired companies are engaged is such that competition is strictly limited by the distance between competitors. This follows from the fact that ready-mix cannot be transported more than a limited distance and still remain usable, and that the cost of transportation of aggregates is relatively so much greater than the value of the aggregates that they also cannot economically be transported for any great distance. The distance between Seattle, where Glacier has its place of business and Portland-Vancouver, where PBM and RMC had their plants, is well beyond the distance feasible to transport ready-mix and aggregates as a regular business, so that Glacier and the acquired companies were not in competition with each other for customers.

Glacier is, however, a wholly-owned subsidiary of Permanente which was originally acquired by Permanente for the purpose of insuring to it a beachhead in the Seattle market.[62] Glacier and Permanente have the same president, and the acquisition of PBM and RMC was financed through Permanente and insured for Permanente a greater share of the ready-mix market in Portland. Moreover, Kaiser Industries Corporation, which owned directly or indirectly 39.01% of Permanente's stock, made it clear in its Annual Report for 1958 that it regarded the purchase as Permanente's.[63]

Having determined that the acquisition was, in essence, a forward vertical integration of Permanente's operation through Glacier, the line of commerce involved is next for analysis.

A. *The Line of Commerce*

There are three possible lines of commerce which might be restrained: the cement sold by Permanente to a captive purchaser, the aggregates sold by PBM and the ready-mix concrete sold by RMC. As pointed out under the discussion of facts relating to Count I, it is clear that cement is a separate line of commerce for the purpose of Section 7 of the Clayton Act. Under the same criteria, ready-mix concrete, in light of its peculiar characteristics and use, is also a separate line of commerce. No serious contest has been made on this point except to point to substitute products which are used in various applications in substitution

[62] Permanente's 1958 Annual Report, p. 13 (CX 1b) contains the following: "One initial step in this program [of vigorous marketing] was entry into the growth-hungry Pacific Northwest. A springboard of experience in the area was provided by Glacier Sand & Gravel Company, an aggregates and ready-mix concrete producer purchased in 1944. Two years later a distribution plant was established in Seattle, followed by another in Portland." (Brackets supplied.)

[63] Page 13 of CX 138 states: "Permanente also expanded its sand and gravel operations in the Pacific Northwest with the recent purchase for approximately $1,500,000 of the principal assets of two affiliated firms engaged in the sand and gravel and ready-mix concrete business in Oregon."

for ready-mix or for concrete. However, aggregates present a different problem. Initially, counsel supporting the complaint took the position that river aggregates were so essentially different from pit aggregates that each formed a separate line of commerce. Evidence introduced during the course of the hearings established that there were some characteristics of river aggregates which required less processing. However, counsel supporting the complaint failed to meet the burden of proof required to establish that river and pit aggregates are commercially separate lines of commerce under Section 7 of the Clayton Act. Hence, for purposes of this Count, we regard cement and ready-mix concrete as separate lines of commerce but all aggregates as essentially the same, regardless of source. Thence, we pass to a consideration of the section of the country or relevant market.

B. *The Relevant Market*

Transportation of ready-mix concrete is limited to an even greater degree than is cement. The number of firms competing in a given area is likewise limited by the distance their plant location is from the job to be served. This distance is not the extreme limit that a ready-mix truck could conceivably transport ready-mixed concrete without losing its ability to discharge its load of concrete in workable condition. It is nearer to the distance than an operator would usually dispatch a vehicle without a surcharge.[64] In the Portland-Vancouver area the distance in which a ready-mix plant would deliver without making a surcharge, or the base zone, was a nine-mile circle from the center of the city, excluding the area across the Columbia River into the State of Washington. For destinations outside the base zone, specific community prices are listed and price lists include an instruction to add 25¢ per yard mile from zone limit or closest listed community.[65]

There was, of course, competition from firms outside the nine-mile circle for jobs inside the area enclosed, and there was also competition by firms inside the circle with firms outside for jobs located outside the perimeter. Again, however, the precise area cannot be circumscribed. We must approximate that it is generally the Portland-Vancouver area and suburbs. A similar situation pertains so far as aggregates are concerned. One of the best descriptions of the competition in the relevant market is that which appears in the Report to the Board of Directors[66] which was apparently made before there was any concern that the acquisition would be attacked by the Commission.

[64] Walter Muirhead from Ross Island Sand & Gravel Company, e.g., stated that his company had hauled ready-mix fifty miles but that it did not solicit business beyond six to ten miles. (R 785)

[65] See, for example, CX 64, 65, 66, 68, 80 and 90.

[66] CX 44, Section E, Page 11.

Since it is substantially in accord with the examiner's observation of the evidence presented, it is quoted *in extenso* as follows:

II. *Competition.*

Besides the Company, three other companies engage in production of aggregates at Willamette River front locations: Ross Island Sand & Gravel Co., Willamette Tug & Barge Co., and Portland Gravel Co. Ten additional companies, all significantly smaller in capacity, produce sand and gravel from plants variously located throughout the metropolitan and perimeter Portland area.

Two of the other Willamette River front aggregate producers, Ross Island Sand & Gravel and Willamette Tug & Barge, also engage in production of wet-mix concrete. In addition, Tait & Co. and Tru-Mix Concrete, Inc. are river front wet-mix concrete producers which purchase their aggregate requirements, the former from the Company the latter from Portland Gravel Co. Sever [sic] other companies, all significantly smaller than the river front producers, have wet-mix concrete plants located in the Portland area.

In the opinion of management, the Company is the largest supplier of aggregates to the construction industry within its competitive area, and the Company and Ross Island Sand & Gravel Co. are the two largest suppliers of wet-mix concrete.

Principal competition to the company is derived from river front aggregate and wet-mix producers. Perimeter producers generally possess economic advantages in serving the residential construction users because of shorter hauling distances, but perimeter producers with one exception have insufficient production and delivery capacity to meet the volume and service requirements of building and heavy construction contractors and concrete subcontractors.[67]

Ross Island Sand & Gravel Co., the Company's leading competitor, operates one aggregate and three wet-mix concrete plants. It obtains its aggregate raw materials from owned deposits on Ross Island in mid-Portland. Wet-mix concrete production of the company and Ross Island are estimated to be comparable. No other competitor is a multi-plant producer.

In the ready-mix business, RMC and Ross Island Sand & Gravel Co. were roughly comparable in the amount of their sales and the only companies having substantial business both in the Portland area and in Vancouver. In round numbers, each sold in the neighborhood of 200,000 cubic yards of wet-mix concrete at somewhat over 2.2 million dollars.

In the Vancouver, Washington area, they were the only two effective competitors.

[67] Examiner's note:

Mr. Muirhead of Ross Island confirmed this when he described his main competitors as RMC, Willamette Hi-Grade Concrete Company, Tru-Mix Concrete Company and James A. C. Tait Company, but also testified that there were a number of plants around the perimeter of Portland they would run into on occasion. (R 786)

Mr. Muirhead of Ross Island stated some 95% of his production was delivered in the 9-mile circle around Portland and the 5-mile circle around Vancouver. He also stated that the circles cover an area that has normally been served by the industry in Portland for years. (R 112)

Mr. Slatter of James A. C. Tait Company testified that the bulk of business was within the 9-mile circle. (R 1376)

In Portland and vicinity, the three next largest producers: Tru-Mix Concrete, Inc., James A. C. Tait Company and Willamette Tug & Barge Co., prior to the acquisition, averaged less than 50,000 cubic yards with receipts in the neighborhood of 0.5 to 0.6 million dollars. Eleven smaller firms, whose figures were supplied or estimated, averaged sales of less than half of those mentioned. These for the most part were not equipped to engage in the larger industrial or commercial type developments and were sometimes described as fringe operators.

Thus, in the commercial or industrial building field, PBM/RMC accounted for a little less than two-fifths of the market, and, in the entire field, approximately one-third.

The table attached, as Exhibit B, provides an approximation of the ready-mix concrete sales by the listed companies. While additional companies made sales in competition with these companies, in some instances, the amount of such sales was relatively insignificant when compared to the magnitudes reported.

We now consider some of the competitors' affiliations, the raw material availability, and the ease of entry into the field.

Although one competitor had received a substantial loan from a cement producer, none was affiliated at the time of the acquisition.[68] Ross Island's connection with a cement plant had ended during a depression-induced reorganization.

The situation with respect to supplies of aggregates was that there was ample for all. The larger ready-mix competitors of PBM/RMC all had available sources of aggregates and, while river aggregates were perhaps easier to handle, even the smaller producers either had, or had access to, ample supplies of pit or quarry aggregates.

Entry into the ready-mix business was subject to few obstacles. Trucks and mixers could be purchased on credit at reasonable terms, aggregates and cement were readily obtainable, and a batch plant might be constructed or purchased without a great capital outlay or other difficulty. Hence, the entry into the field was limited primarily by the ability of a prospective ready-mix operator to secure customers for his merchandise. This was difficult as many ready-mix producers had long standing connections with customers who, other things being equal, would tend to remain with their regular supplier.

Having determined that ready-mix is a separate line of commerce, having delineated the market as the Portland-Vancouver metropolitan area, and having described the state of competition at the time of the acquisition, our next concern is the acquisition and its effect.

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[68] Shortly after the acquisition, Oregon Portland Cement Company acquired a half-interest in James A. C. Tait Company.

C. *Circumstances Surrounding Acquisition*

Substantially all of the assets of PBM/RMC were acquired from the trustee of the Pennypacker Estate on March 2, 1959 for about 1½ million dollars. Mr. Pennypacker, prior to his death, had been the directing genius of the two firms which were operated as a single entity and had purchased, for the most part from earnings, interests of former stockholders previously active in the business. This drain on the assets had left the business in such a condition that major repairs to some equipment and replacement of other equipment were required. The present manager, Mr. Melvin Erland, had been assigned to the management after Mr. Pennypacker suffered a heart attack. On the latter's death, Erland realized that added funds would be required to operate the enterprise efficiently. Several attempts were made by the trustee to sell the business, one to a freighting firm and another to Oregon Portland Cement Company. The latter sought, at first, to buy in conjunction with two of the large ready-mix competitors but later, for its own account. After a considerable period of time following Mr. Pennypacker's death, it was determined that a sale to Glacier which had the financial backing of Permanente, and a president in common, was most advantageous to the estate.

While a sale was deemed necessary by Erland and the trustee for successful operation of the business, the two companies were by no means on the verge of bankruptcy and might well have been successfully financed in some other manner, had serious attempt been made to do so. Erland, however, indicated that no effort had been made to secure assistance through some leading institution other than the trustee. Erland was a capable and experienced operator and the business had had a prosperous history. There was no substantial or reliable evidence that, but for the purchase by Glacier, PBM/RMC would have disappeared shortly as a substantial competitive factor in the Portland-Vancouver market. With the character of the acquisition and the financial position of the acquired company described, we next evaluate what effect the acquisition had on any line of commerce.

D. *Effect of the PBM/RMC Acquisition*

1. *Cement Sales*

In determining what the reasonably probable effect of the acquisition will be, we first turn to what the acquiring parties expected. As in the case of the Olympic purchase, a careful study was made before the purchase was authorized. This study found its way into a recommendation to the Permanente Board of Directors which stated in part:

**Glacier purchased 200,000 barrels of cement from Permanente in 1957. In 1958 they will purchase 186,000 barrels of cement. We believe by virtue of purchasing**

PBM and RMC, we will increase our sales in Portland from 178,000 barrels to 400,000 barrels a year. The incremental increase of 222,000 barrels will increase our earnings of the sale of cement at Portland by approximately: $1.14 per bbl.×222,000=$250,000.[69]

This shows very clearly that a purpose and the anticipated effect of the purchase was to increase Permanente's sales of cement in the area to a captive purchaser.

