3. Using the name "Kar-Chance Division of American Plastics," "Kar-Chance" or any other name of similar import to designate, describe, or refer to respondent's business.

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

In the Matter of

TOPPS CHEWING GUM, INC.

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

Docket 8463. Complaint, Jan. 30, 1962—Decision, Apr. 30, 1965

Order adopting in part and rejecting in part the initial decision in this proceeding and dismissing, for insufficiency of evidence, the complaint which charged the Nation's largest manufacturer of bubble gum with headquarters in Brooklyn, N.Y., with using unfair methods of competition in gaining control of the baseball picture card industry.

Complaint

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest hereby issues its complaint, charging as follows:

Paragraph 1. Respondent is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office and place of business located at 254 36th Street, Brooklyn, New York.

Par. 2. Respondent is now, and has been for many years last past, engaged in the manufacture, distribution and sale of bubble gum. In addition, respondent also sells picture cards, including cards containing the picture of a uniformed major league baseball player, or other professional athlete, manager or coach, either separately or in connection with the sale of its bubble gum products.

Par. 3. The respondent is now, and has been for many years last past, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent manufactures gum in its factory located in Brooklyn, New York, and ships, or causes to be shipped, such merchandise, as well as picture cards, via common carriers to wholesalers and direct buying retail accounts located in most of the States of the United States.

Respondent is the largest manufacturer of bubble gum in the United States having annual sales of about $14,000,000 in an industry with total annual sales in the United States by all manufacturers of approximately $30,000,000.

PAR. 4. In the course and conduct of its business in commerce, respondent is now and has been in active competition with other corporations, firms and individuals also engaged in the manufacture, distribution and sale of bubble gum and in the distribution and sale of picture card products, except to the extent that competition has been lessened and eliminated by the acts, practices and methods of respondent herein alleged to be unlawful.

PAR. 5. Among children in the United States, the hobby of collecting picture cards has been practiced for many years and is constantly growing in popularity. The most common type of card, and that with which this matter is primarily concerned, is approximately 3½″ x 2½″ in size, having a picture of an athlete on one side and his brief biography on the other side. Cards are also distributed and collected which contain pictures of many other subjects such as old automobiles, cowboys and Indians and famous men. Although in some instances the picture cards are sold separately, they are more commonly distributed and sold in a combination package with bubble gum.

The most popular picture cards by far are those containing pictures of major league baseball stars. Children engaged in collecting these cards will only purchase bubble gum which is packaged or accompanied with a baseball picture card. The market for bubble gum packaged and sold in combination with baseball picture cards and the market for baseball picture cards sold separately are each substantial.

PAR. 6. In the course and conduct of its business in commerce, respondent has been, and is now, engaged in unfair methods of competition and unfair acts and practices in that it has completely foreclosed competitors from the above-described baseball picture card markets by entering exclusive picture card contracts with almost all major league baseball players (approximately 414 out of the total of 421) and with practically all minor league players having a major league potential (approximately 1,500). Said contracts grant to respondent the exclusive right to use the player's picture, name and biography on picture cards.

Players are first approached and signed to contracts while playing in the minor leagues. These contracts, entered for a nominal consideration of $5.00, bind the players to respondent when, and if, they get into the major leagues for their first five full seasons of play. The contracts are renewed and extended for various periods until the player's retirement. A clause in the contract provides that the player will not:

> * * * grant to others the rights granted to Topps hereunder, or any rights similar thereto, whether such grant or rights to others be for the term of this contract or any part thereof, or whether they be for a time commencing after the expiration of this contract.

In most instances the respondent does not give copies of these contracts to the players, and they are unaware that they are bound, by the terms of the contract, from granting future picture card rights to any person or corporation other than respondent.

The respondent has, by and through a number of means, including threats of legal action and secret payments to representatives or agents in the employ of baseball players, effectively frustrated the efforts of its competitors to secure the rights to use the pictures, names and biographies of baseball players on baseball picture cards, and has thereby foreclosed and prevented said competitors from selling their products, including bubble gum, to substantial markets.

PAR. 7. Through the medium of the aforesaid acts and practices and certain other means and methods, the respondent has created and effected a monopoly in the manufacture and distribution of baseball picture cards, in commerce, contrary to the public policy of the United States and to the detriment of free and open competition in the bubble gum and picture card industries.

PAR. 8. The acts and practices of the respondent as hereinabove alleged are to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. James P. Timony and *Mr. David M. Nelson* of Washington, D.C., for the Commission.

Arent, Fox, Kintner, Plotkin & Kahn, of Washington, D.C., by *Mr. Earl W. Kintner* and *Mr. Sidney Harris* for the respondent.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

AUGUST 7, 1964

TABLE OF CONTENTS

The Federal Trade Commission, in a complaint issued January 30, 1962, has charged Topps Chewing Gum, Inc., with creating and effecting a monopoly in the manufacture and distribution of baseball picture cards in commerce by resorting to various acts and practices alleged to be unfair and to constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.[1]

[1] 38 Stat. 719; 52 Stat. 111; 15 U.S.C.A., § 45; in which, by Section 5(a)(1), it is provided, "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

The respondent appeared in this proceeding and was represented by counsel. While admitting numerous facts alleged in the complaint, it denied all allegations which might serve as a basis for the issuance of an order. A full hearing has been held at which all evidence in support of the complaint and in opposition thereto has been received. Counsel supporting the complaint have submitted what they call Proposed Findings of Fact and Conclusions and a proposed Order to Cease and Desist. Respondent also has submitted what it calls Proposed Findings of Fact, Conclusions of Law and a brief in support thereof. It contends there has been an utter failure of proof and that the complaint ought to be dismissed. (As to the structure of findings of fact, see *Capital Transit Co.* v. *United States*, U.S.D.C. three judge court, 97 F. Supp. 614 at 621; *N.L.R.B.* v. *Sharples Chemicals, Inc.*, C.A. 6, 1954, 209 F. 2d 645; *N.L.R.B.* v. *Newport News*, 308 U.S. 241. What both sides submitted was a detailed and most helpful abstract of their views of what is contained in the transcript of testimony and exhibits, but neither submitted proposals which could become the subject of rulings within the contemplation of Section 8(b) of the Administrative Procedure Act and Section 3.19 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings. The text of this decision, as a consequence, will have to be regarded as the Examiner's rulings on all issues presented.)

The Complaint

The complaint alleges that respondent is the largest manufacturer of bubble gum in the United Sates and that it is engaged also in the sale of picture cards, which include cards containing the picture of a uniformed major league baseball player or other professional athlete, manager or coach. The cards are sold either separately or in connection with the sale of bubble gum. It is alleged further that children in the United States have a hobby consisting of the collection of picture cards, that this hobby is growing constantly in popularity, and that the most popular card is 3½ inches by 2½ inches in size on one side of which is printed an athlete's picture and on the other his brief biography. While there are other picture cards such as cards showing old automobiles, cowboys and Indians, and famous men, it is alleged that the most popular are those containing pictures of major league baseball stars and their biographies or statistics relating to them. It is alleged also that, although in some instances the picture cards are sold separately, they are distributed and sold more commonly in a combination package with bubble gum and that, "Children engaged in collecting these cards (meaning those containing pictures of major league baseball stars) will only purchase bubble gum which is packaged or accompanied with a baseball picture card."

Following all this and various allegations to support jurisdiction, the alleged unfair methods of competition and unfair acts and practices are set forth. In substance, the complaint attacks what is alleged to be "a monopoly in the manufacture and distribution of baseball picture cards, in commerce, * * * to the detriment of free and open competition in the bubble gum and picture card industries," and asserts that this monopoly was effectuated by the respondent by resorting to certain acts or practices as follows:

(1) Foreclosing competitors from the alleged "baseball picture card markets by entering exclusive picture card contracts with almost all major league baseball players (approximately 414 out of the total of 421) and with practically all minor league players having a major league potential (approximately 1,500), (which) contracts grant to respondent the exclusive right to use the player's picture, name and biography on picture cards."

(2) Respondent gets these contracts by approaching first the players in the minor leagues and binding them "for a nominal consideration of $5.00 * * * to respondent when, and if, they get into the major leagues for their first five full seasons of play."

(3) Respondent renews and extends these contracts "for various periods until the player's retirement."

(4) It imposes on the players an obligation not to "grant to others the rights granted to Topps * * * or any rights similar thereto, whether such grants or rights to others be for the term of (the) contract or any part thereof, or whether they be for a time commencing after" its expiration.

(5) Respondent "does not give copies of these contracts to the players, and they are unaware that they are bound, by the terms of the contract, from granting future picture card rights to any person or corporation other than respondent."

(6) Respondent has frustrated its competitors from securing any rights to the use of the pictures, names and biographies of baseball players on baseball picture cards "by and through a number of means, including threats of legal action and secret payments to representatives or agents in the employ of baseball players."

(7) It "has thereby foreclosed and prevented said competitors from selling their products, including bubble gum, to substantial markets."

It is necessary always to remember that this complaint is brought under Section 5 of the Federal Trade Commission Act. Its allegations must be interpreted and construed from the viewpoint of whether, in fact, what respondent has done to secure its position in its business, whether it be the sale of picture cards or the sale of bubble gum or the sale of a combination of both was done by the use of "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce * * * ." This is the conduct made unlawful (Section 5(a)(1), *supra*). The law does not condemn enterprise or ingenuity in business. It does not condemn success in business. It does not protect businessmen from competitors. It does not reward or come to the aid of ineptitude or inefficiency in business. It protects only competition, and it proscribes that competition which is conducted through the medium of unfair acts and practices.

To support an order in this proceeding, it is not necessary that findings be made that all the acts charged in fact have been committed. Even if all are not found to have been committed, remedial action can be and should be taken to require the respondent to cease and desist from such of its acts as are found to have been unfair or deceptive. Alternatively, even if each of the acts charged, taken separately, was not unfair, the circumstances could be such that the sum total of them resulted in an unfair practice. Remedial action also would be indicated in a case of that nature. Furthermore, that the case is concerned with a product like bubble gum or with a product like baseball picture cards, or with a product that may be sold for as little as one cent, or with a product the usual package price of which may be five cents, is wholly immaterial. The public interest may be affected if the acts and practices involved have a substantial impact in interstate commerce.

The Answer

Respondent, in its answer, says that, to the extent that there is competition in the sale either of baseball picture cards or bubble gum or in the sale of a combination of both, such competition has not been lessened or eliminated by any of its acts, practices or methods. It denies that there is "a market for bubble gum packaged and sold in combination with baseball picture cards" to the exclusion of "the market for gum and the market for picture cards" or that there can be a distinction between "a market for baseball picture cards sold separately * * * from the market for picture cards."

It denies that its procedures for obtaining exclusive contracts with baseball players (whether in the major leagues or the minor leagues) are unfair and asserts "that copies of contracts are given to ball players who request such copies at the time they sign them and that copies of the form of contract are made generally available to baseball players." It denies that its contracts or its methods for obtaining such contracts are unfair practices. It denies that it "has created and effected a monopoly in the manufacture and distribution of baseball picture cards * * * to the detriment of free and open competition in the bubble gum and picture card industries", and it denies also that its acts and practices, as alleged in the complaint, "are to the prejudice and injury of the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act."

Five affirmative defenses are pleaded. The first is that its relations with the ball players do not directly affect interstate commerce and consequently are not within the scope of the Federal antitrust laws. (This does not seem to have been pressed.) The second defense is that baseball picture cards are available to the public from numerous sources other than Topps. Interwoven with this defense is an argument (which also seems not to have been pressed) that picture cards are collectors' items having no other functional value and consequently are not items of trade. Thirdly, it contends that, to the extent that baseball picture cards are utilized in connection with the sale of chewing gum and other confectionery products, they are only one portion of a much larger market consisting of all promotional devices utilized in connection with the advertising and sale of such products. It asserts that its competitors have not been frustrated in the promotion and sale of their products because other types of picture cards and other promotional devices or sales aids are available to them. As a consequence, what Topps has done in connection with obtaining exclusive contracts with baseball players has "not tended to create or effect any monopoly in the large competitive market consisting of the various means of promoting sales." The fourth defense is that baseball cards, in and of themselves, are not a market or are not the relevant market; they are only part of a much larger market consisting of "every kind of picture card in connection with numerous kinds of products other than confectionery items." As a consequence, its activities "have not tended to create or effect any monopoly in the market consisting of the distribution, and sale of picture cards." Finally, its fifth defense is to the effect that bubble gum products, in and of themselves, do not constitute a market but, if a market is involved, it includes all forms of "chewing gum and other confectionery products sold in packages at prices comparable to those of respondent's products." Its activities "have in no way interfered with the efforts of other manufacturers of chewing gum and other confectionery products to distribute and sell their products, all of which are competitive with" its chewing gum products. Consequently, its activities have not been detrimental to "free and open competition in the market for chewing gum and other confectionery products."

THE COURSE AND CONDUCT OF THIS PROCEEDING

Early in the case, it became known that counsel supporting the complaint intended to inject numerous matters into this proceeding not readily apparent from specific facts set forth in the complaint. They gave notice of their intention to inject the matter of this respondent's acquisition of all the gum-producing facilities and baseball players' and football players' picture rights theretofore owned by Bowman Gum Company, later Haelen Laboratories, Inc., coupled with an agreement on the part of Bowman not to manufacture or sell gum or picture cards for five years. Although this happened in January 1956, it had overtones of a Clayton Act, Sec. 7 case (15 U.S.C.A., Section 18), but the proceeding had not been brought under that Act. Notice was given also that Topps had engaged in "tie-in" sales practices, in discriminatory practices of refusing to sell its baseball picture cards to vending machine operators or deliberately delaying deliveries to them, and in seeking to control resale prices of its baseball picture cards—all not alleged in the complaint. Respondent consistently objected to the introduction of these matters and both sides regarded them as "issues." The Examiner frequently reminded counsel of his lack of jurisdiction to change the form or theory of the complaint (*Standard Camera Corporation*, Docket No. 8469, November 7, 1963). He suggested to Commission counsel that if he wanted to inject new *issues* or change the form of the complaint, the proper procedure would be to apply for an amended complaint (last sentence of Section 5, Pretrial Order of October 12, 1962). There has been no amendment. The Hearing Examiner ruled, however, that he would receive evidence in support of the charges with respect to the Bowman acquisition, the alleged tie-in practices, the alleged attempt at resale price maintenance and the alleged discriminations against vending machine operators, not because he regarded them as *issues*, but because they could be considered as evidence tending to show the building up of a monopoly or the maintenance and exercise of monopoly power (last sentence of second paragraph of order dated August 8, 1963; see also orders dated February 12, 1963, September 6, 1963, and November 19, 1963). Evidence of this nature has been received over respondent's continuing objection. The recent decision of the Commission in *Grand Caillou Packing Company, Inc.*, Docket No. 7887, Pages 8 to 14, inclusive, Commission Slip Opinion, vindicates this course of procedure. (June 4, 1964.)

There have been many intermediate motions, orders, appeals, rulings by the Commission, and even a United States District Court action seeking to block the Commission's continued prosecution of this case. It is wholly unnecessary to review all this shadow-boxing except to refer particularly to two intermediate opinions of the Commission. In a decision and order dated November 15, 1962, the Commission said, "The complaint in this proceeding charges that respondent has 'created and effected a monopoly in the manufacture and distribution of baseball picture cards' in violation of Section 5 of the Federal Trade Commission Act. The complaint is premised upon a 'relevant market' of baseball picture cards, sold alone or in combination with bubble gum * * *. The complaint as drawn will require presentation of evidence establishing that the distribution of baseball picture cards, either alone or in conjunction with bubble gum, constitutes a distinct market." This expression on the part of the Commission was refined in a later opinion issued July 2, 1963. The Commission there said:

> *If, as the complaint implicitly alleges, such picture cards are sold both separately and in conjunction with other products, the legality of respondent's practices can be determined by examining their probable effect upon competition either in the sale of the picture cards themselves or in the sale of the products with which they are distributed.* Thus, there are in this case two potential market issues: (*1*) *Whether baseball picture cards are sufficiently distinct from other kinds of picture cards or similar picture devices to make their foreclosure to others who might wish to sell them or use them for promotional purposes competitively significant;* and (2) whether bubble gum, the product with which respondent distributed baseball picture cards, is sufficiently distinct from other gums, candies or confections to make competitively significant the foreclosure of a promotional device to other bubble gum manufacturers.
>
> Depending upon what complaint counsel is prepared to prove, however, both of these market issues may be avoided. If complaint counsel is prepared to prove that baseball picture cards account for a sufficient share of all picture cards or devices so that respondent's exclusive arrangements foreclosed a substantial share of this larger market, the existence of a narrower market

limited to baseball picture cards would be irrelevant, * * * Similarly, *if complaint counsel is prepared to prove, as the contract provision set out in the complaint indicates, that respondent's exclusive arrangements foreclosed the use of baseball picture cards to all producers of gums, candies and confections, the existence of a narrower market limited to bubble gum would be irrelevant,* * * * (Emphasis added.)