The impact on the market and consequently the intended lessening of competition from other suppliers of cement is even more clearly shown in Mr. Marsh's memorandum dated November 19, 1958 to Mr. Trefethen, another Permanente official, when the acquisition was under consideration. Marsh stated in part:

In and around Portland and Vancouver, Washington, the cement demand is about 800,000 barrels a year. In 1958 Permanente Cement Company is participating in about 178,000 barrels of this demand or 22%. In the event that we were to acquire these facilities, it would be possible for us to increase our participation in the market to 400,000 barrels or approximately 50%.[70]

Thus, according to the expectation of Permanente's general manager, the acquisition would have the possible effect of increasing Permanente's share of the Portland-Vancouver market for cement from 22% to 50%. We infer from such a recommendation made by as experienced a person as Mr. Marsh that the predicted reduction in the share of other companies [71] marketing cement in the Portland-Vancouver area is reasonably likely to occur.

Certainly, so far as PBM/RMC were thereafter concerned, there was a decided shift from Oregon Portland Cement Company to Permanente as a source of supply [72] as Erland put it:

Q. You do purchase cement from other companies than Permanente?

A. Yes.

Q. Under what circumstances?

A. When the customer specified any particular brand of cement to be used in the concrete that he buys, well, we put in whatever brand he specified.[73]

The impact of capturing the business of one of the two largest ready-mix companies also seems likely to induce other companies selling cement to engage in forward vertical integration for the purpose of reaching the ultimate consumers who buy cement in the form of ready-mix concrete. There has been further integration in the Seattle area

[69] CX 43a–b.

[70] CX 37d.

[71] Prior to the acquisition the market for Portland was primarily served by Oregon Portland Cement Company and Permanente. Since then, Ideal has opened a distribution facility in Vancouver, Washington and Caleveras Cement Company has shown signs of attempting to sell in the Portland-Vancouver metropolitan area.

[72] In 1958, Oregon Portland Cement Company sold about 140,000 bbls. to PBM/RMC. By 1960, this had dropped to about 3% of that amount. In 1960, Permanente sold PBM/RMC 310.895 bbls. or 99% of its requirements.

[73] (R 5660).

where now both of the largest ready-mix concrete companies are owned by cement companies.[74] Similarly, in the Portland-Vancouver area, Oregon Portland Cement Company purchased a one-half interest in James A. C. Tait Company and there is still a reasonable probability that some further integration will take place.[75]

2. *Price Competition in Ready-mix Concrete*

Although in the cement supplier line of commerce the probable effect seems clear, the reasonable probability of substantial lessening of competition among the ready-mix producers in the Portland-Vancouver area is more difficult to predict. A large segment of the proof dealt with price competition among ready-mix dealers after the acquisition.

After the merger took place, funds were available to PBM/RMC and price changes were discussed with Glacier officials. In some cases, Mr. Marsh, the president of both Permanente and Glacier, was consulted. Thus, there was an opportunity to change the impact on the captive business of the largest ready-mix company. Certainly, price policies would, in all probability, accord with Permanente's overall objectives. Permanente did not expressly state what those objectives were except to sell more cement and thus secure a greater share of the market. We are left to infer, from what actually occurred, whether there was a reasonable probability that competition in the ready-mix line of commerce would be substantially lessened or a monopoly promoted as a result of the acquisition. One way of determining it is to see what occurred.

Between the signing of the contract in February 1959 and the closing on March 2, 1959, covering the purchase of assets of RMC and PBM, there was a dip in prices from the price lists of January 1958 amounting to about a dollar and three quarters a cubic yard of concrete. Erland's version of the information he received was:

> * * * the original cut was made on February 18 by Willamette Hi Grade Concrete Company. It was followed by Ross Island Sand & Gravel, and, then, as days wore on, we found out that all the other operators were making the similar cut due to the fact they had to to [sic] hang on to their customers. We maintained our price list, we were having nothing but difficulties, the customers were calling in, they wanted to continue to buy from us, but under these kind of differentials in prices, it would be impossible. We persuaded them to continue on. Glacier Sand & Gravel Company took over our company, then, on Monday, March 2, and it was discussed back and forth regarding this price war. We could

[74] Lone Star now owns Pioneer Sand & Gravel Co. and Permanente owns Glacier.

[75] Shortly after Permanente acquired PBM/RMC, Oregon Portland Cement Company purchased a half interest in the James A. C. Tait Company because it was concerned over the trend of acquisitions of ready-mix customers by a competitor. This was so, although this trend consisted of only two acquisitions almost 15 years apart. Similarly, Ideal indicated in its Annual Report that it was watching recent instances of cement companies buying or building ready-mix concrete and concrete products plants.

see it was something that had happened and was not going to correct itself immediately and for us to continue to stay in business and hang onto our accounts, we had to do something about it. So, on March 6 we established a new price of $1.75 discount off our previous price list and went out to meet our competition.[76]

Although Garside testified that he had heard PBM/RMC had dropped their price about a week after Willamette and Ross Island, Erland was certainly in a better position to know what instructions he had given. Hence, we find that PBM/RMC made no attempt to disrupt the market in February and March 1959. To the contrary, it was to the interest of Permanente to have a stable market at a relatively high price so that it could sell its cement in reasonable assurance that it would receive payment for it without credit loss from PBM/RMC and from its other customers.

The manner in which PBM/RMC[77] changed its price list is an indication that its purpose was to prevent continuance of price cutting by issuing a price sheet with lower prices and also by indicating that they did not regard the lower price as satisfactory. They did this by continuing to use the old price lists but striking out the printed figures and substituting others in pen or typewriter. As Erland phrased it, discussing new price lists which were ordered in April 1960:

* * * we were still on [sic] the hopes that this reduced price of $1.75 a yard would not continue, so we had, we were out of our January 8, 1958, price lists, so we had new price lists printed showing our January 8, 1958, prices which, as we needed additional price lists in the field then, we merely typed out the January 8 price, and typed in our going price, which, at the time, was a reduction of $1.75 a yard. Our new price lists that we ordered in May of '59 were also, where it says here "Effective January 8, 1958", that was left out, and we typed in, then, the effective date of March 6, 1959.[78]

This lower price prevailed throughout the summer of 1959 and into the late fall. Then Erland observed a further "softening of the market" and by December 14 "could see where the price had depleted itself to at least another 40 cents a yard cut * * *"[79] Hence, again, PBM/RMC issued a new changed list (still crossing out the old prices and putting in the new ones) reducing the price another 40 cents a yard.

Again, the maneuver was successful and Erland testified:

Well, it seemed like we established the base price then, that there wasn't much cutting from outside on the large jobs.[80]

Following the price reductions, several of the ready-mix companies in business, at the time of the acquisition, ceased operations or sold out

[76] (R 5766).

[77] PBM/RMC is hereafter sometimes used to designate the division of Glacier which was operated as a separate entity after the acquisition.

[78] (R 5784).

[79] (R 5786).

[80] (R 5788).

to some other operator. A number of others testified that such prices were below their costs and that they would be operating at a loss if they continued to sell at such prices. PBM/RMC, after maintaining this price for about a year, realized that it could not continue to sell at such a low price. Again, adopting Erland's testimony:

> * * * we just couldn't see selling concrete at 10.70 for a five-sack mix, so discussing it, why, we decided regardless of what the other people did, we would change ours. On January 3, 1961, we raised our price $1.95 a yard, and we had price lists printed to that effect and mailed to our trade.[81]

Results of this January 3, 1961 price rise were, according to Erland:

> * * * we were criticised quite a bit. They could buy it elsewhere cheaper. We no doubt lost quite a few accounts, but as time wore on, why there were several new price lists entered the field from our competition also raising their price in the proximity of ours, and on all the small jobs, or not all the small jobs, but a lot of small jobs we had been able to get this price. On any bid job 500 yards and above, we cannot get this price.[82]

This testimony related to the Portland price. In Vancouver, Washington, Erland testified:

> * * * we tried to maintain that price for several months with no deviations. * * * We found out along the middle of the year we couldn't do it, our volume was falling off terrifically.[83]

In January of 1962, after hearings commenced in this matter, PBM/RMC followed Tualatin and Willamette in another price rise of 55 cents a yard. This was effective only on small jobs. On bid jobs lower prices were offered.[84]

Thus, according to the testimony of respondent Glacier's vice president and general manager of its PBM/RMC division, Glacier was interested in stabilizing the price of ready-mix concrete. It first undertook this stabilization by dropping the price and making up a price list which had the appearance of being merely temporary. This was done twice by scratching out the former prices of January 1958 and substituting by striking through and writing in the new prices once in March and again in December. This formalization of a price change, as Walter Muirhead stated, had the effect (since PBM/RMC was a large operator) of placing a formal ceiling on prices. As to the second cut, Erland admitted: "* * * it seemed like we established the base price then * * *."[85] Thereafter, after a year of discipline, with some success, particularly on jobs where there were small purchasers, Glacier's PBM/RMC division raised the prices to a point where it

[81] (R 5788 and CX 66).
[82] (R 5789).
[83] (R 5790).
[84] (R 5790–91).
[85] (R 5788).

could profitably continue. While it was not established statistically that Glacier's PBM/RMC division far out-distanced its competition, nor that the discontinuance of some of the smaller firms were the direct result of the acquisition,[86] it is quite clear that Glacier, after further discussion,[87] took steps to stabilize and then to raise the price in the Portland-Vancouver market. Since this occurred after the acquisition, with the result that the price level was affected, and, since that result would be favorable to Permanente, it was reasonably probable that the result which did take place would take place.

In making this finding, based primarily on the testimony of Glacier's own representatives, and reasonable inferences drawn therefrom, we find it unnecessary to resolve the conflict between the testimony of Erland and that of Parker as to the alleged statement by Erland in the summer of 1959 that he was again going to cut the price[88] which Erland said he did not recall.[89] We also find it unnecessary to determine whether or not the discontinuance of certain ready-mix companies was proximately caused by the acquisition.

Having found that it was probable that some effect on competition, so far as ready-mix prices are concerned, we return to again consider the effect, if any, of the acquisition on aggregates.

3. *Aggregates*

As to aggregates, we find that there is no evidence that the acquisition would probably result in lessening competition or tending to create a monopoly. As pointed out in considering aggregates, we see no valid commercial distinction between river and pit aggregates. Considering aggregates as a whole, we find that there is an ample available supply of aggregates—that there is no indication that Permanente or Glacier's control of additional quantities would affect the market. Nor is there credible evidence that, in practice, any such restraint occurred. River aggregates are dredged under license from the State and the U.S. Army Corps of Engineers. There is no indication that additional licenses cannot be procured or that the supply of aggregates is soon likely to become exhausted. In addition to the river aggregates, there are a substantial number of pits in the area where gravel can be quarried. There have been no spectacular price changes established and no indication from any witness that his business has been adversely affected. Hence,

[86] (R 1125) Mr. Victor Johnson, for example, testified that he had ready-mix business in the Beaverton area in 1959, and very soon quit because "we weren't strong enough financially, I guess, to feel that we could continue indefinitely in such an uncertain market."