In response to the Commission's direction, the Hearing Examiner issued an order (July 5, 1963) directing counsel supporting the complaint to state what he intended to prove and the markets upon which he intended to rely. Counsel supporting the complaint filed what he called a Statement of Market and Proof, to which he attached a Prehearing Narrative previously filed. The Hearing Examiner found this unsatisfactory and not responsive either to the Commission's direction or the Hearing Examiner's order. Counsel were directed to appear before him. During the conference which ensued counsel supporting the complaint finally stated that he was prepared to prove "that respondent's exclusive arrangements foreclosed the use of baseball picture cards to all producers of gums, candies and confections." Acting upon the Commission's delineation of "two potential market issues" in its prior decision, the Hearing Examiner, in the order dated August 8, 1963, ruled "that there is only one market issue in this case, and that is:

* * * whether baseball picture cards are sufficiently distinct from other kinds of picture cards or similar picture devices to make their foreclosure to others who might wish to sell them or use them for promotional purposes competitively significant.

Despite all this, practically all the market evidence was concerned with the relation of baseball picture cards to bubble gum and with picture cards alone, but, again, over respondent's objection, the Examiner agreed to receive such evidence on the ground that sellers of bubble gum could be regarded as coming within the more inclusive word "others" which had been used by the Commission.

PICTURE CARDS IN GENERAL AND BASEBALL PICTURE CARDS IN PARTICULAR

It is almost a certainty that anyone reading this decision has seen picture cards such as are involved in this proceeding and knows what they are. The illustrations which will be inserted below are typical and sufficiently instructive to make up for any lack of familiarity. The content or subject of a picture card is and can be as varied as the ingenuity, imagination or resourcefulness of the designer or producer. There is nothing new or modern about picture cards. They have been produced and utilized for almost one hundred years. Counsel supporting the complaint suggests, without contradiction, that some "date back beyond recorded history." Actors, actresses, sports personalities, governmental officials, military personnel, license plates, comics and cartoons, cowboys, the Wild West, flags, events (both current and historical), phenomena of nature, motion picture and television sources, all have provided material for the content, design and production of picture cards. As promotional devices in the candy, gum and confection field, we have seen them sold with caramels, Cracker Jacks, baked goods, soft drinks, ice cream and gum (CX 213, pp. 92–128).[2] Since gum has been given so much emphasis in this proceeding, it may be well to observe that a single manufacturer (not Topps) marketed gum with Indian cards in 1932 (Tr. pp. 831, 834) and with baseball cards from 1933 until 1942 (Tr. pp. 825–843; CX 98–B). That gum manufacturer was not the only one to utilize baseball picture cards in gum sales before World War II. At least four others did the same (Tr. pp. 835–837, 895, 2518; CXs 99–102). [World War II is mentioned as a time division because during that period bubble gum manufacture was curtailed "because of the war and the shortage of materials" (Tr. pp. 895–896).]

Whether a picture card be regarded as a toy, as an educational device, as a collector's item or as a mere something which catches the fancy of a child or adult for whatever subjective reason may prompt him to want it is wholly immaterial. The point is that it has some attractive quality which inspires in a person the desire to acquire it.

In recognition of the value of *baseball* picture cards as a promotional device, they have been utilized for this purpose in connection with the sale of a host of consumer products, including not only bubble gum (Leaf, Tr. pp. 2391–2394; Bowman, Tr. pp. 895–896; Fleer, Tr. pp. 1905–1907; Topps, Tr. p. 223), but also at least four brands of cookies (Tr. p. 2598; RX 9; Tr. p. 540), bread (RX 9;

[2] Here, and throughout this decision, appear transcript and exhibit references. References to the transcript or any exhibit are for purposes of illustration or example only. In no case are they to be regarded as reason for concluding that the record does not support elsewhere any statement or conclusion. By reason of my continued and intimate association with this proceeding from its inception and during the recent long, continuous sessions of the hearing, I have obtained general impressions, understandings and views based upon the whole record and my observation of the witnesses. These are all fresh in my mind and have facilitated the writing of this decision and the disposition of the questions and issues involved. Mostly, I have resorted personally to the record for my citations. In some instances, when my recollection supported particular propositions, I have adopted without verification citations furnished by counsel.

Tr. pp. 540, 3718–3719; 168–170, 3773–3777), at least two kinds of soft drinks (CX 137, RXs 9, 288; Tr. pp. 1098–1111, 3950), at least four brands of frankfurters (RXs 9, 204–A, 291; Tr. pp. 3954–3955), two brands of potato and corn chips (RX 9; Tr. pp. 286–287, 3946–3949), dry cereals (RXs 8, 9, 144, 153, 154), dog food (RX 9), ice cream (RX 9), two desserts (RXs 8, 203–A, 154, pp. 6 and 20), chewing tobacco (RX 11), and gasoline (RX 11). One religious society and two magazines have utilized them in their publications (RXs 9, 12; Tr. p. 543). They have been used also by a shirt manufacturer (RX 10) to promote his sales. Among the foregoing are included Leaf Brands, a gum manufacturer, which sold or promoted baseball cards with marbles as well as with bubble gum, and Frank H. Fleer Corp., another bubble gum manufacturer, which did the same with cookies, also as well as with bubble gum.

Here follow nine exhibits, all part of the record herein, partially illustrating the above: *

The variety and number of different picture cards which have been utilized by all sorts of business in connection with the sale of consumer products since World War II is so great that it would be wholly unfitting to list them in this decision. As far as the respondent is concerned, the activities of Topps alone involved three kinds of cards and picture devices in 1948; seven in 1949; ten in 1950; fourteen in 1951; thirteen in 1952; eleven in 1953; twelve in 1954; thirteen in 1955; nineteen in 1956; twenty-two in 1957; twenty-one in 1958; nineteen in 1959; eighteen in 1960 and in 1961; and since then, at least seventeen (Tr. pp. 81–141, 481–482, 486, 532–534, 3842, 3847–3851, 3862; CXs 12–19, 213, RXs 189, 193–194).

While this recital testifies to the aggressiveness, creativeness and enterprise of the respondent, its past and present competitors in the gum business by no means have been missing. Bowman, prior to the acquisition of its assets by Topps in 1956, utilized not only baseball picture cards, but basketball, football, movie stars, wild man, red menace, presidents, antique autos, fire fighters, preview movies, frontier days, spacemen, Wild West, law heroes, jokes, magic pictures, peace, questions and riddles, television stars, navy victories, etc. (Tr. pp. 895–896; CX 122, 213, pp. 116–119). Frank H. Fleer Corp., the source of a major portion of the testimony in support of the complaint, in 1959 utilized baseball, Three Stooges, Chief Halftown; in 1960, baseball, Spins and Needles, Chief Halftown, Three Stooges, Yule Laff, hobby, football; in 1961, baseball, football, pirates, bas-

*Pictorial exhibits omitted in printing.

ketball, hobby, Casper the Ghost, Yule Laff; in 1962, baseball, football, basketball, pirates, Casper the Ghost; and, in 1963, baseball (Tr. pp. 1420–1431, 2712–2713; RXs 56–58, CXs 193, 195–199, 203–212). Leaf Brands, Inc., in 1948, utilized baseball, football and two other subjects; the same in 1949; in 1958, antique automobiles; in 1960, baseball and one other subject; in 1961, two cards as well as a comic book and various war subjects; the same in 1962; in 1963, Spook Theater (a very successful promotion), and Son of Spook (CXs 88–B, 213, 337, 343–344, RXs 75–76, 80; Tr. pp. 2354–2357, 2378–2379, 2391–2394, 2433–2436, 2453–2457, 2476–2477). Philadelphia Chewing Gum Company published Babe Ruth baseball cards in 1948 and 1949, and magic trick cards in 1961 and 1962. It has acquired the exclusive picture card rights involving the National Football League football players, both alone and with gum, for the three years commencing 1964 (Tr. pp. 486, 641–643, 1991, 2392; CXs 90, 213 at pp. 118–122 and RX 79). The Donruss Company has utilized "idiot" cards, stamp cards and combat cards (RXs 79, 178, 197; Tr. pp. 3783, 3874–3875). The Becker Company has utilized elephant jokes (RX 79; Tr. p. 2507).

In addition to these gum manufacturers and such other businesses that use cards as promotion items, several manufacturers are engaged only in the business of producing picture cards of various kinds, including baseball. For example, Space Pak Co., Nu-Cards, Inc., National Trading Card Co., Abby Finishing Corp., Rosan Printing Corp., Adtrix Corp., Buymore Sales Corp., Mattel, Inc., Golden Press, and Exhibit Supply Co. (RXs 12, 160, 295–296, CX 77; Tr. pp. 475, 671, 927, 3709–3710, 3723, 3746–3753).

The American Card Catalog (CX 213) lists many hundreds, if not thousands, of card promotions.

It is perfectly apparent, therefore, that there are picture cards and picture cards, and that baseball picture cards by no means preempt the classification known by the general term "picture cards."

Nevertheless, baseball cards (not exclusively, but to a large extent) have been sought by children for various reasons. Perhaps the primary reason is the popularity of baseball as a sport and the desires of boys mostly between the ages of five and fifteen to associate themselves with it and to learn more about it. This is a vicarious entry into and participation in the game. It serves also to satisfy acquisitive desires. Contributing to this satisfaction are the devices to which picture card producers resort for the purpose of exciting and maintaining interest. For example, the respondent puts out several series of baseball cards each year, each of which has within it different pictures or cards of baseball personalities, and to each of which is assigned a number. In 1963 it issued six series totalling 576 cards (CX 395; Tr. pp. 3183–3185). Its principal competitor, Fleer, has put out a set of 79 different cards built around the career of a single ballplayer, Ted Williams (CX 195; Tr. p. 1905). It put out one other set consisting of 79 cards in 1960 and two sets totalling 152 cards in 1961—both known as "Baseball Greats" (Tr. pp. 1934–1935; CXs 196–199).

Obviously, a single picture card, in and of itself, has little value. From a business point of view, nobody could make any money with it. However, if a subject can lend itself to a great number of cards to comprise a set, it becomes a money-making proposition, and if the nature of the subject is big enough to have series of sets, then the interest in the cards will be aroused, nurtured and sustained over a longer period of time.

The object of the "series" and "set" approach is to induce collectors to try to amass complete sets, either separately, within a series, or of all the series. This results in giving the cards additional values, such as "trading cards" which can be traded so that persons with duplicates may acquire cards which they do not have, and playing, for they can be flipped or matched (Tr. pp. 104, 111, 115, 119, 127, 593, 1128, 1250, 1485, 1904–1906, 1931–1932, 3833; CXs 125, 128, 154, 196–199, 213, 431–Z–15, RX 140, Page 38). Counsel supporting the complaint relies most strongly on the contention that, during the baseball season, the interest of boys is so great in baseball that nothing else but baseball cards or bubble gum plus baseball cards will be purchased by them. While it is true that boys do have this great interest in baseball and those boys who want baseball cards will spend such money as they have available for that purpose only on baseball cards, whether they are sold alone or in combination with bubble gum, it is not a positive rule. The very mentality of boys causes the rule to break down. This has, in fact, happened on numerous occasions and with numerous card products. For example, just before World War II, war cards were successful during the baseball season. In 1955, Davey Crockett (Topps) trading cards were very successful. In 1963, Leaf Brands, Inc., a bubble gum manufacturer, had a spectacular success with cards called "Spook Theater." Monster cards, dinosaur cards and combat cards also have done well during the baseball season. As the hearing in this case was drawing to a close, it was brought out that respondent was about to market cards built around The Beatles, a group of singing troubadours imported from England. It has sought a reopening of the record to show a phenomenal success in this venture during the baseball season, but its motion to present the evidence has been denied (order of May 28, 1964) on the ground that the evidence sought to be offered was cumulative (Tr. pp. 912–915, 1147, 1162, 1219, 1955–1963, 1988, 2458, 3709–3710, 3883, 4042–4053; RX 197).

Baseball, as a sport subject, does not stand alone. Illustrative of this is the following exhibit of football promotions.*

Football has many attributes similar to baseball. It, too, has its season, and the season returns each year. It, too, has numerous teams and the teams have numerous players. While football cards have achieved a certain degree of popularity, the interest in them is not as great as that in baseball cards (Tr. pp. 874-875, 1982). Bowman Gum Company distributed football cards in 1948 and respondent lagged, except in 1951, until 1955. In football, as distinguished from baseball, the contract for publishing the cards is not made with the individual players, but is made with the football league (National or American) of which the teams are members. The players receive no direct compensation, the money going to the pension funds of the respective leagues (Tr. pp. 487, 1626–1634; CXs 12, 78–B, 193). Contracts have been made by various bubble gum companies with the football leagues over the years. At this time, the contracts seem to run for a period of three years (Tr. pp. 487, 1620–1630, 1780, 3339; CXs 190–191, 406). Topps, Fleer and Philadelphia Chewing Gum Company all have sought these exclusive contracts in competitive bidding. Philadelphia has the National Football League rights for 1964–1966, inclusive (Tr. p. 1630). Topps has the American Football League rights for 1964 and 1965 (Tr. pp. 1620–1625). Fleer paid for football rights $14,381 in 1960, and $32,400 in 1961 (CX 190, Sch. 8; CX 191, Sch. 8). From the viewpoint of the ballplayer, this arrangement is probably not as advantageous as an individual or separate contract made with him. Certainly, his freedom of contract is impaired and in fact taken away from him when he is unable to make his own contract, gets no direct benefit from it and the entire control is in the league.

Despite the widespread use and variety of picture cards they, nevertheless, have not become the subject of governmental statistics embracing a "picture card industry." The 1958 Census of Manufacturers and the confectionery sales and distribution statistics for 1961 and 1962, issued by The Business and Defense Services Administration of the Department of Commerce (RXs 281, 282 and 283), give

*Pictorial exhibit omitted in printing.

no tabulations for such an industry. While it might not be unreasonable to conclude, as suggested by respondent (even though there are large sales of all kinds of cards alone), that "picture cards are customarily published as an adjunct to another business," primarily the sale of consumer goods, the promotion of vending machines, and the printing industry (CX 77–A; Tr. pp. 925, 940, 959, 984, 3748–3749), my own conclusion is that, even though not an "industry," they are a commodity very much in demand and constitute a part of commerce.

BUBBLE GUM

Although, as is stated above, a bubble gum market, in and of itself, has been ruled out as a potential market issue, bubble gum is mentioned prominently in the complaint, and most of the evidence touching on the monopoly question offered by counsel supporting the complaint was concerned with it. It is well, therefore, to give it some attention here. Bubble gum is chewing gum which is distinguished from the well-known product only because it has a particular appeal to certain children of grammar school age who get some play value out of it (in addition to taste satisfaction and jaw exercise) by blowing it into bubbles. It has a harder base than regular chewing gum. Obviously, bubble gum is rarely purchased by adults or older children unless the purchase is made for the bubble gum-blowing child (Tr. p. 830). The essential object of that child's desire is the bubble-making characteristic of the gum. Brand names have little particular significance (Tr. p. 1224). Most of the manufacturers of bubble gum have been mentioned. They are mainly the respondent, Topps, The Frank H. Fleer Corp., Philadelphia Chewing Gum Co., Leaf Brands, Inc., The Donruss Co., Balmar, Inc., Gum Products, Inc., Curtiss Candy Company, and Shelby Gum Company. Lesser manufacturers are U.S. Chewing Gum Mfg. Co., Goudy Gum Co., Los Angeles Confectionery Co., and Skyline, Inc. All counsel seem to agree that the regular gum manufacturers, such as Wrigley's, American Chicle Company, and Beechnut Company (who concededly control 80% of the chewing gum industry), are not particularly interested in and do not market much, if any, bubble gum, and that the bubble gum manufacturers restrict their product generally to bubble gum (Part 26, In Camera, Proposed Findings, Counsel Supporting the Complaint; Tr. pp. 173–174, 826–830, 855, 1150, 1913–1920, 3505–3506; RX 140). Topps' basic bubble gum product is sold under the trade name "Bazooka," and its major competitor's (Fleer's) basic bubble gum product is "Dubble Bubble." For each, the named brand is the heart of its business (Tr. pp. 82, 1940–1941; CX 13).

It is alleged in the complaint, "Children engaged in collecting (baseball) cards will only purchase bubble gum which is packaged or accompanied with a baseball picture card." In a sense, this statement presents a bit of a conundrum in view of all the evidence. If it means that if a child wants *both bubble gum and baseball cards*, he only will purchase gum which is packaged with baseball cards, I have no difficulty with it. However, if it means that if a child wants bubble gum he will prefer the package with the baseball cards, I cannot agree. Topps' sales of Bazooka and Fleer's sales of Dubble Bubble, to say nothing of the sales of the other companies, belie this (Tr. pp. 1941, 1955, 2505–2506, 2542, 2865; CX 12, in camera). Conversely, if the statement means that if a child wants baseball cards, he will purchase only bubble gum packed with baseball cards, again I cannot agree. The availability of cards, whether alone, or with cereals, or with soda-pop, or with a cookie, or with the other commodities mentioned above, belies this (eg. CX 431, in camera). Even Fleer's president, the principal witness in support of the complaint, mounted a trapeze on this (Tr. pp. 1911–1912, 2613–2616).

BASEBALL CARD CONTRACTS IN THE COURTS

Because this proceeding, both in the complaint and in the proposed order served with it, as well as in the proposed order now offered by counsel supporting the complaint, is, to a very large extent, concerned with the terms of the contracts made by the respondent with the baseball players and because somewhat similar contracts were the subject of a litigation which resulted in instructive opinions by the United States Court of Appeals for the Second Circuit, extensive reference will be made to *Haelan Laboratories* v. *Topps Chewing Gum, Inc.*, 202 F. 2d 866, Cert. Den'd 346 U.S. 816.

A judgment of a court of general jurisdiction is, of course, frequently not *res judicata* of the issues raised in a Federal Trade Commission complaint. The opinion of the court, nevertheless, can be "extemely persuasive," particularly when the law governing the terms of a contract or other matter in issue is settled by the decision of the court. *Grand Caillou Packing Company, Inc.*, Docket No. 7887, June 4, 1964, Commission's Slip Opinion, Page 69. The law, as defined by a court, could be determinative of the public policy governing or the legality of some practices under attack by the complaint. *Sterling Drug, Inc.*, Docket No. 8554, February 20, 1964.

Before World War II, the bubble gum companies purchased their baseball cards from persons or firms engaged in the business of printing them. It appears from the evidence in this case that gum companies became embroiled in three litigations.

A minor litigation involved a baseball player, Johnny Mize, who, in 1941, sued Gum Products, Inc., claiming that it was using his picture without permission. Although Gum Products won the action, it decided not to continue the use of the baseball cards in its gum sales (Tr. pp. 752–753, 764–765, 841).

Leaf Brands, another gum company, was sued by Bowman Gum Company (which became Haelan Laboratories in 1952). The latter claimed that Leaf, which had used pictures of 106 baseball players who were under contract with Bowman, had infringed its rights to those contracts. Bowman (Haelan) ultimately won the case. They entered into a settlement agreement under which Leaf agreed to withdraw from the baseball trading card business until 1951 (Tr. pp. 2395–2397; CX 338). (As a matter of fact, Leaf, having failed, some time later, to work out satisfactory arrangements with Topps for sharing of current baseball card printing rights, elected not to market current baseball players' picture cards, either alone or with gum thereafter, but did, as noted elsewhere in this decision, market current baseball player picture cards with marbles.)

Bowman (Haelan) had entered into a great number of contracts with baseball players under which the players gave it the exclusive right to use their photographs in connection with its sales of gum and agreed not to grant any other gum manufacturer a similar right during the terms of the contracts. The contracts also had in them renewal options. During the same general period, Topps, both through an agent or affiliate and an unrelated publishing company, obtained contracts permitting it to print the ballplayers' pictures on cards and to utilize them in connection with the sale of its chewing gum. Bowman brought an action (cited as the Haelan case, *supra*) against Topps in the United States District Court for the Eastern District of New York. It contended that Topps, by using the baseball cards, was infringing on Bowman's contracts with the ballplayers and also that Topps, by having obtained contract rights from ballplayers who had contracted previously with Bowman, wrongfully had interfered with Bowman's contracts. [As to tortious interference with contract, see *Lumley* v. *Gye*, El. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853), and *Hornstein* v. *Podwitz*, 254 N.Y. 443.] Bowman lost the case in the District Court. The court held, in essence, that the nature of the contract by the ballplayer with Bowman was merely a release of his right of privacy and that it vested in Bowman no property right in the ballplayer's name and picture which could be enforced by Bowman. The theory of the District Court's decision was that the right to a person's name or picture was a strictly personal right and that it could not be the subject of a sale or assignment other than a sale in gross, as in the case of the sale of a trade or business. A somewhat similar ruling had been made in connection with the descriptive use of ballplayers' names on baseball bats. *Hanna Mfg. Co.* v. *Hillerich & Bradsby Co.*, 78 F. 2d 763, Fifth Circuit. (The *Hanna* case was very much like an ordinary Section 5 Federal Trade Commission case and turned on the deceptive use of the baseball player's name. It authorized an injunction which would permit the use of the name if it were followed conspicuously by the words "style" or "shape.")

Having lost its case against Topps, Bowman (now and hereafter to be referred to as "Haelan") appealed to the Circuit Court for the Second Circuit. That court expressly disapproved of the reasoning in the *Hanna* case. It rejected the contention that a ballplayer contracting with a commercial enterprise gave merely a release of liability or a release of his right of privacy. It held:

> * * * (A) man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made "in gross," i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a "property" right is immaterial; for here, as often elsewhere, the tag "property" simply symbolizes the fact that courts enforce a claim which has pecuniary worth.
>
> This right might be called a "right of publicity." For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures. *Haelan Laboratories* v *Topps Chewing Gum*, 202 F. 2d 866 at 868.

Thus, it has been established as a matter of law that a ballplayer, when he contracts with another party giving that other party the exclusive right to use his name and picture, grants to that other party a property right which is enforcible by the other party. It has been established also that the ballplayer himself has a property right to grant to another the exclusive right to utilize his name and picture. (This latter point is the basis for one of respondent's arguments in this case—that the Federal Trade Commission cannot enter an order in this proceeding which would take away from the ballplayer the property right thus held to be assignable, the ballplayer not being a party.) Having ruled that the property rights thus transferred or transferable may be the subject of enforcement by the assignee or transferee, the court, of course, must be deemed to have held that the contract whereby the right is assigned or transferred is a legal and valid contract.

Since it has a bearing on the contracts which Topps' principal competitors, Fleer, has made with "thousands" of ballplayers, many of which run concurrently with contracts previously made by Topps with the same ballplayers, reference here is made to the other phase of the *Haelan* v. *Topps* litigation. It was mentioned above that Topps was sued also for tortious interference with Haelan's contracts with the ballplayers when it, its agent or its other supplier, entered into parallel contracts with such ballplayers. Upon the petition for rehearing, Per Curiam opinion at 202 F. 2d 870, the court discussed contracts running concurrently with two different business enterprises and said:

Certainly, if the terms of one party's contract provide that its rights shall go into effect only upon expiration of a prior grantee's exclusive rights, the later grant would become fully effective at the time of such expiration. Indeed, in this situation no tort has been committed. However, the problem becomes more complex where the subsequent contract, by its terms, purports to go into effect before termination of any prior exclusive rights. Where the party soliciting such a subsequent contract knows of the prior rights and actually proceeds to use the grant given in violation thereof, its contract is tainted with illegality and is utterly invalid. See Reiner v. North American Newspaper Alliance, 259 N.Y. 250, 181 N.E. 561, 83 A.L. R. 23. Hence such a contract would convey no rights even if it ran beyond the duration of the other party's prior rights. But where the subsequent solicitor treated its contract as if it became effective only upon expiration of any prior rights and made no effort to use the grant before then, that grant would bloom into full force as soon as the earlier rights expired. The same is true if the subsequent grantee did not know at the time he entered into his contract that the ball-player had already given exclusive rights to another party. The validity of one party's contracts beyond the expiration date of prior exclusive rights given the other will thus depend on the district court's findings of fact as to the considerations we have pointed out.

Thus, Topps lost the case to Haelan and the court held that Haelan's exclusive contracts with the ballplayers were valid and enforcible. Having lost the case, Topps entered into a settlement agreement with Haelan, which by then had become Connelly Containers, Inc., as the result of a merger. Connelly, basically, was not in a business catering to the consumer. It did not have a great deal of interest in the gum business, which, as a matter of fact, had not been doing too well. The litigation had been extremely expensive. For example, in one year, it had cost Bowman (Haelan) $110,000 in legal fees and it had cost Topps only slightly less in the same year. The parties having spent all that money, and Topps now being subject to damages for infringing the Haelan contracts, and Connelly having suffered large declines in the sale of its bubble gum from 1953 to 1955, a settlement was effected. Topps bought out all of Connelly's (Haelan's) gum-producing assets and trade marks, all the contracts made with the ballplayers, plus other assets and it obtained negative covenants on the part of Connelly (Haelan), all for $200,000 (Tr. pp. 328, 879, 909; CXs 78, 48, 325, 119, 120).

THE TOPPS' CONTRACTS WITH BALLPLAYERS

This entire controversy revolves mainly around Topps' contracts with ballplayers. These contracts, in turn, stem from the Bowman contracts which the court had before it in the Haelan litigation above mentioned (RX 4, bound into CX 1). The Bowman contract provided for the "exclusive right to print, publish, exhibit, display and sell" the ballplayer's photograph together with his name, signature or facsimile thereof, and also a descriptive or biographical sketch. A somewhat similar additional exclusive right was given "in connection with the advertising, promotion and selling of chewing gum products of Bowman Gum, Inc." The contract restricted the ballplayer from granting to anyone else any of the exclusive rights granted to Bowman. He got $10 for this and became obligated for five years. (Some Bowman contracts were for ten years, CXs 222–A, B; RX 326–B, In Camera.) During the entire term, if he was a member of a major league baseball club for the first 31 days after the opening of the official baseball season, he was to be paid $100 for each such year. (In the first year he would get $90 because the $10 paid at the time of execution was applied to the $100.) In addition to the cash payment (or merchandise of an equivalent value at the player's option), the ballplayer, by entering into the contract, became eligible to compete for the "Jack Singer Annual Good Sportsmanship awards," or in any other award programs sponsored by Bowman. The contract had a saving clause providing that it would not conflict with the "Uniform Player's Contract" of the player's baseball club which permitted the club to use various types of pictures for publicity purposes.

To repeat, Bowman got printing and reproduction exclusiveness plus bubble gum and confectionery promotional exclusiveness for five or ten years, for only $10. Additional compensation was conditioned upon the ballplayer playing at least the first 31 days in a major league baseball club after the official opening day of each baseball season. Thus, he had to be in the major league club on the opening day of the season and for at least 31 days thereafter before being entitled to more than $10. It appears, also, that the contract did not provide for the possibility that the ballplayer might come into the major league club and start playing on a day following the official opening day. In other words, if he came in on the third or fourth day, or at any time after that, and played even the entire season, he would not be entitled to the $100 compensation for that year. This is the contract which the Court enforced in the Haelan-Topps litigation.

The settlement of the litigation between Topps and Haelan (which became Connelly) was consummated January 20, 1956 (CX 78). In that year, the Topps' contract with the ballplayers (CX 421) gave Topps "exclusive rights to exhibit, display, print, reproduce, publish, distribute and sell (the ballplayer's) name, picture, signature or facsimile thereof, description and/or biographical sketch, in any form, size, manner, material, color or language, such as trading cards in Topps regular resale packages and/or in combination with Topps products, chewing gum and candy during the term of this contract, or any extensions thereof." This was the limit of Topps' right. Testimonials or endorsements, while appearing to be excluded, may not have been, because of ambiguity, insofar as "Topps' Bubble Gum Brands" were involved. The ballplayer represented that he had not given similar rights to anyone else "either exclusively or non-exclusively for the term covered by (the) agreement or for any subsequent period." He agreed also not to give similar rights to anyone else "until the expiration of (the) contract * * * ." The term of the contract was for five calendar years. It was to be governed by the laws of the State of New York. The initial consideration was $5. Thus, the player became bound for five years for $5. He might get additional compensation of $125 in each of the five years constituting the term of the contract. To be eligible for this additional compensation, he had to play as a member of a major league baseball club for any period of 31 days after the official opening of the season and the reduction of the club's official roster to the limit required by the rules of its league. (The first year's payment was cut to $120 because of the application of the initial $5 to that year's payment.) But even this additional compensation was not certain. Topps was to be relieved from paying it even if the ballplayer played for 31 days, if in any year Topps decided "not to market a complete series or any part thereof of baseball cards * * * ." [This escape provision for Topps seems to have been included in all Topps' 1956 contracts, except that used for the New York Yankees. Topps was obligated to pay the Yankees whether or not it marketed "a complete series or any part thereof" (CX 422).] There was also a saving clause providing that, to the extent the ballplayer had "entered into a contract controlling or validly granting to others the rights or any part thereof granted to Topps," then Topps' rights under its contract were to be suspended until the expiration of the prior rights and, upon such expiration, Topps was to "be entitled to exercise exclusively the rights granted" to it. Similar contracts, except as to commencement and ending dates, were used in 1957 until September (CXs 422–423).

After September 1957, for the balance of that year, the form was changed in two respects. The ballplayer had to be "retained as an active, eligible member of a Major League Baseball Club for the *first* 31 consecutive days of the Championship Baseball Season without interruption." (It will be recalled that I have interpreted the prior Topps' contracts as providing that *any* 31 days qualified the ballplayer for the $125 payment.) The other change specified "*five full baseball seasons*" for the term as distinguished from five calendar years previously provided (CX 425). Counsel supporting the complaint argues that the effect of this is to bind the ballplayer, not for five calendar years following the date of execution, but, conceivably, for many more years. This is because there could be some years in which the ballplayer would not reach a major league, and there could be other years in which, even if he did reach a major league, he might be dropped back before the completion of the "first 31 consecutive days of the Championship Baseball Season * * *." I do not agree because, if this were so, it might be concluded that the contract was void for indefiniteness because of lack of certainty of duration. I believe (consistent with the rule that whenever possible validity of a contract should be sought) that the proper interpretation is that the contract is for five baseball seasons following its execution and that the references to major league playing are for the purpose of determining additional compensation, not length of term. This is the practical construction by the parties concerned, e.g. see Howard, CX 2, pp. 38–40.

The 1958 contract was like the September 1957 contract except that it expanded the combination of products from "Topps products and chewing gum and candy" to "Topps products and chewing gum, candy and confections" (CX 426).

The 1959 contract (CX 427) has a most important change. It makes clear that exclusivity extends to *trading cards alone* as separate articles of commerce in addition to the rights to use them for promotions.

Its covenant against dealing with others is:

I shall not during the term of this Agreement or any extension or renewal thereof, enter into any agreements with others with reference to, or involving the rights granted herein, nor will I grant to others the rights granted to Topps hereunder, or any rights similar thereto, whether such grant of rights to others be for the term of this contract or any part thereof, or whether they be for a time commencing after the expiration of this contract.

This provision has been the subject of strong criticism on the part of counsel supporting the complaint. He contends that this deprives the ballplayer and all Topps' competitors of the right to negotiate for or enter into a new contract commencing after the expiration of the present contract so long as the present contract is in effect. As a practical matter, the argument is demonstrated to be unsound by reason of what actually has happened. Fleer has made contracts with thousands of ballplayers who were and still may be under contract with Topps. Topps has been aware of this, and it does not appear to have taken any legal action or made any effort (other than competition) to stop Fleer from making contracts with ballplayers under contract with it. This may appear to but does not result in conflicting contracts. There is no conflict because the Fleer contracts take effect only upon the expiration of the Topps' contracts. (See *Haelan*, above, pages 30–31, this decision.) The proper construction of this clause is that the ballplayer is required only, while the contract is in effect, to refrain from giving others an *exclusive* contract for cards alone or for gum, candy and confections during its term or for a time after its expiration. The ballplayer's liberty to make contracts for any other uses of his name, picture, signature, etc., is not in any way restrained. Nor is he in any way restrained from making a non-exclusive contract, for the same rights, to take effect at the termination of his contract with Topps. Considering the large investment that the record shows Topps makes in the publicizing of baseball, minor league activities, individual baseball players and its promotion of the game as a universal sport, both spectator and participant, it does not seem unreasonable for Topps to include this clause for the purpose of protecting its investment and opportunity for competitive bidding at least so long as its contract remains unexpired (Tr. pp. 398–401). It is entitled to have a period of repose. There are too many ballplayers involved and the ambulatory nature of their activities is such that, without some such clause, it would be impossible for Topps to protect what has been regarded as a real right, its probability or expectation of renewal or extension. Similar, if not analogous, is the recognized reasonable expectancy or probability that an existing lease will be renewed or extended or a license or permit will be renewed or extended. 40 *AmJur*, Section 134; in re *Carter*, 192 F. 2d 15, at pp. 26, 28–29.