[87] We infer from this that Mr. Marsh, Glacier's president, who was also Permanente's president was consulted and approved the course, which he felt was most likely to result in the increased sale of cement by Permanente. (See R 5850 as to discussions in December 1959).

[88] (R 1449).

[89] (R 5812–13 and 5851)

we find that there was no tendency in connection with the purchase of the aggregate assets apart from the balance of the business and assets of PBM/RMC to restrain competition or tend to create a monopoly. In making this finding, we also find that, while the assets obtained from PBM were primarily aggregates, the assets of both PBM and RMC had been so integrated as a single business in practice, that it would be impractical to divide them.

E. *Position of Respondents*

In addition to the 85-page brief, respondents submitted detailed findings of fact consisting of 36 printed pages and 106 separate findings on Count II. The substance of a large number of these findings has been adopted by the hearing examiner, although not in as great detail as proposed. A number of respondents' proposed findings, however, require some discussion.

With respect to respondents' proposals concerning Permanente's position, it is clear that respondent has engaged in interstate commerce and that its cement sales have been intimately connected with the operations of Glacier, both before and after it acquired PBM/RMC. It is also clear, as has elsewhere been pointed out, that Glacier acted as a conduit and, in respondents' words, "springboard" for Permanente's entry into Washington State. It was thus an extension of Permanente's interstate business, and its purchase of PBM/RMC was financed by Permanente and expressly intended to enhance Permanente's share of the cement market in Portland. It was thus, at all times, important to this proceeding, operating in aid of Permanente's interstate business.

With respect to respondents' proposed findings relating to the business history of PBM/RMC prior to their acquisition by Glacier, it is found that there had been a substantial drain on their assets by reason of the death of two of the original three major stockholders, and that on the death of the sole remaining stockholder, there was need for additional liquid assets to rehabilitate the equipment.

It is also found that prior to the death of the then major stockholder, there had been discussions concerning the sale of the company to Oregon Portland Cement Company and to Consolidated Freightways. It is further found that the United States National Bank, the executor, and trustee, regarded it as desirable that the companies be sold. It acquiesced, in the instructions of the widow of the major stockholder, that the sale be made to Glacier rather than to Oregon Portland Cement Company. This was because of her fear that many of the employees would lose their jobs, should Oregon Portland Cement Company bring in as partners in the enterprise Ross Island Sand &

Gravel Company and Willamette Hi-Grade Company. This partnership had been contemplated at one time. While it is true that the acquisition was regarded as a good investment and was not established to be part of a general plan to acquire aggregates or ready-mix contract business, the acquisition nevertheless was designed by Permanente to increase its share of the sales of cement in the Portland market. Permanente was successful in accomplishing its designed purpose.

Respondents' findings regarding competing producers of ready-mix concrete, are found to the following extent:

At the time of the acquisition, the competitive situation was substantially as reported in Marsh's report to the Board of Directors, hereinbefore quoted at length. While there were other ready-mix companies which, at times, entered into competition and were capable of shipping ready-mix concrete into metropolitan and suburban Portland, these firms were, in the language of Permanente, significantly smaller and without sufficient production and delivery capacity to meet the volume and service requirements of building and heavy construction contractors and concrete sub-contractors. Hence, both in establishing the geographical area of competition and the share of the market, their figures are insignificant.

With respect to respondents' findings relating to the price war in progress at the time of the acquisition, it seems clear that this was not of PBM/RMC's making. However, it is also clear that in December 1960 PBM/RMC decided to establish a base price. It did so by revising the prices on a previous price list. This had the effect of placing a ceiling on the prices of all other ready-mix producers in the area.

Respondents' proposed findings, relating to the changes of ownership in or termination of the business of some of the competing ready-mix producers, are found to the extent that, in many cases, there were reasons other than Permanente's action in reducing the price which contributed to their change in ownership or failure to continue in business.

Having now determined that facts have been established which demonstrate that each of the acquisitions have had the probable effect of lessening competition in the manner described, our next concern is to state our conclusions from such facts and the legal effect of such facts.

## CONCLUSIONS

The Federal Trade Commission has jurisdiction over the persons of respondents and of the subject matter of this proceeding. The proceeding is in the public interest and the facts found are supported by substantial and reliable evidence.

A. *Jurisdiction*

On the question of jurisdiction a recent authoritative decision now makes it clear that both the acquired and acquiring company must be engaged in interstate commerce.[90] The facts establish that there was such jurisdiction.

Glacier contends that it was not in interstate commerce at the time of the acquisition because the cement it purchased came to rest in its silos and its products were sold with a minor exception only to persons within the State of Washington. This is the only company involved which has even a colorable claim to lack of jurisdiction.

Glacier's colorable claim to lack of jurisdiction, however, has no real validity. It was acquired by Permanente in 1944 as an assured market for Permanente cement in Seattle and its environs. It thus was intended to and acted as a conduit for the sale of cement (mixed with aggregates in a ready-mix truck) to customers to whom Permanente did not sell directly. To the time of the acquisition of PBM/RMC, Glacier continued to purchase its cement from Permanente (except where customers specified another supplier) and continued its role as a conduit for the cement, (some of which was produced in California) to the ultimate consumer. It was also a tool in Permanente's extension of its marketing in the Pacific Northwest when it acted to purchase PBM/RMC. This acquisition, much as was the case with Permanente's purchase of Glacier, was designed to obtain a 50% participation in the Portland, Oregon, Vancouver, Washington, market for Permanente's cement. Permanente assisted in financing the acquisition and its president was also president of its wholly-owned subsidiary Glacier at the time. We, therefore, disregard the corporate fiction between Permanente and its wholly-owned subsidiary as otherwise the purpose of the statute could not be effected.[91] Section 7 of the Clayton Act clearly prohibits acquisitions indirectly achieved as well as those which are accomplished directly by a corporation engaged in interstate commerce.

The Commission possesses such jurisdiction as may be necessary to effectively divest a purchase even when legal title is taken in a subsidiary which at the time of the purchase was limiting its sales effort of ready-mix concrete to an area wholly within the State of Washington. At the time of suit, Glacier was clearly engaged in commerce

[90] *In the Matter of Foremost Dairies, Inc.*, Docket No. 6495 opinion by Chairman Dixon dated April 30, 1962 [60 F.T.C. 944, 1049].

In *Report on Mergers and Acquisitions*, May 1955, p. 151, the Commission had taken the position that any acquiring corporation regardless of whether or not it was engaged in commerce might be subject to the act.

[91] See *National Labor Relations Board* v. *Deena Artware, Inc., et al.*, 361 U.S. 398 at 403 (1960).

among the States of Washington and Oregon. Glacier moreover, was at all times since its acquisition a mere extension of Permanente's interstate business and thus engaged in interstate commerce, as such. Hence we find no merit in Glacier's claim that it cannot be made a party respondent in this matter, or that its part in the purchase of PBM/RMC cannot be challenged.[92]

Respondents' contention, that there was neither proof that Glacier and PMB/RMC were engaged in interstate commerce or that it was reasonably probable that interstate commerce would be affected, is an attempt to apply a technical legal conception contrary to Judge Holmes' admonition that: "* * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business."[93]

Practically Glacier was a wholly controlled riverlet in the stream of commerce flowing from Permanente's plant in Permanente, California to customers in Washington.[94] PBM/RMC were likewise conduits in their case located with plants astride the boundary between Oregon and Washington and passing communications as well as products daily across the state boundaries, as we infer they must, to operate such plants with centralized control.

The effect which actually occurred after the purchase was to increase the flow of interstate commerce from California into both the Vancouver, Washington and Portland, Oregon plants of PBM/RMC and to decrease the flow from Oregon Portland Cement Company to the Vancouver, Washington plant. Thus it was interstate commerce which felt the pinch.[95]

There is no merit in respondents' denial in the complaint (eventually withdrawn) that Olympic is a corporation under Section 7 of the Clayton Act. Admittedly it engaged in making sales in interstate commerce. Its foreign domicile is no bar since it was actually engaged in the quarrying of limestone and the production and sale of cement in the State of Washington, and was qualified to do business there. Olympic was present and subjected itself to the laws of the State of Washington and also to the laws of the United States to the same extent as if it had been originally incorporated in that state.

Although there was some argument that RMC apart from PBM was not engaged in commerce, this claim is equally invalid. Factually PBM and RMC were so intermingled that they must be regarded as a

[92] Compare *F.T.C.* v. *Cement Institute,* 333 U.S. 683, 696 (1948) re: Claim of Superior Portland and Northwestern Portland Cement companies.

[93] *Swift & Company* v. *United States,* 196 U.S. 375, 398.

[94] See *Standard Oil* v. *Federal Trade Commission,* 173 F. 2d 210, 214 (7th Cir. 1949), 340 U.S. 231, 237 (1951).

[95] *United States* v. *Women's Sportswear Manufacturers Association,* 336 U.S. 460 (1949).

single entity. More important, RMC was actually astride the boundary with its main plant in Portland, Oregon and its secondary plant in Vancouver, Washington just across the river. Although each mixed cement and made delivery on its own side, the central direction compels the conclusion that interstate communication and thus commerce[96] was constant.

B. *The Prima Facie Case*

Counsel supporting the complaint has established a prima facie case by a preponderance of the evidence. The data contained in the findings of fact heretofore set forth support the ensuing conclusions.

The statistical data and the testimony and the corporate reports and memoranda offered by counsel supporting the complaint, are adequate to establish the approximate extent of the market in which each of the acquisitions took place, and the approximate shares of each of the companies involved in the acquisitions. Such figures are not and cannot be determined except approximately in the absence of procedure, which will require counsel to admit, under appropriate sanctions, data properly proposed.

The following are separate lines of commerce within the meaning of Section 7 of the Clayton Act:[97] Portland Cement, ready-mixed concrete and aggregates (including both Pit aggregates and River aggregates).[98]

*Count I—Olympic*

The relevant market or section of the country affected by the acquisition of Olympic for the purpose of determining the competition between Olympic and Permanente is that marketing area in which Olympic regularly made the great bulk of its sales.[99] That area consists of that portion of the western section of the State of Washington roughly bounded on the north by the Canadian border, on the east by the Okanagon and the Columbia Rivers; on the south by the Columbia River (excluding the Portland, Oregon Vancouver, Washington trade area) and on the west by the Pacific Ocean. At the date of that acquisition, at the date of the commencement of suit, and at the date of the close of the hearings, it was a reasonably probable consequence of the acquisition that competition between Permanente and Olympic would be destroyed in the West Washington market.[100] That competition was

[96] See *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533 (1944).

[97] See *United States* v. *du Pont & Co.*, 353 U.S. 586 (1957); *In the Matter of Foremost Dairies, Inc.*, Docket No. 6495, April 30, 1962 [60 F.T.C. 944].

[98] Compare *Erie Sand and Gravel Company* v. *Federal Trade Commission*, opinion by Judge Hastie, 291 F. 2d 279 (3rd Cir. 1961).

[99] See *Hamilton Watch Co.* v. *Benrus Watch Co., Inc.*, 114 F. Supp. 307, 206 F. 2d 738 (2nd Cir. 1953).