The next change merely eliminates the application of the initial $5 consideration as a credit against the first $125 to be paid to the ballplayer. The next change governs the term of the contract, "five full baseball seasons," above mentioned, and adds thereto a reference to a later, new provision, which will be discussed below.

The next change takes away from Topps the escape provision under which it did not have to make payments to the ballplayers if it decided "not to market a complete series or any part thereof * * * for any year or any part thereof." The obligation to pay is now absolute.

The greatly changed section, Section 7, is as follows:

> Notwithstanding anything to the contrary herein contained, it is understood and agreed that if prior to the date of the execution of this contract, I have entered into a contract controlling or validly granting to others the rights or any part thereof granted to Topps Chewing Gum, Inc., hereunder, then nothing herein contained shall be construed as granting to Topps Chewing Gum, Inc., rights interfering with the exercise of such other contracts. Topps may at all times use any portion of the rights granted it which do not interfere with the rights validly granted others, and in the event of such use only, Topps shall pay Player in accordance with Provision 3 until the expiration of such prior contracts, at which time Topps Chewing Gum, Inc., shall be entitled to exercise exclusively the rights granted herein, and payment shall then be made to Player each year of the unexpired portion of Topps' exclusive term in accordance with Provision 3, and without regard to use by Topps.

The first sentence, of course, is no different from similar sentences in prior contracts, merely makes clear that Topps is given no rights which the ballplayer previously gave to another, and forestalls a claim of tortious interference with contract. The second sentence modifies the exclusiveness of the contract to take care of a situation where the ballplayer might have a non-exclusive contract with another. To the extent that the contract with the other does not prevent Topps from exercising *any part* of the exclusive rights given to it, it is clear that Topps is permitted so to do. If it does, its obligation to pay the ballplayer the full amount is made clear. Finally, still taking care of the possibility that the ballplayer has made another contract inconsistent with the contract with Topps, a result similar to the result under the first sentence is attained in that Topps' rights come into play just as soon as the conflicting contract expires, but they endure for the balance of the five full baseball seasons which followed the date of execution of the contract. That this contract, with all its changes, was used in 1959 is a point not to be overlooked because that was the year that Fleer set about trying to get contracts with the ballplayers for the purpose of issuing picture cards with its bubble gum. It may be added here that Fleer's contracts universally were non-exclusive contracts and were designed, like Topps', to take effect at the expiration of a conflicting contract, if any there was. Thus, the ballplayers, even though under contract with Topps, were free to and actually did, enter into subsequently effective non-exclusive contracts with Fleer while their contracts with Topps still were in effect.

During 1959, Topps had still another contract with major league trainers (CX 428). While this differs in some respects from the contract with ballplayers, it is unnecessary to consider it in detail because it is of negligible concern in this proceeding so long as our attention is given fully to the contracts with ballplayers generally.

In 1960, and since that time, Topps has used a form of contract somewhat different from the 1959 contract (CX 429). In the covenant against entering into agreements with others during the term of the contract, the scope of the prohibition looks as though it may have been changed by the insertion of the word "subject" in the following:

> I shall not during the term of this agreement or any extension or renewal thereof, enter into any agreements with others with reference to, or involving the subject or the rights granted herein, * * *.

The insertion of this word "subject," in my opinion, adds nothing to the obligation of the ballplayer. It is just additional lawyers' language. To give it any other meaning would result in expanding the scope of the entire contract to everything having anything at all to do with baseball or reproduction rights. This, obviously, was not and could not have been the intention.

Whereas previously, in the payment clause, payment was required to be made "for each year of the term" of the contract, now it is provided that payment shall be made "for each baseball season" of the term of the contract. Later in the form, it is provided that the term of the contract shall end on December 31st of the year in which the last season falls. I do not regard this change as being of any significance except possibly to require payment to a ballplayer in the first year of his contract, even though the contract might have been made at a time following the commencement of the calendar year. The payment clause does, however, have a significant additional provision requiring payment not only if the ballplayer plays his first 31 consecutive days in a major league baseball club, but also if his "picture is published and used." This addition served two purposes. A ballplayer could get paid even though he did not serve the required period in the major league club and it made clear that Topps could increase and expand its picture gallery to include many players in the minor leagues.

The remaining changes are to assure payment to the ballplayer if his picture is published under conditions not conflicting with another prior contract and to assure to Topps a full term of at least five full baseball seasons upon the expiration of a prior contract if any competitor got to the ballplayer ahead of it.

In the struggle to maintain its position and to combat its major competitor's efforts to contract with the ballplayers, Topps has resorted to various means for extending the term of its agreements with ballplayers. These have varied. Generally, they involve extensions of two years or of a term equivalent "to the already expired portion of the term" of an existing contract. In addition to the financial obligations in the contract, Topps would pay a consideration, $75, for the extension. Thus, an initial five-year contract, in some instances, could have, and actually did, become a relationship for seven years or even nine (CX 430–A–F, inclusive). This, to repeat, was a *relationship*, not a seven or nine year contract. The relationship resulted from the making of one or more *successive* contracts.

WHAT ATTRACTS THE BALLPLAYERS TO TOPPS?

The details of the methods used by Topps to procure contracts will be discussed elsewhere in this decision. This part is intended only to present a general picture. Topps has contracts with more than 6,500 ballplayers both in the major leagues and in the minors. In 1961, these included 446 out of 450 major league players (Tr. pp. 2224, 2331; CXs 268–273). This number is not constant. Fleer had and paid 20 in 1962 and 27 in 1963 (Tr. pp. 2748, 2767, 2957). The precise number at this time may be more or less because of expirations, renewals or extensions, and new contracts. The contracts follow the pattern already set forth. They are exclusive and run initially for the term indicated. (Topps' competitor, Fleer, has made contracts with perhaps four thousand of these ballplayers, some presently effective and some to take effect on the expiration of the Topps' contracts.)

From the ballplayer's viewpoint, the pecuniary compensation he receives from Topps or Fleer is relatively minor. Presumably, a large compensatory factor is the publicity and adulation which results from his being selected as the subject for a picture card. The tendency to contract with Topps is kindled and fanned by missionary work undertaken by it in the sport. Typical are the Annual Rookie All-Star Team Awards, a prize program providing for taking a team of American teenagers to Puerto Rico for a series of baseball games with local all-stars publicized through public and institutional television broadcasts, awards to players in the minor leagues, "Player-of-the-Month" programs for minor league players and "All-Star Team" competitions (RXs 298–310, 2, 3; Tr. pp. 361–362). These, in turn, have rewarded Topps with various recognitions by baseball officialdom, included among them being testimonials of appreciation by the National Association of Professional Baseball Leagues (RXs 4–6).

A considerable amount of good will thus is built up. This, coupled with the ballplayer's own desire for publicity and what seems to be common knowledge of the wide distribution of baseball cards by Topps, facilitates the signing up of a ballplayer by Topps. (Tr. pp. 3538–3539, 3540–3557, 3577, 3581, 3617, 3634–3637, 3691–3692.)

Having settled the litigation with Bowman and acquired all of Bowman's contracts, and having the reservoir of the contracts it had acquired on its own prior to the settlement of the litigation, Topps, in 1956, had a broad base on which to build its present position. Despite the fact that it had this broad base, it embarked upon an aggressive campaign of solicitation to get the maximum of ballplayers of major league potential signed up. The approach always was personal solicitation of ballplayers. Because of the great number of major league and minor league teams and the scattered places in which the teams and their training camps were located, a small force of full-time and regularly employed part-time employees had to be augmented in some way. The general plan of operation was not new and was similar to that described by the court in 1935 in *Hanna Mfg. Co.* v. *Hillerich & Bradsby Co.*, 78 F. 2d 763 at 765:

> For many years it (the bat manufacturer) has had a contact man whose duty it is to become acquainted with professional ballplayers of promise, to take pains to make bats for them of such size, shape, and balance as they may prefer, thus inducing their use of appellee's bats, which are bought direct and marked with such player's name. The player in return, sometimes for a small

744 Answer

consideration, signs an agreement that for 20 or 25 years appellee shall have the exclusive right to use his name, autograph or photograph in connection with the advertising and sale of baseball bats, and consenting to registration of them as trademarks. Many autographs and photographs have been so registered. Appellee has thousands of such agreements.

The persons who solicit the contracts for Topps visit or frequent the clubhouses, minor leagues and training camps, They are hired because of their connection with baseball, some having been in the game before and some still being in the game. Among these are scouts, managers and even players or other personnel, all of whom, by reason of their baseball backgrounds, have easy access to the players. Apart from those who are employed full time by Topps, the compensation paid to persons active in baseball is not substantial and it varies. An agent or representative may get as much as $100 a year plus $5 for each ballplayer signed, or just $5 for each ballplayer signed. Others in baseball, clubhouse men, players, managers, scouts and trainers who do not have a definite arrangement with Topps, have been made aware that gifts, tips or small payments will be forthcoming from Topps on delivery of signed contracts (Tr. pp. 349–363, 388–391, 806–809, 1673–1676, 1687–1700, 1709, 3211, 3337–3338; CXs 45–46, 53, 55, 57, 59, 62, 284, 420). (This is not unique. Fleer now has representatives who are active players on the teams [CX 1, Lau, page 25, Williams, page 50; CX 2, Cottier, page 12, Howard, page 44; CXs 378–A, B; CXs 379–A, B, 380–A, B].)

All these persons, full time, part time, or casual, are instrumental in attracting ballplayers to Topps. It has been a traditional, generally accepted practical method for soliciting in this extremely fluid reservoir. The food company did not find it necessary to do it this way but that does not mean it should not be done this way.

THE STRUGGLE FOR CONTRACTS WITH BALLPLAYERS

As noted before, prior to 1956, the major competition to sign up ballplayers and utilize their cards in the bubble gum business was principally between Bowman and Topps and Bowman and Leaf. After Topps settled with Bowman and acquired Bowman's contracts as a supplement to its own, Leaf proposed that the rights be shared with it. Topps rejected this proposal (CXs 341–A–C). This would have been the easiest way for Leaf to utilize baseball cards because, following the prior litigation, it had terminated its entire trading card facilities (RX 80; CX 338; Tr. pp. 2396–2403). In its business judgment, it was not advisable to get back into the trading card operation. To do so would have made necessary setting up the traditional organization to solicit personally the baseball players and to overcome what it believed to be a feeling of players' ill will (RX 80). Apart from its effort to make a sharing arrangement with Topps, Leaf's interest in baseball trading cards for use in connection with its bubble gum business extended only to ineffective efforts to get copies of Topps' contracts (Tr. pp. 2457–2460) and an investigation of the law governing exclusive contracts for the use of ballplayers' pictures, which was followed by its conclusion not to attempt to sign up ballplayers. The person whom it had consulted was the then lawyer for the Baseball Players' Association. It thought and he concurred in the belief that non-exclusive contracts might be arranged for use by several companies (Tr. pp. 2414–2416; RX 80), but he was unable to make the hoped for arrangements. As a matter of fact, Leaf has not received any requests from the trade to manufacture baseball cards (Tr. p. 2460). Not until its decision to market baseball picture cards with marbles many years later did Leaf exhibit any new interest in baseball cards.

Fleer's first effort to acquire baseball picture card rights was at the end of 1958 (Tr. pp. 410, 1940, 2594, 3033). Thus, apart from the progress which Topps had made during the years prior to settling its litigation with Bowman, Topps had had the following three years (1956, 1957 and 1958) all to itself.

Coming into baseball as late as December 1958, following Topps' head start and following all that Topps had done in connection with the signing up of ballplayers, it is perfectly obvious that Fleer was bound to encounter difficulties in getting ballplayers to sign with it. However, the manner in which Fleer went about soliciting contracts was not conducive to success. It started with a mere mail solicitation in December of 1958, and followed this up with visits at major league and minor league spring training camps in 1959 by perhaps 10 of its regular sales marketing and internal personnel (Tr. pp. 2061, 2571–2582). As was to be expected, this indication of Fleer's intention to get into the baseball picture card business with bubble gum prompted Topps to step up its solicitations for contracts with the ballplayers, e.g. CX 249. This has helped Topps to maintain its lead over Fleer (Tr. p. 2061).

Since Fleer's belated decision to avail itself of whatever benefits baseball picture cards might provide for its bubble gum business, it has engaged in constant and ruthless competition with Topps for contracts with ballplayers. This competition has been reflected in the contracts utilized by both. The Fleer contracts sought to overcome the hold which Topps had on baseball players. They provided either that they take effect immediately if a ballplayer was not under contract with Topps or that they take effect upon the expiration of an existing contract between a ballplayer and Topps. The distinctive features about the Fleer contract are that it provided for non-exclusive rights as opposed to the exclusive rights for which the Topps' contract provided and that it was not fully binding on Fleer.

In order to combat Fleer's activities in the acquisition of baseball picture card rights, the Topps' contract was modified so that, even if a ballplayer became bound to Fleer, Topps, nevertheless, acquired non-exclusive rights equivalent to those for which provision was made in the Fleer contract. Also, Topps aggressively went on a campaign to prolong its relationship with the ballplayers by means of extensions of existing contracts. These were obtained by making payments of $75 for an extension. Once the word got around about this, Topps was beset with requests from ballplayers that their contracts be extended. The ballplayers began to look for these $75 payments given at the time of the execution of an extension agreement (Tr. p. 414). And this despite Fleer's debate with Topps and its warning to the ballplayers (CXs 232, 233).

Fleer, for the ostensible purpose of ascertaining the times at which its rights with ballplayers might become effective (and possibly for another purpose suggested below), embarked on two courses of procedure to obtain contract information governing Topps' rights. Fleer's problem arose because most of the ballplayers who signed with Fleer previously had signed with Topps but did not have copies of their Topps' contracts. This was primarily because of their trust in Topps, their carelessness, their lack of interest, the nomadic nature of their existence, and the lack of any reason to be concerned with details before Fleer started its campaign.

One of the courses of procedure taken by Fleer was to attempt to pursuade Topps to exhibit to it all its contracts or furnish to it copies of all its contracts. It seems perfectly natural that Topps did, very properly, refuse to accede to this request of its major competitor in the bubble gum business (CXs 291–313). Topps, soon after learning of Fleer's interest in acquiring baseball rights, had instituted a practice of furnishing Fleer with a list of the players under contract with it. In the course of the negotiations started by Fleer, Topps offered to exhibit to Fleer its contract with any ballplayer if Fleer made known the name of the ballplayer claimed by it and showed Topps its contract with that ballplayer. In the opinion of the Hearing Examiner, this was a reasonable proposition because it was Fleer who was claiming contract rights which could mature only on expiration of rights obtained previously by Topps. If it wanted to ascertain the extent of its rights, it seems only fair that it should have made the first disclosure of whatever rights it claimed for the purpose of ascertaining whether the Topps' rights were paramount. Fleer rejected Topps' offer. It appears that it would be satsified only with a complete disclosure by Topps of all its contracts (CX 291–313; Tr. p. 2318). Fleer's additional motive in wanting to see *all* of Topps' contracts is quite transparent. If it had been given this privilege, it would have learned all expiration dates and then could have concentrated all its efforts in step with the expiration dates. Thus, Topps' efforts for a mutual resolution of the problem were to no avail.

Fleer's other course of procedure was a campaign in which it offered a ballplayer a monetary or gift reward if he furnished Fleer with a copy of his contract with Topps (Tr. p. 2303). Prior to this, the ballplayers, in general, had not been concerned, as a rule, with obtaining copies of their contracts. Such ballplayers as from time to time had written Topps for copies of their contracts invariably were given copies (RXs 324–332, 337–338). However, when Fleer went on its campaign to have the ballplayers obtain copies of their contracts, which campaign involved not alone individual writing of letters, but sending of letters previously prepared by Fleer and utilization of Fleer's mailing facilities for the sending of such letters, Topps stopped sending copies of contracts. Instead, in each instance, it provided the ballplayer with sufficient information to acquaint him fully with the terms of his existing contract. It provided him with the form of the contract which had been signed and the expiration date. It offered to arrange meetings for exhibition of the actual contracts (RXs 339, 361–B, 362–A, B, C, D). In substance, this appears to be a sufficient and adequate compliance with requests for contract information, particularly when the circumstances surrounding the requests and their mass nature are taken into consideration. Fleer, here again, as was with the efforts to exchange contract information, wanted to play only if it could play its own way (Tr. pp. 2951–2955).

Fleer's struggle with Topps included, in addition, a massive bombardment of ballplayers with "educational" material seeking to acquaint them with the terms and obligations in Topps' contracts and in Fleer contracts, subversive efforts and espionage to obtain copies of Topps' contracts, powerful sales arguments in letters and personal talks to and with ballplayers, both individually and in groups, attempts to solicit the aid of baseball officialdom in the procuring of contracts with the ballplayers, and even an argumentative letter to college coaches attacking the Topps' contracts, lauding the Fleer contract and, most reprehensibly, subverting this proceeding to its own purposes by saying, "An indication of the serious nature of this matter is that the Federal Trade Commission has issued a complaint against Topps for monopolistic practices" (CXs 71, 232, 233, 318, 319, 330, 331; RXs 73, pp. 6, 82, 106; Tr. pp. 440–442, 3176–3183, 3215, 3229–3231). See *Mytinger & Casselberry, Inc.*, 57 F.T.C. 717 at 733–735, 745; also *Kalwajtys* v. *F.T.C.*, 237 F. 2d 654, 656.

Fleer's representatives were star witnesses and, in proportion, carried the burden of making the record in this proceeding. They were in constant attendance throughout the hearing. Even before the hearing, one of the baseball players, in response to a question put by Commission counsel during the taking of his deposition, said, referring to Fleer, "Well a representative of your (Commission counsel's) company asked me to get a copy of the contract * * * I am sorry; Fleer's" (CX 2, Cheney, Page 25). In retrospect, much of the struggle for contracts with ballplayers seems to be Fleer's private struggle with Topps. That is not determinative. *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 at 213. The Hearing Examiner is, however, of the opinion that the delegation of the Commission's "adjudicative fact-finding functions" does not embrace a policy question going to the public interest. F.T.C. Statement of Organization, Section 8.

Apart from Leaf and Fleer, in recent years there seems to have been little or no interest of any bubble gum company in baseball. This is probably attributable to a sense of futility induced by the knowledge that Topps has contracted with a large proportion of all the major league players (Tr. 754–766).

THE CONSIDERATION IN THE CONTRACTS

It is alleged in the complaint that the players, for a consideration of $5 paid to them while playing in the minor leagues, bind themselves to the respondent for five full seasons of play. This bare allegation does not portray the entire consideration because, while the $5 is a binder and the ballplayer does become obligated to allow the respondent exclusive rights in limited areas as set forth in the contract for five major league seasons, the ballplayer does receive additional compensation—$125 each season for each of those five seasons. This compensation is by no means the ballplayer's entire source of income or his means of livelihood. It is most insignificant in relation to his business and total area of compensation.

379-702—71——50

To the extent that reasonableness of compensation may appear to be an issue, it is my opinion that, in the absence of deception or fraud, the consideration expressed in a contract is not a concern of the Federal Trade Commission. However, if it be considered that the $5 is paid to thousands of unselectively chosen ballplayers, the vast majority of whom never will be the subject of a baseball picture card, and that the annual $125 payments, in practice, are the subject of a binding commitment and are paid not only to all the ballplayers in the major leagues under contract with Topps but also to others if their pictures are used, the consideration does seem adequate and reasonable. This matter of consideration is a term for bargaining, and, certainly, if the competition were sufficiently interested and practical about getting the rights which are in issue, this consideration could not remain long at $125 per year. On the other hand, the probabilities are great that if it went much beyond $125 a year, and all ballplayers were assured that they would get the amount payable, the business feasibility of utilizing baseball players in picture cards soon might reach the point of diminishing returns. This was Bowman's actual experience (CX 120-C).

The testimony is that, at the time of initial contracting, the ballplayers are young, naive, uninitiated in business, impractical and that they tend to do what the crowd does (Tr. pp. 808, 813, 3585–3586, 3628–3642, 3691–3692; RX 1, p. 66; CXs 55, 2, pp. 30, 42, 44). But there is nothing in the record to suggest that any ballplayer is deceived or is not aware of the fact that for $5 he is committing himself in a limited manner to Topps for his first five seasons or years of major league playing. On the other hand, it appears from the record that the young ballplayer welcomes the $5 if for no reasons other than it is $5 which he did not have, that he knows he is signing up for exclusiveness, that he is flattered that he has been asked to sign a Topps' contract, that somehow he believes, understands or knows that the rest of his teammates or a large number of them also have signed with Topps, and he wants to be part of the crowd.

The Fleer contracts currently in use also are executed for a $5 initial consideration (CX 417). They bind the ballplayer to Fleer, non-exclusively, for substantially the same rights as those in the Topps contracts. They take effect immediately or upon the expiration of any contract (obviously Topps') which is currently in effect and inconsistent with granting non-exclusive rights to Fleer. Under this contract, the player *may* get $125 if he plays major league baseball for at least 31 consecutive days after the official opening of the championship baseball plus "such additional period, if any, as may be designated by the rules of such League for the reduction of the official roster of baseball players to the legal limit." This means that the player must play major league baseball for at least 31 consecutive days or more from the opening of the season in order to be eligible for the $125. That, however, does not, alone, entitle him to be paid, because, in addition to some of the more usual *force majeure*-like provisions, there is an escape clause for Fleer not to make any payment for any year in which it does not "exploit through marketing . . . the right" therein granted. This is a large commitment on the part of the baseball player, but a no-risk commitment on the part of Fleer.

Another contract which came up during the testimony was one offered by Sports Novelties, Inc. (CX 179). While this also was non-exclusive, it provided for rights "when distributed and sold in combination with marbles, or with other non-edible novelties such as 'charms' made of plastic or metal." This committed the baseball player not only to baseball cards with marbles, but also to practically every other kind of a novelty which could be made. It also committed the baseball player not to sell or bargain the rights "to anyone exclusively for future years without first offering such exclusive rights to Sports (Novelties, Inc.) upon the same terms and conditions." The effect of this was to tie the baseball player up for life as far as exclusive rights were concerned and give to Sports Novelties, Inc. a first refusal of every potential contract the ballplayer might have offered to him. This contract did not go to all players but to players chosen selectively. For all this, and for a term substantially one year, Sports Novelties, Inc. offered only $50.

Given circumstances like these, there is no basis for ruling that the $5 payment for the purpose of binding the player to Topps in the limited exclusiveness provided in the contract for his first five seasons of major league play or that the $125 per season paid during the five major league years is unreasonable.

THE RENEWALS AND EXTENSIONS

It is alleged, "The contracts are renewed and extended for various periods until the player's retirement." This allegation is susceptible of misunderstanding. There is nothing in any of the Topps' contracts which provides for an automatic renewal or extension whereby the contract may be self-perpetuated. Essentially, the maximum term of any of the Topps' contracts, whether it be those now being executed or those executed in the past, is for five years of major league baseball playing. It is true, however, as appears above, that Topps now has a practice of obtaining extensions or renewals of rights' contracts and that the effect of these extensions or renewals may result in a prolonged relationship—sometimes seven years, sometimes nine years, and, conceivably, sometimes more. This practice of obtaining renewals or extensions, under some circumstances and standing alone might be questionable. In fact, without the explanation which appears in the evidence of this case, a universal pattern of obtaining two-year extensions or obtaining extensions for additional periods of time equivalent to the period of time already expired under the contract might be condemned as a considered scheme to perpetuate Topps' hold on a ballplayer. In this case, the evidence shows that Topps resorted to the practice of negotiating extensions or renewals by reason of the interplay of the forces of competition. Three years after it settled its litigation with Bowman, after going through this period of lack of competitive interest, it was confronted suddenly with Fleer's large-scale effort to obtain contracts with the ballplayers, which contracts were to become effective just as soon as the contracts with Topps expired. Thus, it was Fleer which was contracting for *future* rights. This activity on the part of Fleer resulted in Topps also becoming active to contract for future rights in order to salvage for itself the benefits of the exclusive contracts it already had made with ballplayers.

By this time, it had become well known among ballplayers that both Fleer and Topps were competing for the rights they had for sale. These competitive efforts were to obtain baseball picture card rights. Topps met the competition head-on. It paid $75 as *additional* consideration for the execution of a two-year extension. This $75 did not serve to reduce in any manner the compensation otherwise payable under the contract then in force or as extended for the rights given to Topps. As I have said above, as far as the extensions or renewals are concerned, there was nothing self-perpetuating about them. Each extension or renewal was a new agreement freely entered into by the ballplayer. This time he was keenly aware of the competitive effort to get his signature on a contract (RXs 334–336). Of course, the $75 was an added inducement. In fact, it facilitated and sparked off a flood of ballplayers' requests that their contracts be extended. In these days of the "fast buck," particularly in the field of exhibition, and, more particularly, in the sports field, it can hardly be said that a ballplayer, being aware of the competition for his signature between Fleer and Topps, was seduced or misled for a paltry $75 into signing a two-year extension of an existing contract. To repeat again, while this, in effect, resulted in a continuing relationship, the relationship was not the result of one contract but, on the contrary, was the result of two or more contracts separately executed at separate times for new and separate considerations.

It has been suggested during the course of the proceeding that Topps' practice of getting extensions of contracts might have interfered with future rights which Fleer had obtained under its non-exclusive concurrent contracts with Topps' ballplayers. It has been argued, also, that these extensions further complicated Fleer's efforts to ascertain when, if ever, its future rights matured. This is not a concern of the Federal Trade Commission. If Fleer's rights, under any contracts it might have made with ballplayers, are or were affected by any conduct on the part of Topps, that is a matter for resolution in the courts in private litigation between Fleer and Topps. The remedy at law is available and history tells us it can be had. *Haelan Laboratories* v. *Topps Chewing Gum*, 202 F. 2d 866, *cert. den'd* 346 U.S. 816.

Finally, Topps' valuable right to expect renewal or extension (page 769 above) should not be overlooked. Consequently, I do not regard the fact (standing alone) that Topps does obtain renewals and extensions for various periods as making it subject to remedial action for this reason.

THE EXCLUSIVE NATURE OF THE CONTRACT

Before considering, in general, the problem of exclusiveness, I direct my attention to that portion of the contract quoted verbatim in the complaint, without explanatory matter as to the reason for quoting it. The complaint alleges:

A clause in the contract provides that the player will not:

"* * * grant to others the rights granted to Topps hereunder, or any rights similar thereto, whether such grant or rights to others be for the term of this contract or any part thereof, or whether they be for a time commencing after the expiration of this contract."

(This part of the contract may be incorrectly quoted because the actual contract says "* * * whether such grant of rights * * *," and not " * * * whether such grant or rights * * * ." This is probably immaterial.) Except to the extent that it may be regarded as a recital of a step towards monopoly, the complaint makes no direct allegation explaining the reason for attacking this provision of the contract, but, during the course of the proceeding, it developed that counsel supporting the complaint contended that because, by the terms of the contract, it was operative "during the term of this Agreement or any extension or renewal thereof * * * ," it prevented a ballplayer from making any contract during the time that the current contract was in effect, to commence at any time following the current contract's expiration. I have ruled, and I adhere to my ruling, that a proper interpretation of this clause is that the ballplayer agrees only that so long as his contract with Topps is in effect, he will not enter into an agreement with anyone else to give it the same exclusive rights at a future time as Topps has under the existing contract. The ballplayer is not prevented, while the existing contract is in effect, from executing a contract for any other rights nor is he prevented, during that time, from executing a contract for non-exclusive rights, such as those provided in the existing contract, to commence at its expiration. Thus, the ballplayers were able to and did make non-conflicting contracts for the use of their pictures and biographies with cereals, non-conflicting contracts for the use of their pictures and biographies with cookies, and non-conflicting contracts for the use of their pictures and biographies with marbles, to name but a few. It has been shown above, also, that Fleer was quite successful also in making contracts for future rights with respect to bubble gum.

The Topps' contract, nevertheless, is an exclusive contract. It does bind the ballplayer to Topps as far as the use of his picture and biography on trading cards sold alone is concerned, as well as their use in combination with chewing gum, candies and confections. Also, the term is not short—it is for five years. At the beginning, and under certain circumstances, the five years may not start to run until some time after initial execution. This exclusiveness is, however, not a *complete* exclusiveness. The ballplayer's freedom to contract is *unlimited in all respects* except that of the baseball picture card as an individual article of commerce and the baseball picture card as a promotional item for chewing gum, candies and confections.

Counsel supporting the complaint attacks this contract and cites as authority *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 292 (1952). There the only charge was that, by entering into written screening agreements with motion picture exhibitors for periods running one, two or five years whereby the exhibitors were required to display advertising films supplied by it, and were prohibited from showing commercial advertising films furnished by anyone else, M.P.A.S.Co. was guilty of an unfair method of competition in those cases where the agreements extended for a period longer than one year. It appears that in that case only about 60 percent of the motion picture theaters accepted film advertising and that theater patrons resented the showing of too much of this sort of advertising. Thus, there was a limited number of theaters available for the screening of film advertising. M.P.A.S.Co. and three other companies had similar exclusive arrangements with three quarters of all the theaters which displayed advertising films for compensation. M.P.A.S.Co.'s share of this was almost 40 percent of the theaters in the areas in which it operated. The M.P.A.S. Co. contract did not restrict the individual theaters from displaying toy advertising films as distinguished from candy advertising films. It did not restrict the individual theaters from displaying chewing gum, candy and confectionery advertising films as distinguished from displaying furniture and other non-edible commodity advertising films. It just did not restrict any theater from displaying any particular kind of advertising film as distinguished from another type of advertising film. On the other hand, it did clearly and all-embracingly restrict every contracting motion picture theater from displaying any kind of an advertising film not furnished by M.P.A.S.Co. This is not at all like the much lesser restriction we find in the Topps' contract.

In discussing the M.P.A.S.Co. case, respondent relies heavily on the remarks of Justice Frankfurter in his dissenting opinion. While the Hearing Examiner understands the arguments based on the dissent and recognizes the distinctions there made, it is not for him to adopt as law what was said in a dissenting opinion. For that reason, he cannot accept the arguments grounded on the Frankfurter dissent. The Hearing Examiner does, nevertheless, find merit in the point made, that 75 percent of all the theaters available for motion picture advertising had no choice other than to make the exclusive contracts which were handed to them by the four companies selling motion picture advertising. This is not analogous to our case. Here, the opportunities of the ballplayers are unlimited. Not only do they have a choice between the exclusive contract offered by Topps and the non-exclusive contract offered by Fleer or Sports Novelties, Inc., but they also can and do contract either exclusively or non-exclusively, and sometimes both exclusively and non-exclusively, for any number of different commodities. Furthermore, no matter what may be said about the habits and nature of ballplayers, they are not naive and they are very well aware of the meaning of exclusivity in a contract. This became quite clear during the taking of the ballplayers' depositions.

Coupled with his discussion of the M.P.A.S.Co. case, counsel supporting the complaint cites *United States* v. *International Boxing Club of New York, Inc.*, 171 F. Supp. 841, 842. The Supreme Court set forth all the facts in its opinion in *International Boxing Club* v. *U.S.*, 358 U.S. 242. At this part of this decision, my consideration is limited to the bearing which IBC may have on the validity of a single exclusive contract. I am not at this point concerned with the whole series of steps alleged in the complaint. Counsel is correct in qualifying his reference to the IBC case by saying "* * * that where a firm's control of a market is more extensive, exclusive contracts by which it got control may be prohibited altogether." That case involved a combination and conspiracy. There is no combination or conspiracy involved in this case. Next, the case involved a steady, calculated march whereby a certain group, by means of acquisitions, combinations and restrictive agreements, eliminated Joe Louis, by voluntary retirement, from his title of Heavyweight Champion, got control of the exclusive promotion rights to fights of the four leading contenders for the heavyweight crown, obtained control of the key arenas and stadia available for championship fights in the United States, obtained control of all promotions of boxing matches in three championship divisions (heavyweight, middleweight and welterweight), and required every contender for or aspirant to the title in any of the divisions to grant the combination an exclusive promotion contract to his championship fights, when and if he became a champion, for a period of from three to five years. The contenders and every title aspirant had to grant these exclusive promotion contracts, which included, in addition, film and broadcasting rights, because, if they did not, there was no place in which they might fight and no one with whom they could fight.