[100] *Crown Zellerbach Corporation* v. *F.T.C.*, 296 F. 2d 800 (9th Cir. 1961), *Cert. denied*, 370 U.S. 937 (1962), *In the Matter of Foremost Dairies*, Docket No. 6495 [60 F.T.C. 944].

substantial. The combined shares of the West Washington market possessed by the two companies exceeded 50%. Permanente has indicated its intent to and has actually diminished the flow of cement into West Washington. Moreover, the acquisition was the very type of transaction which Section 7 of the Clayton Act was designed to prevent. It closed the last gap to oligopolistic control by three exceedingly large companies. Concentration was substantially increased. It engulfed the last "independent" company having a supply of limestone in West Washington adequate to support cement production. Thus, it was thereafter difficult, as a practical matter, for a new concern to enter the market as a West Washington cement producer. Moreover, even if as respondent contends, the relevant market for the Olympic acquisition be deemed more extensive than the western portion of the state of Washington, there was still a substantial *diminution* of competition reasonably *probable* in such a larger area. No longer would there be effective competition between Permanente and Olympic and their combined share regardless of how calculated would be very substantial in any area which, it could be plausibly argued, was a proper section of the country for the purpose of testing the acquisition under Section 7 of the Clayton Act.[101]

*Count II—PBM/RMC*

Somewhat different criteria from those controlling the Olympic purchase apply to the acquisition by Glacier and Permanente of PBM/RMC. The lines of commerce under Section 7 of the Clayton Act include in addition to Portland Cement, ready-mix concrete and aggregates. The appropriate section of the country or relevant market is metropolitan and suburban Portland-Vancouver.

This acquisition so far as Permanente is concerned, is a forward vertical acquisition and so far as Glacier is concerned, a market extension acquisition.[102] Since neither Permanente nor Glacier was directly in competition with *PBM/RMC* there is no *diminution* of competition between the acquired company and the acquiring one. There is, however, a reasonable probability of a diminution of competition between Permanente and other cement suppliers, and between ready-mixed concrete producers in the Portland, Oregon, Vancouver,

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[101] As the Circuit Court for the ninth circuit recently pointed out: "Congress expressed a mood that acquisition of a rival firm by a larger one, resulting in a substantial increase in the concentration of power in the absorbing concern, is to be prohibited for the reason that such increased opportunity will probably lessen competition or tend to create a monopoly." *Crown Zellerbach Corporation* v. *F.T.C.* 296 F. 2d 800 (9th Cir. 1961) *Cert. denied* 370 U.S. 937 (1962). The Court held in effect that such an acquisition was almost a *per se* violation for it stated: "This alone justified the Commission's finding that the reasonably probable result of the acquisition would be substantially to lessen competition and to create a Monopoly".

[102] *In the Matter of Foremost Dairies,* Docket No. 6495, opinion of Chairman Dixon dated April 30, 1962 [60 F.T.C. 944, 1049].

Washington area. This reasonable probability arises from the fact that, as recommended to the Board of Directors, one of the anticipated results of the purchase of PBM/RMC was to increase Permanente's share of the cement market in the Portland Vancouver area from 22% to 50%.[103] That is a substantial share of the cement sales to ready-mix concerns in the Portland Vancouver area. By respondents' own admission, and in the recommendation for the purchase, the respondents regarded the area as a market. Others in the field including Oregon Portland Cement Company Calaveras and Ideal would thus have a reduced share if the intended result were effectuated.[104]

Equally detrimental to competition is the fact that by this forward vertical integration Permanente is likely to start a trend, whereby large multiplant cement companies would purchase their own outlets for ready-mix concrete and thus swallow up the independent small businessmen who had heretofore operated the ready-mix business. Two such purchases have already been made. Further, the facts demonstrate that it was reasonably probable that Permanente, through PBM/RMC, would take the lead in first stabilizing the market by issuing temporary price lists placing a low ceiling on prices and after accomplishing its purpose raising the prices to a point where profit could be assured. On respondent Glacier's Vice President's testimony this seems to have been what occurred. Viewed against the background of price cutting which pre-existed the acquisition and against the background of Permanente's interest to secure more and more cement sales to prosperous purchasers, it was reasonably probable that this activity to reduce the price competition among the ready-mix producers in the Portland, Vancouver area would occur. It would thus substantially lessen competition by inducing such ready-mix producers to follow the price *list* of PBM/RMC which was the first or second concern in the field and one with substantial cement company backing. Once having occurred, the probability of repetition in the future is enhanced.[105]

While we do not find the evidence sufficient to conclude that there will probably be a substantial lessening of competition in the aggregates line of commerce, we do conclude that PBM and RMC were prior to the acquisition, and thereafter, run as a single entity despite their original corporate duality. Moreover, we find that their activities are so integrated that it would not be feasible to sell the assets of one without the assets of the other. There would not be a unit capable of re-

[103] Respondents' own anticipated result distinguishes this matter from that present in *Scott Paper Company* v. *F.T.C.* (3rd Cir. 1962) 301 F. 2d 579, and *In the Matter of Procter and Gamble,* Docket No. 6901 [63 F.T.C. 1465].

[104] See *In the Matter of Union Carbide Company* (Docket No. 6826) [59 F.T.C. 614] *United States* v. *du Pont & Co.,* 353 U.S. 586 (1957).

[105] Compare *Reynolds Metals Company* v. *F.T.C.* (D.C. Cir. Sept. 27, 1962).

storing competition to its pre-acquisition state if the assets of one only were ordered sold. Hence we conclude that the assets of both PBM and RMC must be disposed of as a single transaction.

Our conclusion, that the facts presented demonstrate that the reasonably probable effect of each of the acquisitions will be to substantially lessen competition or to tend to create a monopoly, in appropriate sections of the country and in specified lines of commerce leads us next to consider the arguments presented by respondents as reasons why such acquisitions are not in violation of Section 7 of the Clayton Act.

C. *Respondents' Contentions on the Law*

In addition to raising questions as to the jurisdiction of the Commission, dealt with initially in these conclusions, respondents raise three principal legal issues: (1) The pleadings are at variance with the proof. (2) The facts established do not support a prima facie case. (3) There are mitigating circumstances which either take the acquisitions out of the class prohibited by Section 7 of the Clayton Act, or affirmatively justify them. We deal with each of these in turn.

1. *The Variance From The Pleadings*

Respondents argue, as they did on their motion to strike and motion to dismiss which are denied, that the facts established are not in accord with the pleadings and that, consequently, respondents were not given notice and opportunity to defend. This argument is primarily based on the variance between the effects charged and those established. No argument was made that all of the alleged effects need be established. The argument was directed primarily to the contention that the complaint charged a restraint in one line of commerce and counsel supporting the complaint established others. A short answer to this is that the acquisitions were identified and there was an express charge of violation of the Act. Probable effects need not be alleged in detail. Moreover, at least one of the charged effects in each count was found to be probable in the very terms charged. Any one of the effects would be adequate to support the charge of violation. In addition, even if the complaint had been poorly drafted, the variance would not be fatal as Chairman Dixon recently stated:

> While poorly drafted and probably inadequate in a court proceeding, the complaint is doubtless sufficient before this body since "Pleadings before the Commission are not required to meet the standards of pleadings in a court where issues are attempted to be framed with a measure of exactness which is designed to limit the broad sweep of investigation which characterizes the proceedings of administrative bodies * * *." (*A. E. Staley Mfg. Co., et al* v. *Federal Trade Commission*, 135 F. 2d 453, [7th Cir. 1943]).[106]

[106] *In the matter of Paul J. Lighton, et al.*, Docket No. 8305, Apr. 25, 1962 [60 F.T.C. 821].

In any event, respondents were given ample intervals,[107] after complaint counsel's evidence was completed. They cannot now properly claim that they did not have an opportunity to defend after full knowledge of the case they had to meet.

2. *The Burden of Proof*

Respondents argue correctly that complaint counsel must establish each of the elements of the charge against them by a preponderance of evidence. They charge that in both Count I and II neither the section of the country or probable effects are so established. In Count II, in addition, respondents claim, that the line of commerce has not properly been delineated in the complaint or in the proof.

Complaint counsel soundly supported its position under Count I that West Washington as defined in the complaint is an appropriate section of the country by introducing evidence, largely from respondents' records, demonstrating that the major impact of overlapping sales between the acquired and acquiring company occurred in that area.[108] They also established that the other companies with plants in that area sold the products of such plants principally in that area and that those with plants outside that area shipped but a small proportion of their cement into the area. The history and structure of the industry was adequately set forth and the shares of the acquired and acquiring company in the delineated area were established by competent evidence.

The witnesses producing evidence were subjected to skilled cross-examination which disclosed some variation in the precise boundaries selected by the competitors. These variations, however, although they constituted "technical flaws", did not change the "broad picture" and were thus "adequate for making the determination required by Section 7."[109]

The probable effects of the Count I acquisition were established by contemporaneous documents from Permanente's files showing among other matters that sales leadership was a desired end and that Permanente eventually intended to cease shipping into the area. This prediction was bolstered by statistics demonstrating that as Olympic's sales increased Permanente's shipments decreased.

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107 At respondents' request an interval from March to June 1962 was granted during respondents' case to convenience respondents' expert who was actively engaged until then as a full time professor at the University of Washington. Assuming that initially counsel did not expect the type of evidence offered, which seems unlikely since the documents containing it were from respondents' files, three months was quite enough to reply if a reply was available.

108 *Crown Zellerbach Corporation* v. *F.T.C.* (9th Cir. 1961) 296 F. 2d 800, *Cert. denied,* 370 U.S. 937 (1962).

109 *Brown Shoe, Inc.* v. *U.S.*, 370 U.S. 294 (1962). Respondents also claim, that by reason of the inclusion of part but not all of the so called Columbia River Basin, Permanente's share of the market was distorted. The figures for Washington State as a whole demonstrate that the so called distortion does not materially change the broad picture.

Complaint counsel also sustained its burden on Count II both as to the area and the probable effects by introducing the contemporaneous report to Permanente's Board of Directors which both delineated the competition in the area and predicted the result which actually took place. Permanente predicted, and statistics demonstrated, that PBM/RMC would become a captive customer and thus exclude other cement plants from its custom. As PBM/RMC was either the largest or next to the largest producer of ready-mix in the area, this effect significantly affected the market in cement in the Portland-Vancouver area.[110]

A reading of Count II as a whole makes clear that ready-mix is the type of concrete referred to as the line of commerce. Ready-mix concrete, although there are many substitutes, has peculiar characteristics and is an appropriate line of commerce for the purposes of Section 7.[111]

As to this, complaint counsel also produced statistics adequate to demonstrate the broad picture and the testimony of Glacier's PBM/RMC manager which made it clear that following the acquisition of PBM/RMC, after discussion with Permanente's president, exercised price leadership over the ready-mix market in the Portland-Vancouver area.

3. *Alleged Mitigating Circumstances*

Respondents argue from the first sentence of the last full paragraph of Chief Judge Warren's opinion in *Brown Shoe* [112] that there

[110] See *U.S.* v. *du Pont & Co.*, 353 U.S. 586 (1957), 366 U.S. 316 (1961).