No event could be staged successfully in any of the most fruitful areas of the country without the consent of the group. A more pervasive grip on boxing defies the imagination. Having found that it was proper to designate the relevant market as "championship fights," which are the "cream," the court affirmed the decree below, which included a prohibition against exclusive contracts applying to all professional boxing contests. This conspiracy and the attendant result of permitting no entry into the field of championship boxing contests by others is far different from the facts of this case insofar as the limited exclusivity of the Topps' contract, standing alone, is concerned.

The limited exclusive nature of the Topps' contract, whether it be for picture cards alone or for picture cards to be sold in combination with candy, gum and confections, is not so all embracing without more as to make it subject to remedial action. This prompts an inquiry to be considered more fully elsewhere. Is the five-year term so unreasonable as to make it an unfair business practice in and of itself? This is a matter dictated generally by the needs of the contracting parties. The Topps' missionary work in baseball, the totality of its investment in baseball, the unselective contracting with all ballplayers, followed by the distinction of being published on a card even when not in a major league lead me to believe that a five-year exclusive, limited as it is here, in and of itself, standing alone, is not so unreasonable as to warrant remedial action. Counsel supporting the complaint, in suggesting the unfairness of the five-year term, points to shorter terms found in some other contracts. We are not informed as to all the reasons why others might have preferred or negotiated shorter terms and for that reason are unable to make a just comparison. Moreover, this sort of argument seems to be reminiscent of the argument of many respondents in Federal Trade Commission cases—the others are doing it, therefore it is proper for us to do it too. To counter this argument, respondent points out that sporting goods companies get exclusive contracts with the ballplayers for their lives (CX 2, Cottier, p. 13; see also CX 1, Williams, p. 48).

COPIES OF CONTRACTS FOR SIGNATORY BALLPLAYERS

Next, the complaint alleges, "in most instances the respondent does not give copies of these contracts to the players, and they are unaware that they are bound, by the terms of the contract from granting future picture card rights to any person or corporation other than respondent." We have seen by now, that not only are the ballplayers aware of the exclusive nature of their contracts with Topps, but also that they are not barred from granting future picture card rights to any person or corporation other than respondent. We know that the ballplayers did and do grant picture card rights to others—witness the contracts with a cereal box manufacturer, with a soda-pop bottler, with Fleer for cookies, with Leaf (Sports Novelties, Inc.) for marbles, to name but a few. The contract provisions already quoted show that the ballplayer is not barred from granting all future picture card rights to any person or corporation other than the respondent, and the facts demonstrate that no one in business interested in obtaining picture card rights so interpreted it.

If the respondent, for the purpose of perpetuating its control over the ballplayers, had a general plan or scheme not to give copies of the contracts to the players, such a practice, unquestionably, would be unfair and subject to remedial relief under the statute. This, however, is not the fact. The evidence shows that any ballplayer, when he signed a contract with Topps, could have had a copy. If he did not have a copy, it was neither the fault nor design of Topps that this deficiency prevail (Tr. 428–429, 445, 447–448, 2198). Even Fleer's President, testifying on this subject, in response to Commission counsel's inquiry, said (Tr. p. 2189):

> Well, we have written up contracts with several thousand players now, so we have a good bit of experience at this, too. They unfortunately aren't very sharp businessmen and it generally does not occur to them to ask for a copy.

There is no evidence in the record that a copy of the contract was withheld from any ballplayer at the time that he signed the contract. There is evidence (which I believe credible) in the record that, at contract-signing time, many copies were available, and they could be found in locker rooms and other places where they might have been dropped or thrown away (Tr. pp. 428–429). Evidence cited above is to the effect that before Fleer started its mass campaign of harassment to obtain copies of Topps' contracts, those ballplayers who requested copies invariably received them. It has been shown, also, that after the Fleer campaign was under way, contract information was given frequently and regularly to every ballplayer in a form sufficient for him to know his rights and obligations, and Topps further offered to meet with the ballplayers for the purpose of exhibiting their contracts to them. No ballplayer testified that Topps refused to give him a copy of his contract at a time prior to the Fleer campaign. Those who did testify testified, with respect to the time after the commencement of the campaign, that Topps either furnished them with the contract information or offered to make arrangements for giving it to them. Furthermore, the offer by Topps to exhibit to Fleer every contract with every ballplayer over whom Fleer asserted contract rights was a reasonable gesture to avert or forestall possible contract interference litigation, but Fleer rejected this offer. The picture presented is not a picture of calculated refusal or deliberate intention not to give copies of contracts. The contrary seems to be the case.

As a matter of fact, there is no reason to believe that if Topps were required by order of this Commission to force a copy of the contract on every ballplayer who signed a contract with it, the ballplayer would retain it for future reference or use. The past conduct of the ballplayers suggests quite persuasively that it would not be long before most of them would throw it away, mislay it or lose it (CXs 1, 2).

During the hearing, the general problem was discussed in colloquy between the Hearing Examiner and counsel, and the Hearing Examiner, at that time, expressed his awareness, an awareness which turned out to be shared as well by counsel, that even trained lawyers frequently do not have copies of their contracts with persons with whom they deal. Illustrations given were relations with banks, with stock brokers, with utility companies, and with theaters.

It cannot be said that the respondent wrongfully withheld copies of contracts from the players. Moreover, those players who had no copies of their contracts were aware of the exclusive nature of their contracts with Topps. Finally, even in their testimony, when they were called by counsel supporting the complaint, the ballplayers exhibited a singular lack of interest in the contents of the contracts (CX 1, Lau, pp. 29–30; Williams, pp. 42–43, 60–61; Breeding, p. 73, CX 2; Cottier, pp. 14–15; Cheney, pp. 30–31).

THREATS OF LEGAL ACTION

The next allegation in the complaint is:

> The respondent has, by and through a number of means, including threats of legal action and secret payments to representatives or agents in the employ of baseball players, effectively frustrated the efforts of its competitors to secure the rights to use the pictures, names and biographies of baseball players on baseball picture cards, and has thereby foreclosed and prevented said competitors from selling their products including bubble gum to substantial markets.

In this section, I shall discuss only "threats of legal action," reserving the other "means" for later discussion. Since the allegation with respect to "threats of legal action" is related to the efforts of Topps' competitors, the proof might have been restricted only to alleged threats to bubble gum manufacturers and/or producers or vendors of baseball picture cards as separate articles of commerce. The proof did, however, extend to alleged threats to a cereal manufacturer and a soda-pop bottler.

Recently, the Commission has had occasion to deal with litigation (which would include, of course, threats to litigate) as a possible unfair practice in commerce. *Grand Caillou Packing Company, Inc., et al.*, Docket No. 7887, Commission's Slip Opinion, pp. 69–70, June 4, 1964. No one would suggest that the Commission, by making the allegation quoted above, meant to allege that a mere threat to go to court to enforce one's legal rights, in and of itself, constitutes an unfair practice. The complaint must be interpreted to mean that Topps was accused of threatening, without legal basis, to sue other persons, and that the purpose and object of such a threat was to discourage lawful conduct on the part of the recipients of the alleged threats because of the expense which might result from litigation. The Commission said as much in *Grand Caillou*, "(The court litigations cited) preclude a finding by this Commission that the respondents' infringement suits were not brought in good faith for the purpose of protecting their patent rights" (p. 70). The issues here, then, are, assuming that Topps did threaten others with legal action, were these threats false? Were they groundless? Was there a lack of good faith when the threats, if made, were made? At this stage of the decision I do not reach the question whether zealous protection of legal rights in some circumstances may be regarded as an element supporting a conclusion that there was a "constructive intent" to monopolize.

Counsel supporting the complaint, in support of this part, has cited alleged threats to two gum competitors, three card printers or vendors, a cereal manufacturer, and a soda-pop bottler.

One of the gum companies was Leaf Brands, Inc., which, it will be recalled, tried to make an arrangement with Topps, following the settlement of the Haelan litigation, for the sharing of baseball picture card rights. Following the rejection of Leaf's offer, Topps wrote a letter to the Player Representative of each of the clubs. It said:

> Even if someone were to completely disregard the ethics and equities involved, by this time it should be abundantly clear that a player cannot sign an exclusive contract with one party and then sign a conflicting contract with another without exposing himself to a law suit. It should be equally clear, as determined by the Federal Circuit Court and the Federal Court of Appeals and the final refusal of the Supreme Court of the United States to grant Certiorari, that anyone, with knowledge, interfering with the rights granted, would be similarly liable for damages (CX 341-B).

This letter was written on August 14, 1956, and two days later a copy of it was sent to the attorney who had endeavored to make the arrangements with Topps on behalf of Leaf (CX 341-A). The statement in the Topps' letter to the Player Representatives, in and of itself, seems to be a fair and reasonable statement of the law. Considering that Leaf's lawyer was informed promptly of the letter to the Player Representatives and considering that the recipient of the information was the lawyer who had conducted the negotiations on behalf of Leaf, this could hardly be regarded as a bad faith threat of legal action, if it could be regarded at all as a threat.

The other gum company alleged to have been threatened is Fleer. Here again, we recall that just as soon as Fleer started its efforts to get into baseball cards, Topps started keeping Fleer informed of the names of baseball players over whom it asserted contract rights. Commission counsel's sole citation for contending that the information thus given to Fleer was a bad faith threat of litigation is to Tr. p. 2124 where Fleer's President, in response to a question (doubtful as to form), "What was the purpose of providing these lists to you, to your knowledge?" answered, "To put us on notice as possible grounds for an infringement action." The exhibits to which the witness referred were CX 235–A and CX 235–B. The opinion of Fleer's President as to the purpose of the communication from Topps has no probative value alongside the actual communication. A reading of the communication demonstrates the opinion to be completely without reason. The communication was a letter dated March 6, 1959, to which was appended a 57-page list of the names of ballplayers. In that letter, Topps said, after referring to Fleer's "interest in entering the baseball picture card field" and a prior offer "to permit (Fleer) to review (Topps') agreements with Professional Ball Players and others connected with the sport":

> In order to accelerate such a comparison and to evidence our good faith, I am attaching hereto a list of Professional Ball Players, among others, who have granted Topps exclusive rights for the above purposes for this year and for additional periods of time. We have checked the list very carefully but due to its length, we may be in error in some cases and the list is not represented as being complete as of this date (CX 235–A).

There is nothing in this to justify a conclusion or interpretation that the communication was a threat. It seems to be a perfectly reasonable vehicle for informing a competitor of rights claimed, and, more than that, it suggests a perfectly simple and appropriate method for averting, not causing, litigation.

One of the manufacturers and vendors of picture cards and picture card vending machines made an affidavit dated May 10, 1963 (CX 77–A) which was offered in evidence by counsel supporting the complaint. This is cited as evidence of a threat. In the affidavit appears the statement that the affiant had advised a Federal Trade Commission representative that in 1959 Topps' President "requested that (the affiant's company) discontinue reproduction and sale of certain baseball player picture cards, stating that such activity was in violation of exclusive rights granted to Topps Chewing Gum, Inc." This, of course, without more, is not a bad faith threat of litigation—and there is no more to suggest that it was. It is interesting, however, to quote further from this Commission exhibit:

That (the affiant's company) does not have contractual arrangements with any of the personalities (including baseball personalities) whose photograph reproductions are manufactured and sold by it; that it has never attempted to, nor is it currently attempting to secure such contracts; that it has in the past discontinued the sale of photographs of any personality requesting such discontinuance personally or by their agent; but that it has not discontinued the sale of such cards at the request of third parties, including Topps Chewing Gum, Inc.

7. To the knowledge of this affiant the activities of Topps Chewing Gum, Inc. have not injured (the affiant's company) in its business of manufacturing and selling baseball player picture cards; that in the event (the affiant's company) should be prohibited from manufacturing and selling said picture cards, its business would thereby be injured (CX 77–B).

The allegations as to threats to other baseball picture card manufacturers or vendors are supported by citations to the testimony of a witness of doubtful credibility. The testimony, however, does not support the allegations. The witness was interrogated about a letter (CX 74–A) which he had seen but not read. It had been addressed to a company which was negotiating for the purchase of the witness' stock of cards. This letter merely transmitted a list of professional ballplayers who, it said, "have granted Topps Chewing Gum, Inc., exclusive rights for the use of their pictures, etc. for trading cards alone or in combination with gum or candy, for 1962 and for additional periods of time." Attached to the letter was a 40-page list of names. There is no proof that any name contained in the list was falsely represented as the name of a grantor of rights to Topps. Referring to the letter and the lists, the witness (Tr. p. 942) said, "After receiving that letter (the purchaser) devalued the baseball cards which were in our inventory and we ended up sort of as a stress sale and received only $13,000 for the cards." Here again, this is not proof of a bad faith threat to litigate.

The same witness is cited again at Tr. pp. 949–950. It seems that the witness or his company had received a letter in 1960 from Topps regarding a series of cards called "Baseball Highlights." The letter was not produced but, after some objection and colloquy, respondent's attorney agreed to let the witness "testify as to what he thinks the contents of the letter would be." The witness then answered, "Well, in general it said that we were exposing ourselves to a lawsuit because Topps had contracts with these players; and, in effect, if we printed these cards—I think it was after we printed the cards that they told us." In the absence of proof that Topps did not have contracts with the ballplayers whom Topps claimed, this is, at best, merely a putting on notice of possible infringement. It is not a threat of an unwarranted lawsuit.

The cereal manufacturer allegedly threatened is one of the largest food companies in the United States. It is the one to whose cereal boxes with baseball picture cards reference already has been made. It seems that, in connection with the baseball card promotion, it included an offer of ten baseball cards for two box tops plus $0.10. Whether or not this sale was an infringement on Topps' rights governing the sale of baseball cards alone may be debatable but it is hardly likely that this mammoth food company could be intimidated by a false claim. Counsel supporting the complaint cites a letter written by Topps (CX 75–A and 75–B) which was followed by an agreement between the food company and Topps governing the 10-card offer for box tops and $0.10. Topps, together with the letter, sent the food company a copy of its typical contract with the ballplayers and a list of the major league baseball players claimed to be under contract with it. In the letter, it said:

> Any offer or sale of trading cards in violation of these contracts will result in irreparable harm and substantial damage to Topps. We have reason to believe that your proposed baseball card promotion, in part, infringes upon and invades our contracts.
>
> In view of our past cooperation, we sincerely trust you will do nothing that would violate or affect our contract rights.
>
> May we have appropriate assurances from you?

Shortly after the writing of this letter, Topps and the food company entered into an agreement under which the food company agreed to pay Topps graduated license or royalty fees in connection with its distribution of cards alone under the offer (CX 76–A–M). This is not proof of a bad faith threat of litigation but it does demonstrate that legal rights claimed can be settled amicably and upon terms and conditions which are reasonable and satisfactory.

Finally, in support of this charge, counsel supporting the complaint cites a letter to the soda-pop manufacturer, also a giant in its field. It had started a promotion offering a baseball card insert with every carton of soda-pop sold. (CX 137) It sought to obtain the right to publish the picture cards under a contract with the individual ballplayer, which would have granted to it the right to use, print and publish the name, biography, etc., of the ballplayers "in connection with the advertising, promotion and selling of a beverage * * *," and, in addition, similar rights "in connection with the advertising, promotion and sale of articles of merchandise * * *." (CX 138) On

April 8, 1958, an attorney for Topps wrote the soda-pop company a letter referring to the contract being used by it, and stated:

> In our opinion this contract is in conflict with rights granted our client by most professional baseball players in the Major and Minor Leagues, including the exclusive right to reproduce, publish, distribute and sell the name, pictures, biographical sketch, etc. of contracted ball players in combination with chewing gum and alone; such as but not limited to, picture or trading cards.
>
> These rights are created by virtue of contracts that have been in existence for a number of years, are now in effect and have a number of years to run.
>
> In view of the conflict, we have no alternative but to insist that you desist from entering into agreements which are in violation of the rights of our client.