[111] Judge Weinfeld's able analysis sets respondents' contrary contention at rest:

"When the question is power over price, substitute products may be relevant because they can limit that power. The issue under Section 7 of the Clayton Act is not whether a merger may result in a company having power over price or the power to exclude competition. The issue under Section 7 is whether there is a reasonable probability of substantial lessening of competition. There can be a substantial lessening of competition with respect to a product—whether or not there are reasonably interchangeable substitutes." *U.S.* v. *Bethlehem Steel*, 168 F. Supp. 576 (SD NY 1958). *Crown Zellerbach* v. *F.T.C.* (9th Cir. 1961) 296 F. 2d 800, *Cert. denied*, 370 U.S. 937 (1962) adopts this reasoning and distinguishes the Sherman Act Cases of *U.S. v. du Pont & Co.*, 351 U.S. 377 (1956) and *U.S.* v. *Columbia Steel*, 334 U.S. 495 (1948). The court holds in language apt in this case (with the insertion of the words "Building material" in place of "paper") that substitutes are unimportant:

"as a practical matter no one in the industry or interested in it or having anything to do with it has any difficulty in distinguishing one type of paper from another."

[112] *Brown Shoe Company* v. *United States*, 370 U.S. 294 (1962).

"At the same time appellant has presented no mitigating factors, such as the business failure or the inadequate resources of one of the parties that may have prevented it from maintaining its competitive position, nor a demonstrated need for combination to enable small companies to enter into a more meaningful competition with those dominating the relevant markets. On the basis of the record before us, we believe the Government sustained its burden of proof. We hold that the District Court was correct in concluding that this merger may tend to lessen competition substantially in the retail sale of men's, women's, and children's shoes in the overwhelming majority of those cities and their environs in which both Brown and Kinney sell through owned or controlled outlets."

were mitigating circumstances in this case which place the acquisitions outside the sanctions of Section 7.

These alleged mitigating circumstances seem to include all of the economic arguments of Dr. Mund, heretofore discussed and dismissed. In addition, they include a variation of the failing company claim [113] and a challenge to the public interest in the proceeding.

Respondents construe Chief Justice Warren's examples of "inadequate resources of one of the parties" and "demonstrated need for combination to enable small companies to enter into a more meaningful competition with those dominating the relevant markets" as tailor made to fit both of the acquisitions concerned in this case.

As we have heretofore indicated, we do not find that there is a sufficient factual basis to meet either of these conditions. Olympic had ample resources and while PBM/RMC required working capital, there was no proof that it could not have secured it other than by a sale of the company to Permanente and Glacier. A sale was necessary only because an estate was involved. Olympic had held its own in competition since 1913, and it was making a profit in the years preceding the acquisition. There was no evidence that it needed *combination* to make its competition more meaningful. Even on respondents' own argument, all it required was a desire to offer price competition, rather than its well tried restrained attitude, to make it a price leader in the area. In the case of PBM/RMC, it had been and continued to be one of the dominant factors in the ready-mix business in the Portland-Vancouver area. It needed no combination to make its competition more meaningful.

Finally, and this pervaded respondents' presentation, it was argued that the public interest dictated that Permanente be retained as a strong competitive force in West Washington. This was based on a number of assumptions, none of which were established to the satisfaction of the hearing examiner. We shall deal in a few of these. The first assumption is that Permanente could not have continued in West Washington without a plant in the area. Experience was to the contrary. Permanente remained after it lost the Diamond Plant and its present excess plant and ship capacity by reason of the building of the Hawaii plant makes it almost a requirement that it continue to market in the West Washington area. The second assumption is that if Permanente is not present to offer f.o.b. mill pricing and proprietary truck delivery, its competitors will revert individually to their former practice of selling cement only at destination prices which include

[113] *International Shoe Company* v. *F.T.C.*, 280 U.S. 291 (1930). Other cases indicate that the doctrine is not to be extended beyond the facts there disclosed. *Crown Zellerbach* v. *F.T.C.*, 296 F. 2d 800 (9th Cir. 1961). *Erie Sand and Gravel Company* v. *F.T.C.* 291 F. 2d 279 (3rd Cir. 1961).

freight and thus tend toward price stabilization. Such practices were disapproved by the Commission and the Justice Department. This also has not been established. It seems contrary to human experience to suggest that concessions such as f.o.b. mill proprietary truck delivery, which required a substantial outlay for equipment, will be so easily shut off by the present competitors at the risk of incurring customer ill will. Moreover, the person purchasing the plants on sale if divestment is required, will be unconnected with the competitors and can be counted on to offer inducements necessary to retain customers. With Permanente's success using its unorthodox (to the cement industry) approach, in mind, a purchaser would be foolish to adopt any different system. As to the PBM/RMC acquisition there would seem to be no reasonable basis at all for a lack of public interest contention.

On the other side of the coin, it is very clear that the PBM/RMC acquisition ran contrary to Congress' intention that: "Where an industry was composed of numerous independent units—to preserve this structure." [114] It is also plain so far as the Olympic purchase was concerned that Congress intended to "plug the loophole" which had left asset acquisitions outside the unamended law and "by deletion of the 'acquiring-acquired' language in the original text—hoped to make plain that Section 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers * * *" [115] having the prescribed effects. The "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly".[116] The Olympic merger, far from being a *de minimus* alliance, embraced 58% of the West Washington market as defined and 48% of the entire state of Washington. Moreover, there are only two other effective competitors left. Under such circumstances, "gauged on a broader scale", [117] the probable impact on competition seems decisive.

In somewhat similar circumstances, Chairman Dixon collected the accumulated views of the Commission, commentators and the court,[118] when he said:

> Respondents' argument ignores the fact that as a result of those acquisitions herein found to be illegal, substantial competitors, actual and potential, have been eliminated. As we have previously pointed out, the dairy processing industry is undergoing technological changes which seem to be favoring the large firms. In such an environment, it is especially important that substantial competitive factors not be eliminated from the competitive race. * * * The court, in the *Crown Zellerbach* case, *supra*, set forth in a footnote a quotation from Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, which we consider to be significant on this point:

[114] *Brown Shoe Co., Inc.* v. *U.S.*, 370 U.S. 294 (1962).
[115] Id.
[116] Id.
[117] *Brown Shoe* v. *U.S.* 370 U.S. 294 (1962).
[118] *In the Matter of Foremost Dairies, Inc.*, Docket No. 6495, Apr. 30, 1962 [60 F.T.C. 944, 1080].

"The loss of a substantial firm, however, may of itself induce a reduction in the vigor of competition. For even if new entrants are coming into the market or concentration is for some other reason declining, there will be one less substantial firm that would have existed but for the merger, and an adverse finding under Section 7 is predicated on the presumption that competition would have been benefited had that firm remained independent."

These combined views make it clear that in this case, Section 7 of the Clayton Act has been violated by the Count I acquisition for the following reasons: (a) small business had had a recent history of being displaced with large multiplant firms; (b) the acquired and acquiring firms had been in competition with each other; (c) the opportunity for new entrance into the industry had been reduced, and (d) the withdrawal of Olympic [119] made it probable that competition among the remaining firms would be adversely affected.

In the case of the purchase of PBM/RMC suppliers are foreclosed from a substantial factor in the market to an extent much more significant than in *U.S.* v. *du Pont & Co.*, 353 U.S. 586 (1957).[120]

Moreover, by its activities since the acquisition became effective, PBM/RMC has seized a position of market leadership to the consternation of its small business competitors and to the detriment of competition in the Portland-Vancouver area.

While respondents cannot be said to have built up their position primarily by mergers or acquisitions, the record discloses a sufficient number to require at least premerger notification for an extended period. The habit of merger has not been so confirmed that an order prohibiting all mergers even for a limited time seems necessary.

TERMINAL CONCLUSIONS

1. The acquisition of the stock of Olympic Portland Cement Company Ltd. by Respondent Permanente Cement Company violates Section 7 of the Clayton Act, as amended.

2. The acquisition of the assets of Pacific Building Materials Company and Readymix Concrete Company by Respondent Permanente Cement Company acting through Respondent Glacier Sand & Gravel Company violates Section 7 of the Clayton Act as amended.

3. An order of divestment and an order requiring premerger notification is appropriate.[121]

[119] In a footnote No. 299 at p. 327–328 of 74 HLR Professor Bok suggests:

"Conceivably, supplementary rules might be needed in the rare case where there are only three or four firms in the relevant market. In such cases, the independence of any firm of more than *de minimis* size might be deemed sufficiently important to bar its acquisition (unless the firm was in a failing condition. See pp. 339–47 *infra.*)"

This suggestion is clearly applicable to the Olympic purchase.

[120] See also *Crown Zellerbach Corporation* v. *F.T.C.*, 296 F. 2d 800 (9th Cir. 1961) *Cert. denied*, 370 U.S. 937 (1962) and *U.S.* v. *Bethlehem Steel Corporation*, 168 Supp. 576 (SD NY 1958).

[121] See *U.S.* v. *du Pont & Co.*, 366 U.S. 316 (1961).

ORDER

*It is ordered*, That Respondent, Permanente Cement Company, a corporation, and its officers, directors, agents, representatives and employees, shall, within twelve months from the date of service upon it of this Order, divest itself absolutely, in good faith, of all stock, assets, properties, rights and privileges, tangible or intangible, including but not limited to, all properties, plants, machinery, equipment, raw material reserves, trade names, contract rights, trademarks, and good will acquired by Permanente Cement Company as a result of the acquisition of the stock and assets of the Olympic Portland Cement Company, Ltd., together with all plants, machinery, buildings, land, raw material reserves, improvements, equipment and other property of whatever description that has been added to or placed on the premises of the former Olympic Portland Cement Company, Ltd., as may be necessary to restore the Olympic Portland Cement Company, Ltd., as a going concern and an effective competitor in the manufacture and sale of cement.

Pending divestiture, Permanente Cement Company shall not make any changes in any of the plants, machinery, buildings, equipment, or other property of whatever description, of the former Olympic Portland Cement Company, Ltd., which shall impair its present capacity for the production, sale and distribution of cement, or its market value, unless such capacity or value is restored prior to divestiture.

Permanente Cement Company in such divestiture shall not sell or transfer, directly or indirectly, any of the stock, assets, plants, machinery, buildings, land, raw material reserves, equipment, properties, rights and privileges, tangible or intangible, acquired by Permanente Cement Company as a result of the acquisition of the stock and assets of the Olympic Portland Cement Company, Ltd., or added to, modified, or placed on the premises of the former Olympic Portland Cement Company, Ltd., by or for Permanente Cement Company, to anyone who, at the time of divestiture, is a stockholder of respondent, or to anyone who at the time of divestiture is, or at the time of the acquisition, was an officer, director, representative, employee, or agent of, Permanente Cement Company, Kaiser Industries Corporation, Henry J. Kaiser Company, or of any of their subsidiaries, divisions or affiliates, or to anyone who is connected with, or under the control or influence of, directly or indirectly, the foregoing companies, or of any of their subsidiaries, divisions or affiliates.

*It is further ordered*, That, in said divestiture, respondent shall not sell or transfer, directly or indirectly, any of the stock, assets, plants, machinery, buildings, land, raw material reserves, equipment, properties, rights or privileges, tangible or intangible, to any corporation, or to anyone, who at the time of said divestiture, is an officer, director, employee or agent of such corporation, which, at the time of such sale or transfer, is engaged in the manufacture, sale and distribution of cement.