The best proof that this letter (CX 139) was not a false threat of litigation is what followed shortly thereafter. The soda-pop company conceded that its proposed contract with the ballplayers conflicted with the Topps' contract. Its lawyers wrote Topps a letter (CX 141–A–B) saying that following their "examination of the baseball player's contract form used by Topps Chewing Gum, Inc., the list of players under contract to Topps and following a further discussion of the problem * * * (our client) does not desire to infringe upon the proper rights of Topps Chewing Gum, Inc. and has authorized me to make the following assurances to you * * *." There followed what appears to have been a mutually agreeable procedure for the use of the baseball picture cards and also for a form of contract between the soda-pop company and the ballplayers. All this seems to have been worked out without the payment of one cent of consideration or tribute by the soda-pop company to Topps. Moreover (for what interest it may have on the scope of the Topps' contract), it shows that Topps made most clear that the use of the baseball cards in connection with the sale of soda-pop was not regarded as an infringement of its contract with the ballplayers. Following the adjustment of all differences, the soda-pop company's lawyer wrote to it (CX 144–C) as follows:

> In view of the decision of the United States Court of Appeals for New York which restrained Topps from using trading cards at the suit of another chewing gum manufacturer who had previously signed up the ballplayers with whom Topps had contracts, I believe that the outcome of the present matter has been quite favorable to (you) and hope that you will agree. If Topps had not adopted a reasonable attitude, this promotion campaign could have resulted in a large expenditure on your part for which you would have gotten no return * * *.

In view of all this, it appears that what has been alleged to have been threats of litigation should be regarded only as conciliatory efforts to avert litigation.

SECRET PAYMENTS TO REPRESENTATIVES OR AGENTS IN THE EMPLOY OF BASEBALL PLAYERS

This is the other means alleged to have been utilized by Topps to frustrate the efforts of its competitors to secure baseball picture rights.

The language utilized in the complaint is precisely as set forth in the title heading "(S)ecret payments to representatives or agents in the employ of baseball players." A proper interpretation of this would dictate that the Commission's theory of the complaint is that *representatives or agents in the employ of baseball players* were induced by Topps, through the medium of secret payments, to breach their fiduciary relationship to the ballplayers by promoting the signing of Topps' contracts as opposed to the signing of other companies' contracts. This, of course, is the familiar commercial bribery. *American Distilling Co.* v. *Wisconsin Liquor Co.*, 104 F. 2d 582 C.A. 7, 1939. (By *Standard Camera Corporation*, Docket No. 8469, November 7, 1963, the Hearing Examiner is, of course, required to hew strictly to the theory advanced by the Commission in the complaint. To the extent that the variations injected by Commission counsel will be discussed below, they are discussed only for the purpose of making rulings. I do not take the easy road of discarding them as not being within the theory of the complaint.)

To support the charge thus delineated, there would have to be evidence, first, that secret payments were made to representatives of ballplayers. The matter of payments has been discussed generally at page 773 of this decision. That payments were and are being made by Topps to baseball personnel is well known. The record shows that others, including Fleer, do the same (Tr. pp. 3226–3231).

As far as the evidence in this proceeding is concerned, the relationship of Topps with only one person who can be regarded as an agent or representative of ballplayers was brought out. This person was engaged in business as a player's representative or agent, that is, a person who acts as a middleman for the purpose of arranging contracts for commercial exploitation of a luminary's personality. This was his main business prior to May 1959. In May 1959, he became director of the Major League Baseball Players Association and he has held that office since. He appears to have continued his business as a baseball players' agent while acting as Director of the Association. This continued representation for private business affairs went on sporadically, when a ballplayer requested him so to do (Tr. pp. 1730–1739, 1772–1773). Prior to this person's election as the Director of the Players Association, he had been paid $1,000 a year by Topps for services in connection with the arrangement of contracts with ballplayers (Tr. pp. 1734; CX 178–B–H). Ordinarily, an agent rereceives his compensation or commission from the luminary or out of the money paid to the luminary. In the situation involving the ballplayers, the payments involved almost always were $125 a year or a gift of that value. This did not leave much room for payment to the agent. The explanation for the payments made by Topps to him was, "I received those checks in lieu of commissions which I did not take from the players whom I worked with and who were receiving gifts in the approximate value of $125 apiece from Topps" (Tr. p. 1734). Although Commission counsel seeks to make this appear to have been an "under the table" secret payment, the testimony cited does not justify this conclusion. When Commission counsel asked him whether the ballplayers knew that he was being paid $1,000 a year by Topps, he answered, "Well I don't know if they all knew it. I think that the fellows whom I represented knew it because they never paid me a commission. So it must have been obvious to them. I mean, they did know, I'm sure, in lieu of the commission." When asked whether he told them he answered, "I don't recall whether I made it a point of telling anybody. I don't think I made a point of not telling anybody. I know that many players whom I represented, you know, at that time, when I made a settlement, you know, with them at the end of each year—they mentioned the fact that they might owe me commission for the $125 gift and I told them that they did not because I was paid in lieu of that" (Tr. p. 1738).

After becoming Director of the Baseball Players Association, he told Topps that, as Director of the Association, he "could not under any conditions continue in a capacity for Topps" (Tr. p. 1766), and he "ceased all relationship with Topps" at that time. Commission counsel stresses the fact that although the relations were severed in May 1959, no part of the January 1959 payment of $1,000 by Topps was returned by him to Topps. Since ballplayers for any particular year would, in normal course, be signed up prior to May of that year, and since it must be presumed that services had been rendered prior to May 1959, in the absence of affirmative evidence and not speculation, it must be concluded that there was nothing irregular about the retention of the thousand dollars paid him prior to his election as Director of the Association.

Commission counsel refers to various activities of this individual during the time that he has been Director of the Players Association (Tr. pp. 1736–1767). These activities appear to have been quite objective and not slanted in favor of Topps. Certainly, advice to a ballplayer that he should not sign an agreement conflicting with an existing agreement is not to be interpreted as bias in favor of the person with whom the existing agreement is in force (Tr. pp. 1743–1745, 1766–1770, 1789–1790, 1792, 1799–1806; RX 73).

Commission counsel points to the fact that some ballplayers who also were player representatives received contract payments in excess of $125, the normal amount paid. The difficulty with this is that, even if some ballplayers were paid more than others, the reasons why they received such additional payment are not always disclosed in the record. To assume that they received higher payments solely by reason of the fact that they were player representatives is to speculate. Issues cannot be decided on speculation. One of the player representative-ballplayers to whom reference is directed did receive $250 in each of six contract years but the exhibit evidencing these payments shows that every one of them was made in favor of a Presbyterian church and sent directly to the minister (CX 51–I). One very much honored and famous ballplayer was paid $1,000. He, however, received this money for additional considerations such as endorsement of respondent's products and contributions to or activities related to the State of Israel or to the American Medical Center (CXs 419–A–K).

Many payments, gifts, gratuities and awards to all sorts of people in baseball are cited. These include contracting officials, scouts, coaches, managers, trainers and even clubhouse employees. These payments cannot be held to be improper or irregular in the absence of evidence showing that a baseball player's entry into, continuance or advancement in baseball was linked to or conditioned upon his signing a contract with Topps. Moreover, there was nothing covert or secret about the fact that such payments were made. There is no suggestion anywhere in the record that Topps made any effort to hide the fact that the payments were made or to bind the recipients to secrecy with respect to the payments.

Counsel supporting the complaint must have been aware that the position advanced by him had not been supported by the evidence, because, in the reply to the respondent's proposals, after the completion of the hearing, he injected, for the first time, the theory of the radio payola cases. He argued:

> There, payments or the giving of other valuable consideration to fiduciaries to stimulate or motivate the fiduciary to give exposure to or promote products or programs in which the payor has a financial interest were prohibited when such payments were undisclosed and the exposure or promotion was directed at an individual or group to whom the fiduciary had a responsibility of honesty and fairness.

The Hearing Examiner is of the opinion that the payola cases are not analogous to the facts brought out in this proceeding. In those cases, disc jockeys (persons who control and play the records broadcast on radio programs) are or were in a position where, from hundreds of records available to them, they could pick and choose particular records and play them more frequently than others, thus giving to the listening public the impression that the records being played actually were the best or most popular records. This, in turn, because of the greater exposure given to these records and the suggestive nature of the frequent exposures, would result in larger and more frequent purchases by the public of those records. It was discovered, however, that some disc jockeys were not making an unbiased and honest selection of records played by them. They were selecting records put out by persons or firms who made secret payments to them for the purpose of getting them to play those records. This was clearly an abuse of a quasi-fiduciary if not a truly fiduciary relationship to the public. Under such circumstances, a secret payment, unquestionably, is an unfair business practice. *Radio Corporation of America*, FTC Docket Nos. 7668–7676. See also *Advance Music Corporation* v. *American Tobacco Co.*, 296 New York 79.

The Hearing Examiner, following receipt of the proposed findings and replies thereto, requested counsel for the respective parties to appear before him for oral discussion or argument about some of the matters raised in the papers submitted. Among these, was the matter of payola. It was agreed that an additional submission might be made with respect thereto.

Commission counsel then filed an additional memorandum advancing a somewhat similar but not identical theory, also discussed in *American Distilling Co.* v. *Wisconsin Liquor Co.*, 104 F.2d 582 at 585. The theory is best set forth in a 1921 communication from the then Chairman of the Federal Trade Commission to a congressional committee concerning proposed legislation relating to bribery and other corrupt trade practices. The practice to which the then Chairman referred involved the making of payments to salesmen employed by a retailer, with full knowledge and consent of the retailer, for which the payor obtained the cooperation of the salesmen in pushing his product to potential buyers in preference over one or more other products:

> After the manufacturer's goods are in the hands of the retailer, a manufacturer of beds, for instance, who has conducted a nation-wide advertising campaign, has no power to protect his goods from the conduct or statements of a salesman who has received from a competing manufacturer a promise of a

commission for the sale of his product. Herein is the difference between money expended for advertising purposes and money paid as commissions to salesmen, and in which the consent or absence of consent on the part of the employer plays no part. The advertiser has created the demand or has stimulated it to the point where a purchaser seeks to buy the goods advertised. At this point the commission-giving manufacturer reaches out and diverts the demand into his own channel. It is as though one person had carefully cultivated a fruit tree and at the point of ripening some one else gathers the fruit. Again the practice of commission giving, whether with or without the consent of the employer, has a disastrous effect upon the sales force of producers who do not use the practice. (67th Congress, 2d Session, H.R. Report No. 631, Page 3)

Surely what the then Chairman of the Federal Trade Commission reported was an unfair practice;—but that is not what we find here. There is no evidence to show that the solicitor of a Topps' contract with a ballplayer had a supply of competing manufacturers' contracts and, for a secret payment, pushed the Topps' contract over other contracts which he could have offered to the ballplayer. The evidence here is quite the contrary. Anyone who solicited a Topps' contract had no other contract to offer. The ballplayer was not confronted with the need to make a choice from several contracts in the hands of his solicitor, which choice might have been influenced by the solicitor. As the struggle to obtain contracts developed, discussed elsewhere, the matter of competing contracts became well known to the ballplayers (RX 73, p. 6; CX 331). Both Fleer and Topps had their own solicitors seeking to get signatures. The solicitors were in competition among themselves. It does not appear that any solicitor was in a position to offer either a Topps' contract or a Fleer contract. It was one or the other, but not both.

The evidence does not support a finding that there has been an unfair practice involving secret payments, regardless of theory advanced—whether it be conventional commercial bribery, payola or push money to persons in a position to influence a choice from several available choices offered by them. Respondent's practice was the traditional practice and the practice now prevalent.

"OTHER MEANS" TO FRUSTRATE COMPETITORS' EFFORTS TO SECURE BASEBALL CARD RIGHTS

The allegation of the complaint with respect to which this part of the decision is concerned is quoted in full at page 787 hereof. Threats of legal action and secret payments have just been covered. Three additional alleged means not specifically mentioned in the complaint are urged in the findings. These relate to exclusion of Fleer's "sports manager" from baseball camps, acquisition of a sporting goods promoter with whom Fleer had been negotiating to act on its behalf, and attempted pre-emption of information with respect to the names and addresses of baseball rookies.

The testimony given by Fleer's sports manager (Tr. pp. 3208–3211) is cited to give the impression that Topps, by goon or similar methods, physically excluded or intimidated him from soliciting players at the Vero Beach major league and minor league training camp of the Los Angeles Dodgers for two years after October 1960, and from the Detroit Tigers baseball camp during 1959. The testimony refers to conversations at Bradenton, Florida in which the Topps' representative (now deceased) said he "was wasting (his) time. (Fleer) would never get into baseball because (Topps) had an organization set up that would keep (Fleer) out of baseball," and that Topps' representative also said, "Further I am not going to let you in to Vero Beach. You are not going to get into Vero Beach." He testified further, "I had attempted to get in prior to this conversation and had not been allowed to. I did get in two years later through another connection" (Tr. pp. 3208–3211). This testimony is wholly inconclusive in that it does not show precisely to what efforts, if any, the Fleer representative resorted in his efforts to solicit contracts at Vero Beach. Nor does it show what or who blocked his entry or how it was blocked. As a matter of fact, if anything, it probably supports the testimony by Topps' representatives to the effect that baseball friendship was the essential key for opening the doors of a baseball training camp. At worst, it looks as though the now deceased Topps' representative was engaging in some exaggerated bragging and taunting. Commission counsel says that the sports manager also was excluded from the Detroit Tigers baseball camp during 1959. He testified that he was unable, at first, to get into the camp of the Detroit Tigers, and that it was only several days later, after he had worked at the camp of the Senators and returned to the Tigers' camp, that he was permitted to solicit "in the snack bar area, which was public." He added that a Topps' employee had been signing players during the interval (Tr. pp. 3100–3101). There is nothing in this testimony, however, to suggest that Topps was responsible for his exclusion from the Tigers' camp and it may be noted that he himself said that the areas other than the snack bar were not public. We are not informed as to the position or background of the Topps' employee who did sign ballplayers during the interval and are therefore unable to conclude that there had been an improper discrimination by persons not parties to this proceeding between the Fleer representative and the Topps' representative. Nor is there anything to suggest that, if there had been discrimination, Topps had caused it.

Next, our attention is directed to negotiations which Fleer was having with a person in charge of promotion for a large sporting goods manufacturer. The negotiations contemplated a three-year contract, and, prior to the signing of the contract, the sporting goods promoter actually had started to sign ballplayers for Fleer. Topps heard about it and then the tug of war for the sports promoter's services started. This resulted in the sports promoter rejecting Fleer's offer and accepting compensation of $2,000 a year from Topps as opposed to $4,000 a year which had been proposed by Fleer (Tr. pp. 3195–3201; CX 396). Two thousand dollars a year, only half of what Fleer had proposed, makes one wonder why the sporting goods promoter elected to reject the Fleer proposal and accept the Topps' proposal. The record shows, however, that there were other considerations. The sports promoter seems to have been convinced by Topps that advocacy of the Fleer's non-exclusive contract was inconsistent with his own company's policy of exclusive contracts with ballplayers. Moreover, the agreement between Topps and the sports promoter limited his services to those of "a sports consultant." He was not expected to procure contracts on behalf of Topps because such an activity might conflict with his employment by the sporting goods company (Tr. pp. 488–489). This appears to be rather rough competition but, in the general all-over picture presented by the competition between Topps and Fleer, it does not appear to be any rougher than some of Fleer's activities noted above. *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U.S. 565. Since the promoter, when hired by Topps, came to Topps for only half of what Fleer had offered, there could have been nothing predatory about the hiring. The other considerations mentioned must have seemed more persuasive to him.