II

*It is further ordered*, That respondent Permanente Cement Company, a corporation, and its wholly owned subsidiary, Glacier Sand & Gravel Company, a corporation, their officers, directors, agents, representatives, and employees, within twelve months from the date of service upon them of this Order, divest themselves, absolutely, in good faith, of all assets, share capital, stock, properties, rights and privileges, tangible or intangible, including, but not limited to, all properties, all plants, machinery, equipment, raw material reserves, trade names, contract rights, trademarks, and good will acquired by Permanente Cement Company through Glacier Sand & Gravel Company, its wholly owned subsidiary, as a result of the acquisition of the assets of Pacific Building Materials Company and Readymix Concrete Company, together with all plants, machinery, buildings, land, raw material reserves, improvements, equipment, and other property of whatever description that has been added to or placed on the premises of the former Pacific Building Materials Company and Readymix Concrete Company, as may be necessary to restore them as a going concern and effective competitor in the lines of commerce in which they were engaged.

Pending divestiture Permanente Cement Company and Glacier Sand & Gravel Company shall not make any changes in any of the plants, machinery, buildings, equipment, or other property of whatever description, of the former Pacific Building Materials Company and Readymix Concrete Company, which shall impair their present capacity for the production and distribution of their products, or their market value, unless such capacity or value is restored prior to divestiture.

Permanente Cement Company and Glacier Sand & Gravel Company, its wholly owned subsidiary, in such divestiture shall not sell or transfer, directly or indirectly, any of the assets, plants, machinery, buildings, land, raw material reserves, equipment, properties, rights and privileges, tangible or intangible, acquired by Permanente Cement Company through Glacier Sand & Gravel Company, as a result of the acquisition of the assets of Pacific Building Materials Company and Readymix Concrete Company, or added to, modified, or placed on the premises of the former Pacific Building Materials Company and the Readymix Concrete Company by or for Permanente Cement

Company, or by or for its wholly owned subsidiary, Glacier Sand & Gravel Company, to anyone who at the time of divestiture is a stockholder of respondents, or to anyone who at the time of divestiture is, or at the time of the acquisition, was, an officer, director, representative, employee, or agent of, Permanente Cement Company, Glacier Sand & Gravel Company, Kaiser Industries Corporation, the Henry J. Kaiser Company, or of any of their subsidiaries, divisions or affiliates, or to anyone who is connected with, or under the influence of, directly or indirectly, the foregoing companies, or of any of their subsidiaries, divisions or affiliates.

*It is further ordered*, That in said divestiture, respondents shall not sell or transfer, directly or indirectly, any of the assets, plants, machinery, buildings, equipment, properties, rights and privileges, tangible, or intangible, to any corporation, or to anyone, who, at the time of said divestiture, is an officer, director, employee or agent of such corporation, which at the time of such sale or transfer, is engaged in both the readymix concrete and aggregates industry in metropolitan and suburban Portland, Oregon and Vancouver, Washington, or is engaged in the manufacture, sale and distribution of cement.

*It is further ordered*, That in said divestiture, respondents shall offer to sell as a single entity all assets, plants, machinery, buildings, land, raw material reserves, equipment, properties, rights and privileges, tangible or intangible together with all plants, machinery, buildings, land, raw material reserves, improvements, equipment and other property of whatever description that has been added to or placed on the premises of the former Pacific Building Materials Company and the former Readymix Concrete Company; in any plan of divestment which may be submitted.

III

*It is further ordered*, That for a period of fifteen (15) years from the date of the issuance of this Order by the Federal Trade Commission, Permanente Cement Company shall cease and desist from acquiring, directly or indirectly, through subsidiaries, or otherwise, by merger, consolidation, or purchase, the assets, stock, share capital, or any other interest whatsoever, in any plant or company manufacturing cement, ready-mixed concrete or aggregates without at least 60 days prior to such acquisition sending notification thereof to the Secretary of the Commission by registered mail.

*It is further ordered*, That Permanente Cement Company shall, within three months from the date of the service upon it of this Order, submit in writing to the Federal Trade Commission, its plan for carrying out the provisions of this Order, including the date within which full compliance shall be effected.

## EXHIBIT A

*Shipments of Portland cement from mills located in Washington State and the Oregon Portland Cement Co.; and total shipments from all sources into Washington State and West Washington, 1956–60*

[In thousands of barrels]

| Company | 1956 | | | | 1957 | | | | 1958 | | | | 1959 | | | | 1960 | | | | Sources |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Total shipments from mills | Shipments into Washington, barrels | Shipments into West Washington | | Total shipments from mills | Shipments into Washington, barrels | Shipments into West Washington | | Total shipments from mills | Shipments into Washington, barrels | Shipments into West Washington | | Total shipments from mills | Shipments into Washington, barrels | Shipments into West Washington | | Total shipments from mills | Shipments into Washington, barrels | Shipments into West Washington | | |
| | | | Barrels | Percent | | | Barrels | Percent | | | Barrels | Percent | | | Barrels | Percent | | | Barrels | Percent | |
| Permanente Cement Co. | | 1,087 | 737 | 22.3 | | 1,794 | 1,575 | 42.4 | | 1,983 | 1,629 | | | 973 | 832 | | | 764 | 641 | | CX-121. |
| Olympic Cement Co. or division, Bellingham, Wash. | 666 | 512 | 506 | 15.3 | 1,082 | 1,003 | 998 | 26.9 | 1,326 | 1,293 | 1,237 | | 1,630 [11] | *1,497* | *1,494* | | *1,889* | *1,664* | *1,546* | | CX-120a and b. |
| Combined Permanente-Olympic. | | | | | | | | | | [1] 2,629 | [1] 2,248 | [1] 47.1 | | 2,470 | 2,326 | 51.7 | | 2,328 | 2,186 | 51.4 | |
| Ideal Cement Co: | | | | | | | | | | | | | | | | | | | | | |
| Grotto, Wash., plant.[13] | 466 | 466 | 450 | 13.6 | 556 | 556 | 533 | | 597 | 597 | [2] 562 | | 667 | 667 | 657 | | 518 | 518 | 509 | | CX-111. |
| Spokane, Wash., plant. | 679 | 422 | 8 | .2 | 677 | 458 | 23 | | 701 | 517 | 29 | | 650 | 471 | 26 | | 536 | 387 | 26 | | CX-112. |
| Vancouver Wash., distribution plant. | | | | | | | | | | | | | | | | | | [3] 39 | [3] 25 | | CX-115 and 116, R60. |
| Other | | | | | | [4] 4 | | | | | | | | [5] 65 | [5] 48 | | | | | | |
| Total | 1,145 | 888 | | | 1,233 | 1,018 | 556 | 15.0 | 1,298 | 1,114 | 591 | 12.4 | 1,317 | 1,203 | 731 | 16.3 | 1,054 | 944 | 560 | 13.2 | |
| Lehigh Portland Cement Co., Metalline Falls, Wash. | 617 | 482 | 29 | .9 | 645 | 434 | 25 | .7 | 713 | 548 | 54 | 1.1 | 546 | 428 | 33 | .7 | 690 | 582 | 109 | 2.6 | CX-119. |
| Lone Star Cement Co.,[14] Concrete and Seattle, Wash. (combined). | 1,868 | 1,608 | 1,565 | 47.3 | 593 | [6] 526 | [6] 520 | 14.0 | 1,258 | 1,226 | 1,224 | 25.7 | 1,463 | 1,392 | 1,386 | 30.8 | 1,389 | 1,373 | 1,371 | 32.3 | CX-126 and CX-129. |

| | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Oregon Portland Cement Co., Oswego and Lime, Oreg. (combined). | 1,975 | 99 | [7]17 | .5 | 2,368 | 308 | [7]19 | .5 | 2,812 | 374 | [7]19 | 0.4 | 2,323 | 108 | [7]17 | .4 | 2,793 | [8]782 | [7]19 | .4 | CX-98a and b. |
| Net imports: | | | | | | | | | | | | | | | | | | | | | |
| Customs district Washington.[9] | ------- | ([10]) | ([10]) | ------- | ------- | 22 | 22 | .5 | ------- | 14 | 14 | 0.3 | ------- | ([10]) | ([10]) | ------- | ------- | 1 | 1 | ------- | CX-117 and 118. |
| Customs district. Oregon.[9] | ------- | ([10]) | ([10]) | ------- | ------- | 1 | 1 | ------- | ------- | ([10]) | ([10]) | ------- | ------- | 1 | 1 | ------- | ------- | 3 | 3 | .1 | CX-117 and 118, and R60. |
| Total | 6,271 | 4,676 | 3,312 | 100.1 | 5,921 | 5,106 | 3,716 | 100.0 | 7,407 | 6,552 | 4,768 | [12]87.0 | 7,279 | 5,602 | 4,494 | 99.9 | 7,815 | 6,013 | 4,249 | 100.1 | |

[1] Figure represents Permanente shipments from California plus one-half of Olympic's 1958 shipments since Olympic was acquired by Permanente on June 30, 1958.

[2] CX-111 shows shipments by the Grotto plant of Ideal into West Washington of 587,000 barrels but footnote 7 of CX-111 and TR 2875-6 explains that 25,000 barrels were shipped in 1958 for the account of the Spokane plant to East Washington.

[3] The Vancouver terminal of Ideal shipped 39,000 barrels to Washington State in 1960 (RX60); 25,000 of this 39,000 barrels were shipped to West Washington including shipments to Kalama, Kelso, and Longview (CX 115-116).

[4] 4,000 barrels were shipped by Ideal's Trident Montana mill into East Washington (TR 2876, 2587-2588).

[5] In 1959, 17,000 barrels from the Ideal mill at Gold Hill, Oreg., went to non-West Washington (TR 2590) and another 48,000 barrels were shipped into West Washington from Ideal's mill at Redwood City, Calif. (TR 2504-7 and 2589).

[6] Lone Star's Concrete and Seattle plants on strike May 1, 1957, to Oct. 16, 1957.

[7] Includes the 1 percent of the supply available to the Oswego mill and to the Portland, Oreg., distribution plant and warehouse of Oregon. Portland estimated to have been shipped to Longview-Kelso are (RX 10 and TR 1765), i.e., 15,000 barrels—1956; 17,000 barrels—1957; 18,000 barrels—1958; 16,000 barrels—1959, and 17,000 barrels—1960.

[8] Includes 366,000 barrels reported to Bureau of Mines as Oregon shipments, but delivered to Washington side of John Day Dam (TR 1698).

[9] All imports of all types of hydraulic cement shown in CX 117E-G and CX 118E-F are treated as imports into West Washington except the cement shipped in 1960 from Canada to the Vancouver, Wash., distribution facility of Ideal.

[10] Less than 500 barrels.

[11] Figure as changed by respondent at hearing Mar. 9, 1962 (TR 7439).

[12] Total does not include one-half year Olympic sales made prior to acquisition by Permanente on June 30, 1958. Olympic's one-half year sales amount to 13 percent of total 1958 "West Washington" cement sales.

[13] Northwestern Portland Cement Co. before October 1957 (TR 2553).

[14] Superior Portland Cement Co. before April 1957 (TR 3661).

## EXHIBIT B

*Shipments of ready mixed concrete by named producers in the Portland, Oreg.-Vancouver, Wash., area*

| Ready mixed concrete producers | 1956 | | 1957 | | 1958 | | 1959 | | 1960 | | Sources |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1,000 cu. yds. | Percent | 1,000 cu. yds. | Percent | 1,000 cu. yds. | Percent | 1,000 cu. yds. | Percent | 1,000 cu. yds. | Percent | |
| Pacific Buildings Materials | 250 | 38.9 | 207 | 36.8 | 180 | 27.6 | 219 | 27.8 | 238 | 35.1 | CX 62E, CX 103b, CX 104b, CX 105b, CX-23J; |
| Ross Island | 175 | 27.3 | 148 | 26.3 | 159 | 24.4 | 216 | 27.5 | 185 | 27.2 | CX 81. |
| Tru-Mix Concrete | 38 | 5.9 | 43 | 7.6 | 48 | 7.4 | 68 | 8.6 | 70 | 10.5 | CX 88. See also Record p. 1257 which shows that these data are for both companies. |
| Rose City | 20 | 3.1 | 16 | 2.8 | 29 | 4.4 | 25 | 3.1 | 20 | 2.9 | CX 106. |
| Cobb | | | | | | | 2 | .2 | 7 | 1.0 | CX 94. This company did not produce concrete prior to June 1959 (Record p. 1381). |
| Klineline | 1 | .2 | 2 | .4 | | | | | | | CX 110. |
| Tait | 42 | 6.5 | 32 | 5.7 | 32 | 4.9 | 44 | 5.5 | 36 | 5.3 | CX 91. |
| Troutdale | 12 | 1.9 | 10 | 1.8 | 16 | 2.5 | 11 | 1.4 | 12 | 1.8 | CX 87. |
| Willamette Hi-grade | 55 | 8.6 | 35 | 6.2 | 41 | 6.3 | 47 | 5.9 | 39 | 5.7 | CX 73. 1960 includes Beaverton and Portsmouth plants. |
| Hi-Way [1] | (*) | (*) | 18 | 3.2 | 37 | 5.7 | 64 | 8.1 | 9 | 1.3 | CX 96.[1] |
| Lake Shore Concrete Co | 9 | 1.4 | 14 | 2.5 | 20 | 3.1 | 20 | 2.5 | 14 | 2.1 | CX 86. About 10 percent of 1960 was for precasting done in Lake Shore yard and about 30 percent of 1959 and 1960 was of concrete used in the Lake Shores affiliated concrete contracting business. (Record p. 1155). |
| Columbia | 15 | 2.3 | 13 | 2.3 | 19 | 2.9 | 17 | 2.1 | 15 | 2.2 | CX 107. |
| Oregon Ready Mix Co | 14 | 2.2 | 14 | 2.5 | 17 | 2.6 | 14 | 1.7 | 16 | 2.4 | CX 89a–e. |
| Jack's Ready Mix | 11 | [2] 1.7 | 11 | [2] 2.0 | 16 | [2] 2.5 | 12 | [2] 1.5 | 4 | [2] .6 | |
| Beaverton | | | | | 1 | [3] .2 | 13 | [3] 1.6 | 6 | [3] .9 | |
| Stanton Mfg. Co | | | | | 37 | 5.7 | 13 | 1.6 | 8 | 1.2 | RX 6 & TR. pp. 1409–1417. |
| Total | 642 | 100.0 | 563 | 100.1 | 652 | 100.2 | 785 | 99.1 | 679 | 100.0 | |

*Less than 500 cu. yds. or 0.05 percent as appropriate.

[1] See the following table:

| | Net sales (CX 96) | Average price per cu. yd. of 5 "river" producers | |
|---|---|---|---|
| 1956 | $3,563.47 | 11.67 | (Cubic yard sales of Hi-Way were computed by dividing the annual dollar value (CX 96) by the average price per cubic yard of the other 5 "river producers", Willamette, Tru-Mix, Tait, Ross Island, and PBM (Curry & Albina plants). (See CX 73, 81, 88, 91, 23J, 62E, 103b, 104b and 105b). |
| 1957 | 234,964.02 | 12.70 | |
| 1958 | 500,322.35 | 13.57 | |
| 1959 | 768,830.08 | 12.01 | |
| 1960 | 99,977.00 | 11.38 | |

[2] TR. pp. 1457–1459; these figures are approximated by converting shipments of cement, by Oregon Portland Cement Co. to Jack's (CX 99) cu. yds. of concrete on the basis of a "5-sack mix" that is multiplying barrels of cement by 0.8. For the representativeness of a 5-sack mix, see TR. 1409–1417.

[3] These data were determined by converting the shipments of cement to Beaverton Transit Mix by Oregon Portland Cement Co. (CX 99) by the method used in footnote [2].

APRIL 24, 1964

By ELMAN, *Commissioner:*

The complaint in this matter was filed on June 14, 1960, and charges respondents, in two counts, with having violated Section 7 of the Clayton Act, as amended. Respondents are Permanente Cement Company and Glacier Sand & Gravel Company, the latter a wholly owned subsidiary of Permanente engaged in the manufacture and sale of ready-mix concrete. Count I of the complaint challenges Permanente's "horizontal" acquisition of Olympic Portland Cement Company, a competitor of Permanente in the manufacture and sale of Portland cement. Count II challenges Permanente's "vertical" acquisition through Glacier of Pacific Building Materials Company and Readymix Concrete Company. After extensive hearings, the hearing examiner filed his initial decision, in which he held that the acquisitions violated Section 7 and ordered divestiture and other relief. Respondents have appealed from the examiner's decision and order. Since the basic facts are fully stated in the initial decision, we shall limit this opinion to the salient legal issues raised by the appeal.

I. Permanente's Acquisition of Olympic

*First.* The relevant market in which to appraise the competitive effects of this acquisition is composed of producers of Portland cement [1] located in West Washington. West Washington is, basically, that part of the State of Washington that lies west of the Columbia River. It is the area in which the bulk of the state's population resides.

Determination of the relevant geographic market ("section of the country") in a horizontal-merger case is a two-step procedure. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 357–61; *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F. 2d 800, 817 (9th Cir. 1961); cf. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327. First, it is necessary to delimit "the area of competitive overlap" (*Philadelphia Bank*, *supra*, at 357) between the parties to the merger. West Washington is this area. It is where almost all of Olympic's sales were made, and where Permanente was in competition with Olympic, at the time of the merger.[2]

Second, it is necessary to ascertain the area "to which the purchaser[s located in the area of competitive overlap] can practicably

[1] It is conceded that Portland cement is the proper "line of commerce" (relevant product market) under Count I of the complaint.

[2] The Supreme Court made clear in *Philadelphia Bank* that *within* "the area of competitive overlap" there may be smaller areas in which "the effect of the merger on competition will be direct and immediate" (374 U.S., at 357) and which, therefore, are relevant geographic markets under Section 7. However, in the present case no attempt was made to establish any such submarkets.

turn for supplies" (*Tampa Electric Co.*, *supra*, at 327; see *Philadelphia Bank*, *supra*, at 359)—for those are the purchasers who will lose a source of supply as a result of the merger. The evidence in this case establishes that, for the most part, cement purchased in West Washington is supplied by production or distribution facilities located in West Washington and that the high cost of shipping cement overland effectively prevents plants located outside of West Washington from doing substantial business within.[3] As a practical matter, Olympic's former customers in the West Washington area must obtain their cement supplies from West Washington producers.[4]

*Second.* In *Philadelphia Bank*, *supra*, the Supreme Court held "that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." 374 U.S., at 363. The Court, "[w]ithout attempting to specify the smallest market share which would still be considered to threaten undue concentration", held that where the firm resulting from the merger controlled 30% of the relevant market, and where as a result of the merger there was a 33% increase in concentration among the largest firms in the market, the merger was presumptively unlawful under Section 7. *Id.*, at 364–65.

The present merger is within the presumption of unlawfulness established in *Philadelphia Bank*.[5] In at least one respect the presumption

[3] Permanente's production facilities are located in California, not in West Washington. But it has distribution facilities in West Washington. Hence, deeming the relevant geographic market to be West Washington does not "exclude" Permanente from it.

[4] There is no absolute commercial barrier between West Washington and the contiguous areas; and there is some question as to the proper boundaries of West Washington. But the Supreme Court has cautioned that the relevant geographic market cannot be "delineate[d] with perfect accuracy" (*Philadelphia Bank, supra,* at 360), that some "fuzziness would seem inherent in any attempt to delineate" such a market. *Id.,* at 360, n. 37. We think it is clear that West Washington "is a more appropriate 'section of the country' in which to appraise the instant merger than any larger or small or different area." *Id.,* at 361.

[5] In 1957, the year prior to Permanente's acquisition of Olympic, four cement producers accounted for almost 100% of the total shipments of Portland cement from all sources to West Washington. Permanente accounted for 42% of total shipments, Olympic for 27%, Ideal Cement Company for 15%, and Lone Star Cement Company for 14%. These 1957 figures appear to be somewhat abnormal, in that Lone Star experienced a serious strike during 1957 which caused a marked decline in production. In 1956, prior to the strike, the combined share of Permanente and Olympic had been only 38%, while in 1960, three years after the strike and two years after Permanente's acquisition of Olympic, the combined share of Permanente and Olympic was down to 51%. It is not clear whether this 1960 figure is likely to decline further toward the 1956 level. But even on the basis of the 1956 figures, the merger resulted in a single firm's controlling more than 30% of the relevant market and in an increase—which we deem "significant" within the meaning of the Supreme Court's rule—in the combined market share of the top two firms in the market from 70% to 85%. Since almost all cement sales in West Washington are made from production or distribution plants located in West Washington, the total shipments of cement into West Washington approximate the sales of the West Washington plants. Hence, the percentage shares of such shipments enjoyed by Permanente and Olympic and their competitors provide adequate measurements of these firms' market shares.

of unlawfulness in the present case is stronger than in *Philadelphia Bank*. In that case there were still 41 firms competing in the relevant market after the merger. Permanente's acquisition of Olympic, however, reduced the number of firms in the relevant market from six to five, and, of the four principal firms active in the market at the time of the acquisition, all but Olympic were very large "chain mills". Olympic was the only independent.[6] Indeed, in view of the market shares involved and of the paucity of other competitors, it would appear that the present merger is unlawful even under Sherman Act standards. For "where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger, itself constitutes a violation of § 1 of the Sherman Act." *United States* v. *First National Bank & Trust Co.*, 32 U.S.L. Wk. 4335, 4337 (U.S. Sup. Ct., April 6, 1964).

*Third.* Permanente has not made the "clear showing", required by the rule of *Philadelphia Bank*, that its acquisition of Olympic, notwithstanding the large market shares possessed by the acquiring and acquired firms in an already highly concentrated market, will not have the anticompetitive effects specified in Section 7. Permanente argues that it would have been forced out of the West Washington market had it not acquired Olympic. If the acquisition of Olympic was indispensable to Permanente's continuance as an active and effective competitor in the West Washington market, that circumstance would certainly be relevant. But it is a question of fact, and we think the examiner was clearly correct in finding that Permanente failed to establish a reasonable probability that, but for the acquisition, it would have been forced out of the West Washington market within the foreseeable future.

Permanente's principal argument is that it has traditionally been a more vigorous competitor than the other major cement companies in the West Washington market and that Olympic, in particular, was a sluggish and ineffective competitor prior to its acquisition by Permanente. A company's past record of "competitive" performance is not a defense in a Section 7 proceeding unless it is shown that the acquisition under challenge was essential to the company's continuing to be a competitive performer, and, as has just been pointed out, that is not so in this case. As for Olympic's alleged sluggishness, we find, first, that this has not been proved and, second, that such a contention

[6] We note that even if a somewhat differently drawn geographical area were a more appropriate "section of the country" in which to test the present acquisition, the market-share percentages of the acquiring and acquired firms would not be materially different. For example, if the relevant market were deemed to be the entire State of Washington, the combined market share of Permanente and Olympic would still be 34% by 1956 figures and almost 39% by 1960 figures—well above the 30% level specified in *Philadelphia Bank*.

is far too nebulous, and remote from the central concerns of a Section 7 proceeding, to be entitled to much weight. No contention is made that Olympic was anywhere near failing at the time of the acquisition.

We conclude that Permanente's acquisition of Olympic violated Section 7 and that divestiture is the appropriate remedy. See *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 316.

## II. Permanente-Glacier's Acquisition of Pacific Building Materials-Readymix Concrete Company

Cement is one of the principal raw materials in the production of ready-mix concrete. Permanente's acquisition [7] of Readymix Concrete Company (RMC),[8] which manufactures ready-mix concrete for sale primarily in the Portland, Oregon-Vancouver, Washington area, was, therefore, a "forward vertical" acquisition, *i.e.*, the acquisition by a supplier of one of its customers.

The extent to which vertical integration may have seriously anti-competitive consequences depends, in general, on the degree of market power possessed by the integrated firms at one or another of the levels on which they operate. "Except in empirically unimportant cases, there is no reason to expect that vertical integration has any monopolistic implications so long as every stage of production is competitive. * * * [But] vertical integration loses its innocence if there is an appreciable degree of market control at even one stage of the production process. It becomes a possible weapon for the exclusion of new rivals by increasing the capital requirements for entry into the combined integrated production processes, or it becomes a possible vehicle of price discrimination." Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. Pa. L. Rev. 176, 183 (1955).[9]

In appraising the lawfulness under Section 7 of a vertical merger, the principal focus must be on the structure of the markets in which the acquiring and acquired firms operate. If the structure is already noncompetitive at either level, the merger will be highly suspect,

[7] The acquisition was actually made by respondent Glacier, a wholly owned subsidiary of Permanente engaged in the production of ready-mix (though not in the Portland-Vancouver area). Since Permanente and Glacier were (and are) under common ownership and management, we deem Permanente, rather than Glacier, the acquiring firm (cf. *Bowater S.S. Co.* v. *Patterson*, 303 F.2d 369, 372–73 (2d Cir. 1962))—although it makes little practical difference. Whether Permanente or Glacier be deemed the acquiring firm, Permanente's relationship to RMC is the critical factor in assessing the lawfulness of the acquisition.

[8] Pacific Building Materials Company and RMC were under common ownership and were acquired by Glacier as a unit. Pacific produces aggregates, another raw material in the production of ready-mix. There is no substantial evidence in the present record that the acquisition of Pacific as such had any anti-competitive effects.

[9] The way in which vertical integration may have an undesirable "contagion" effect may be shown by the following example: Suppose an industry is duopolistic, and both firms in the industry acquire all of their distributors; obviously, the result will be to make the market duopolistic at the distributors', as well as the suppliers', level.

especially if vertical integration in the industry is already far advanced or if the merger is part of a larger trend or movement toward integration. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 332–34.

The focus in the present case, insofar as the vertical aspects are concerned, was quite different: it was upon RMC's alleged predatory price conduct subsequent to the acquisition. We have indicated elsewhere why such evidence is rarely of great probative value in a Section 7 proceeding. See *Ekco Products Co.*, F.T.C. Docket 8122 (decided June 30, 1964), pp. 9–10 [pp. 1163, 1210–1211 herein]; *Procter & Gamble Co.*, F.T.C. Docket 6901 (decided November 26, 1963), pp. 38–39, 67–69 [63 F.T.C. 1465, 1558–1560, 1582–1584]. Here, too, the evidence of alleged post-acquisition predatory conduct must be deemed indecisive on the question of whether Section 7 has been violated.

To be sure, an attempt was made to establish RMC's position as a supplier of ready-mix concrete in the Portland-Vancouver area, although the market-share data appear to be somewhat undependable.[10] But since the focus of this proceeding under Count II has been so predominantly on postacquisition evidence, and since the record contains no solid data as to the market structure at the suppliers' level or as to the present extent of or trend toward vertical integration in the cement industry, we shall not attempt to make a determination as to the lawfulness *vel non* of Permanente-Glacier's acquisition of RMC at the present time.

## III

Although the record as now constituted does not provide an adequate basis for an order under Count II of the complaint, we do not think that it would be in the public interest to dismiss this part of the complaint. In the first place, the record, rather than indicating that Permanente's acquisition of RMC was lawful under Section 7, does not permit any informed judgment on the allegations of the complaint. In the second place, in 1960, when this case was brought, the Supreme Court had not yet rendered its decision in *Brown Shoe*, where standards were announced by which to test the lawfulness of vertical acquisitions under Section 7. In light of *Brown Shoe*, it is now clear that the complaint and hearings in the present case did not focus sufficiently on the central concerns of the statute in the area of vertical acquisitions.

We have therefore determined, rather than dismiss Count II of the complaint, to vacate the initial decision and remand the matter to the

[10] The relevant geographic market was limited to producers located within a 9-mile radius of the center of Portland. It seems clear, however, from the record that some ready-mix suppliers located beyond this perimeter competed inside it to some extent and should have been included in computing RMC's market share.

hearing examiner for further proceedings in conformity with this opinion.[11] The examiner is directed, upon completion of the proceedings on remand, to render a new initial decision, disposing not only of the issues raised on remand but of all issues of fact and law under Count II, and determining afresh the lawfulness *vel non* of the acquisition under Section 7. Nothing in the present opinion should be understood as prejudging this ultimate determination, which the examiner is to make upon the full record as constituted at the close of the hearings on remand.

In recognition that the problem of vertical integration in the cement industry through merger is of growing importance and urgency and has apparently assumed industry-wide dimensions, the Commission has determined forthwith to institute a Trade Regulation Rule proceeding for the study and consideration of this problem. See Section 1.63 of the Commission's Procedures and Rules of Practice (effective August 1, 1963); *Atlantic Products Corp.*, F.T.C. Docket 8513 (Order of December 13, 1963) [63 F.T.C. 2237]. Where a problem involves an entire industry made up of a large number of firms, it may be uneconomical, inefficient, and inequitable to proceed exclusively on the basis of individual adjudicative proceedings. Industry-wide problems require, so far as is practicable, industry-wide solutions. We think a rule-making proceeding is particularly appropriate in dealing with such Section 7 problems as are here presented in the cement industry. Such a proceeding affords a better forum than do adjudicative proceedings against individual companies for organizing and appraising the general economic facts involving industry and market structure that are so important under Section 7.

There is no inconsistency in instituting such an industry-wide proceeding and, at the same time, remanding, rather than dismissing, Count II of the complaint. In the interim between the institution of a Trade Regulation Rule proceeding and the actual promulgation of any Trade Regulation Rules, the Commission, if it is to enforce the statutes within its jurisdiction, may be obliged to rely on the case-by-case adjudicative method. Commencement of a rule-making proceeding is not tantamount to declaring a moratorium on all enforcement activities with respect to transactions consummated before the effective date of the rules. Permanente's acquisition of RMC is a major acquisition in this industry and, if unlawful, could have profound and even irreversible adverse effects upon competition in substantial markets. We believe that the public interest does not justify or permit termination

[11] This remand pertains only to Count II; we are issuing herewith a final order disposing of Count I.

of the Commission's proceeding under Count II of the complaint at this time.[12]

Commissioner Reilly did not participate for the reason that he did not hear oral argument.

## FINAL ORDER (COUNT I)* AND ORDER REMANDING TO HEARING EXAMINER FOR FURTHER PROCEEDINGS (COUNT II)

APRIL 24, 1964

Upon consideration of respondents' appeal from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

*It is ordered*, That the initial decision, as supplemented by the opinion accompanying this order, be, and it hereby is, adopted as the decision of the Commission with respect to Count I of the complaint.

*It is further ordered*, That:

I

Respondent Permanente Cement Company, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, shall divest, absolutely and in good faith, all stock, assets, properties, rights and privileges, tangible or intangible, including but not limited to all properties, plants, machinery, equipment, raw material reserves, trade names, contract rights, trademarks, and good will acquired by Permanente Cement Company as a result of the acquisition by Permanente Cement Company of the stock and assets of the Olympic Portland Cement Company, Ltd., together with all plants, machinery, buildings, land, raw material reserves, improvements, equipment and other property of whatever description that has been added to or placed on the premises of the former Olympic Portland Cement Company, Ltd., so as to restore the Olympic Portland Cement Company, Ltd., as a going concern and effective competitor in the manufacture and sale of cement.

II

Pending divestiture, Permanente Cement Company shall not make any changes in any of the plants, machinery, buildings, equipment, or other property of whatever description, of the former Olympic Portland Cement Company, Ltd., which might impair its present

[12] That part of the hearing examiner's order requiring premerger notification was evidently based largely on the evidence under Count II of the complaint. Accordingly, we express no view as to the propriety of such relief in the circumstances of the present case pending the further proceedings we have ordered in this matter.

*Superseded by order of Commission dated Mar. 23, 1965.

capacity for the production, sale and distribution of cement, or its market value, unless such capacity or value is fully restored prior to divestiture.

III

By such divestiture, none of the assets, properties, rights or privileges, described in paragraph I of this order, shall be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee, or agent of, or under the control or direction of, Permanente Cement Company or any of the subsidiary or affiliated corporations of Permanente Cement Company, or owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Permanente Cement Company, or to any purchaser who is not approved in advance by the Federal Trade Commission.

IV

If Permanente Cement Company divests the assets, properties, rights and privileges, described in paragraph I of this order, to a new corporation, the stock of which is wholly owned by Permanente Cement Company, and if Permanente Cement Company then distributes all of the stock in said corporation to the stockholders of Permanente Cement Company in proportion to their holdings of Permanente Cement Company stock, then paragraph III of this order shall be inapplicable, and the following paragraphs V and VI shall take force and effect in its stead.

V

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

VI

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

VII

As used in this order, the word "person" shall include all members of the immediate family of the individual specified and shall include corporations, partnerships, associations and other legal entities as well as natural persons.

VIII

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

*It is further ordered*, That the initial decision be, and it hereby is, vacated and set aside with respect to Count II of the complaint.

*It is further ordered*, That with respect to Count II of the complaint this matter be, and it hereby is, remanded to the hearing examiner for further proceedings in accordance with the directions contained in the accompanying opinion.

*It is further ordered*, That, upon conclusion of such further proceedings, the hearing examiner shall make and file a new initial decision determining all issues of law and fact raised by the record as then constituted.

Commissioner Reilly not participating for the reason that he did not hear oral argument.

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IN THE MATTER OF

## DAVID MANN ET AL. TRADING AS NAME BRAND DISTRIBUTORS

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

*Docket 8533. Complaint, Oct. 10, 1962—Decision, Apr. 24, 1964*

Order requiring a mail order catalog house in Woodside, N.Y., to cease representing that the products they sold—including typewriters, electrical shavers, vacuum cleaners, electric mixers, and rotisserie broilers—were guaranteed without disclosing the limitations on the guarantees, and dismissing charges that it was selling at wholesale prices.

### COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that David Mann and Morris Appleblatt, individually and as copartners trading as Name Brand Distributors, hereinafter referred to as respondents, have vio-