The third of the "other means" is an alleged arrangement between Topps and the Baseball Bluebook Service. The Service has published for many years the official administrative manual of professional baseball. It is subsidized by the major leagues (Tr. pp. 1029–1031; CX 130). Some time after (the time being in dispute) a player signs his first professional baseball contract, the Service gets the information and disseminates it to subscribers. The subscribers include minor and major leagues. This facility was started in 1961. Topps' sports manager was able to persuade the Service to supply this information to it and to no other bubble gum company in 1961 and Fleer's sports representative was unable to get the information because of the exclusive arrangement with Topps (Tr. pp. 1038–1039, 1043, 1044–1045, 1052, 1716–1717, 2151–3014). While the value of exclusivity in the arrangement with the Bluebook Service could be a material element in the march to monopoly, such an arrangement, like any one of the successive steps outlined in the IBC case above, would have to be considered in the determination of the over-all monopoly question. Fleer quickly succeeded in having the Bluebook Service instructed by the Secretary-Treasurer of Professional Major League Baseball to terminate the exclusive arrangement with Topps and to provide the information to Fleer as well (Tr. pp. 1044–1046). The Bluebook Service was, however, not a material factor in Fleer's efforts to secure contracts with rookie ballplayers. It did nothing more than supply information about rookie ballplayers who might be solicited for contracts. Fleer's sports manager testified that he learns the names and addresses of the rookies from the Service. He then sends "them a mailing piece with a contract, asking them to sign." He does not attempt to reach these players in spring training because he has learned from experience that by the time that rookies are in spring training, they have been signed by Topps (Tr. pp. 3211–3212). To the extent, if any, that Fleer might have been hampered during the short interval of Bluebook Service exclusivity from soliciting the ballplayers, it was not material in the competition for contracts. Fleer's relatively mild and ineffective mail solicitation could not possibly overcome the more aggressive personal solicitations at the camps by the Topps' representatives (Tr. pp. 3237–3241). Moreover, the time lag between the availability of the Bluebook Service for utilization in a mail solicitation and the on-the-spot personal solicitation at the rookie camps, in and of itself, would tend to give the personal solicitors a decided advantage. The advantage lay, not in the temporary exclusivity, but in the method of approach—personal, on-the-spot and timely solicitation as opposed to delayed mail solicitation.

MONOPOLY

Respondent, at page 88 of its argument, says:

> The law and the evidence concerning the allegations that respondent used illegal practices to create a monopoly has been discussed in Part I. Respondent is of the view that it is unmistakable from the record that it used no illegal practices for this or any other purpose. If the Hearing Examiner agrees, he need not go on to this Part II or to Part III which deal with whether respondent has a monopoly.

The disposition of this proceeding is not that simple. Even though the Hearing Examiner has held that the specific acts and practices, taken by themselves (other than the over-all charge of monopoly), are not unfair within the meaning of Section 5 of the Federal Trade Commission Act, it does not follow that the respondent is not subject to remedial action in this proceeding.

The respondent may be subject under Section 5 of the Federal Trade Commission Act for violations of either or both Section 1 and Section 2 of the Sherman Antitrust Act. 50 Stat. 693, 15 U.S.C.A. sec. 1; 26 Stat. 209, 15 U.S.C.A. sec. 2. *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 at 452–455; *Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457 at 463–464. Section 1 of the Sherman Act is not involved even though the proceeding is concerned with the contracts made by Topps with the ballplayers and Section 1 says, "Every contract * * * in restraint of trade or commerce * * * is hereby declared to be illegal * * *." The Commission has not alleged that the contracts in and of themselves are illegal. The proposed order, served together with the complaint, assumes their legality. The court in *Haelan*, 202 F. 2d 866, *cert. den'd* 346 U.S. 816, has held similar contracts legal. Viewed in the context of all the facts of this case, the answer might be different. In this connection, Judge Dimock, in *United States* v. *Bitz*, 179 F. Supp. 80 at 86 (D.C.S.D.N.Y), rev'd on other grounds, 282 F. 2d 465 (C.A. 2), said:

> Defendants rightly say that there is no objection to an agreement between a manufacturer and a dealer for an exclusive distributorship. Mr. Justice Black in the Klor's decision, 359 U.S. at page 212, * * * carefully distinguished the case that he had in hand from such an arrangement when he said, "This is not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship." * * * Thus I must assume that it would be lawful for the publisher of a magazine to allot to a wholesaler an exclusive distributorship in Nassau and Suffolk Counties. It does not follow, however, that it would be lawful for a single wholesaler to accumulate the exclusive distributorships from all publishers as is here alleged. It may be that the practice of selling magazines at universally fixed prices would prevent such a monopoly from affecting prices but the other evils of monopoly outlined by Judge Hand in the Aluminum case would remain.

Section 2 of the Sherman Act is involved. It is:

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Assuming, as may be assumed in view of my rulings with respect to the acts and practices other than monopoly set forth in the complaint, that every one of those acts and practices, taken separately, was lawful, the respondent, by these acts, could have monopolized or attempted to monopolize within the meaning of Section 2 of the Sherman Act.

Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control. See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 428, 429. Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809, 811, 814. It is indeed "unreasonable, *per se*, to foreclose competitors from any substantial market." *International Salt Co.* v. *United States*, 332 U.S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. *United States* v. *Aluminum Co. of America*, *supra*. It follows a *fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful. *United States* v. *Griffith*, 334 U.S. 100 at 106.

In *Continental Co.* v. *Union Carbide*, 370 U.S. 690 at 699, the Court said:

In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.

Though it may be claimed that there was no specific intent to monopolize, there is no need to establish "purpose or intent." "(T)he requisite 'purpose or intent' is present if monopoly results as a necessary consequence of what was done." *United States* v. *Paramount Pictures*, 334 U.S. 131 at 173.

Moreover, it is not necessary that monopoly power be exercised. "(M)onopoly power, whether lawfully or unlawfully acquired, may violate § 2 of the Sherman Act though it remains unexercised (*United States* v. *Griffith*, *ante*, p. 100), for as we stated in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809, 811, the existence of power 'to exclude competition when it is desired to do so' is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power." *United States* v. *Paramount Pictures*, 334 U.S. 131 at 173.

A more complete quotation from *American Tobacco* v. *U.S.*, 328 U.S. 781 at 811, is:

The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised and that competition is excluded but that power exists to raise prices or to exclude competition when it is desired to do so.

Monopoly is condemned *without qualification*. There is no qualifying clause in Section 2 as is found, for example, in § 3 of the Clayton Act, as amended. The meaning of the inclusion of the qualification as opposed to its absence was discussed in *Standard Oil Co.* v. *United States*, 337 U.S. 293, pp. 297–298:

> Obviously the (exclusive supply) contracts here at issue would be proscribed if § 3 (Clayton Act, as amended) stopped short of the qualifying clause beginning "where the effect of such lease, sale, or contract for sale * * *." If effect is to be given that clause, however, it is by no means obvious * * * that the effect of the contracts may be to lessen competition or tend to create a monopoly. It is the qualifying clause, therefore, which must be construed."

Here we have no qualifying clause to be construed.

Section 2 of the Sherman Act, in its reference to commerce, differs significantly from other antitrust laws. In § 2(a) of the Clayton Act, as amended, we find the reference, "* * * a monopoly in any line of commerce * * *"; in § 3 again we find the reference, "* * * a monopoly in any line of commerce * * *"; and twice in § 7 of the same Act we find distinctive words, "* * * in any line of commerce in any section of the country * * * ."

These words, whether they be "line of commerce" or "line of commerce in any section of the country," are wider than those found in the Sherman Act. In that Act, the proscribed monopoly need affect only "any *part* of the trade or commerce among the several States * * *." How large a part must be affected is not specified. (There is no issue as to interstate commerce in this proceeding.)

This difference of language is significant. In determining relevant market, we need find only that some "appreciable part" of trade or commerce is involved. *United States* v. *Yellow Cab Co.*, 332 U.S. 218 at 225. Thus, referring again to *International Boxing Club*, supra, although all kinds of or all boxing matches might have been chosen by the trial court, the Supreme Court approved that court's selection of *championship* bouts alone. In an often cited and highly respected District Court case, the court discarded traditional keys for determining market, took jurisdiction and rendered its judgment against a company engaged only in the manufacture of linen rugs, even though other rugs were in active competition with them and possessed the same distinctive qualities. *United States* v. *Klearflax Linen Looms*, 63 F.Supp. 32 at 33.

More recently, the sanctity of the phrases "interchangeability of products" and "cross-elasticity of demand" has been weakened. The existence of *submarkets* now must be recognized. Such recognition has reached Section 7 of the Clayton Act, as amended. In *Reynolds*

Metals Co. v. *F.T.C.*, 309 F. 2d 223, the product was aluminum foil of .00065 of an inch thickness. The submarket recognized was florists' foil, used by only 700 wholesale florists and 25,000 retail outlets in the United States. This result was reached even though, out of 9.7 million pounds of decorative foil shipped in 1956, less than 1.5 million pounds were shipped to this submarket and there was no difference between the foil shipped to the florists from any of the foil in the total of shipments. Relying heavily on and quoting in part from *Brown Shoe Co.* v. *United States*, 370 U.S. 294, the Court, in *Reynolds*, said, at page 226:

It is now clear that mere potential interchangeability or cross-elasticity may be insufficient to mark the legally pertinent limits of a "relevant line of commerce." The "outer limits" of a general market may be thus determined, but sharply distinct submarkets can exist within these outer limits which may henceforth be the focal point of administrative and judicial inquiry under Section 7.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within the broad market, well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes. * * * The boundaries of such a submarket may be determined by examining such practical indicia as *industry or public recognition of the submarket as a separate economic entity*, the product's peculiar characteristics and uses, unique production facilities, *distinct customers*, *distinct prices*, sensitivity to price changes, and specialized vendors." *Brown Shoe Co.* v. *United States*, 370 U.S. at 325, 82 S. Ct. at 1523, 1524. (Emphasis the Court's.)

See also, *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800.

THE CURRENT BASEBALL PICTURE CARDS MARKET

Certain factual or conceptual elements should not be open to dispute regardless of what legal arguments may be made. A baseball picture card is a particular kind of a picture card. A baseball picture card having to do with living, active major league players and minor league stars is even more particular. It has a value, as part of a set, whether in or not in a series, which makes it desirable and sought after for informational, collection, and play purposes. As many as 576 different baseball picture cards make up a series (CX 395). Customers who buy these cards constitute a well-defined and recognizable class. The fact that they are teenagers and generally boys is wholly immaterial. This segment creates a market just as does any other segment or class of the economy. A boy collecting current baseball cards, while other cards such as Spook Theatre may be an attraction to him, will not, and, in fact, cannot, spend his time or money collecting other cards if he wants to make up a set or series. He will and can buy only those baseball cards which form constituent parts of his sets or series (Tr. pp. 1214, 1486, 2248–2251, 2380). The respondent, by its own design, has contributed to this regimentation of the baseball card-buying public. It issues check list cards for each set in a series. Such cards list the numbers assigned to cards for named ballplayers in each set (CXs 23, 215). Moreover, the very nature of current cards embracing the entire spectrum of major leagues and dipping into the minor leagues as well creates an annually recurring market because last year's cards without current statistical content are about as valuable as yesterday's newspaper (Tr. p. 150). The cards provide in simple, handy, toylike, easily digestible form, what must otherwise be presented, albeit more completely, in an annual statistical work known as "Official Guide Baseball," containing 446 pages of fine print text, tables, statistics, etc. (Tr. pp. 1257, 1340–1341, 1910, 1967; CXs 395, 433). The buying market, too, is perennial. Each year, as some teenagers leave it or outgrow it, new entrants step in to fill the void.

This business is not at all negligible. The record (CX 12, in camera) shows the following approximate relation of sales of current baseball cards with gum and sales of such cards alone to Topps' total sales figures and Topps' sales of its major product, Bazooka gum. All products are included in the total sales. All figures are rounded off to near approximations:

[In thousands of dollars]

Year	Total sales	Bazooka	Baseball card gum	Baseball cards
1957	10, 000	5, 000	1, 900	90
1958	12, 000	5, 500	2, 750	180
1959	14, 500	6, 500	3, 600	260
1960	14, 700	7, 700	3, 345	293
1961	13, 500	7, 700	3, 275	200

In 1956, the year of the Haelan settlement, Topps sold about one and one-half million dollars of baseball card gum and nearly $70,000 of baseball cards alone. The record does not disclose any sales by Topps of such cards alone during the years prior to 1956. However, sales of baseball card gum were about $950,000 in 1955, a little more than a million dollars in 1954, almost $900,000 in 1953, almost $800,-000 in 1952, and not quite $200,000 in 1951.

The Goudey Gum Co. (which was liquidated in 1961, Tr. p. 824) presents the following relation of sales of "Baseball Picture Packs" of gum to "Gum alone" sales and total sales (CX 98–B):

Year	Total sales	Baseball packs	Gum alone
1933	$1, 500, 000	$460, 000	$203, 000
1934	800, 000	220, 000	430, 000
1935	740, 000	116, 000	540, 000
1936	645, 000	95, 000	498, 000
1937	681, 000	36, 000	578, 000
1938	545, 000	77, 000	265, 000
1939	415, 000	37, 000	363, 000
1940	304, 000	------------	249, 000
1941	323, 000	13, 000	259, 000
1942	260, 000	6, 800	204, 000

It will be recalled that Haelan was taken over by Topps in 1956. Its sales of baseball gum compared to total sales had been (CX 111–D):

[In thousands of dollars]

Year	Baseball gum	Total sales
1951	973	3, 050
1952	731	2, 750
1953	301	2, 140
1954	602	2, 480

Fleer's sales of Ted Williams' baseball cards, before returns and allowances, were about $250,000 in 1959. In 1960, 1961 and 1962, there were no sales of Ted Williams' cards. Sales of Baseball Greats were almost $300,000 in 1960, $355,506 in 1961 and $85,000 in 1962. Forty-nine dollars of left-over 1960 Greats were sold in 1962. These "baseball" sales, it should not be overlooked, were of cards built either around a single ballplayer or around past heroes. Through September of 1963, Fleer's sales of baseball cards with an inferior cookie amounted to over $200,000 (CXs 189–194). These were of cards featuring current ballplayers. The amount of sales in this single venture is notable because, as respondent asserts, Fleer was most inept in promoting it and its methods of competition were ineffective.

Leaf's affiliate came out in 1960 with baseball cards and marbles. These, too, featured current ballplayers. The sales were nearly $100,000.

The cereal company came out with current baseball picture cards on cereal boxes during the 1961–1962–1963 baseball seasons (RX 144, pages 12, 27 and 41–44). Its promotion was regarded as successful (RX 153, pages 20–21; RX 144, page 24, Smart, 14–A). Its only reason for discontinuing it after 1963 was a conclusion that the nature of its business required a greater number of promotions than the single drawn-out promotion incident to baseball cards which had to be sustained through an entire baseball season (Tr. pp. 869–873). Because of the success of the baseball picture card promotion in cereals, the food company printed similar baseball picture cards on its gelatin dessert packages (RX 154). The success with cereals and dessert is even more notable because the cards had to be cut out of the pasteboard forming the packages and were imprinted only on one side (RXs 144, 154).

With the advent of the competition resulting from the availability of current baseball cards with marbles, cookies, cereals and gelatin desserts beginning in 1960, Topps' sales of baseball products began to decline (RXs 181, 185, 199–A).

Current Baseball Picture Cards as Articles of Commerce or Promotional Devices

The testimony is conflicting as to whether the product sought by the children is just the baseball cards or is a combination product such as baseball cards with gum, or with marbles, or with cookies, or with cereals, or with gelatin desserts. (In addition to previous comments, see Tr. pp. 2379–2382.) In my view the problem adds up very simply. The boys want current baseball cards and they want to make up sets or series of sets. They can't get current baseball cards *alone* unless they buy Topps' baseball cards. This, as brought out above, is because the Topps' contracts give Topps the exclusive right to utilize the baseball player's picture, biography, etc., in the publication of baseball cards alone, and Topps has almost all the major league players and minor league stars under contract. Next, in satisfying their urge for current baseball cards when they can't get them alone or when they are in the mood for a little something extra, they may buy such cards with *Topps'* gum, with one cookie or with a few marbles. The last two products, despite Leaf's protestations, are essentially sham combinations to get around Topps' exclusive rights to baseball cards alone or with gum, candies and confections. That they are sham is perfectly obvious if one only takes a thoughtful look at pages 18, 19 and 20 of this decision and the marbles package at the center left of page 12.* These sham combination products are brought out solely to satisfy the market for current baseball cards. As far as cereals and gelatin desserts are concerned, it must be obvious that one one-sided card on a gelatin box, or a few one-sided cards on a cereal box, while supplying to some extent the demand for baseball cards, certainly cannot supply that demand (either in quality, quantity or net cost) to the same extent that a combination product such as card gum, card marbles, or card cookies or a single product like cards alone can satisfy it. To get any appreciable number of cards from promotions like the gelatin box or the cereal box would take an awful lot of purchases of any of those products (Tr. pp. 1111, 4020–4021; RX 144, pp. 69–70, RX 154, Haynes, p. 17). Moreover, while the survey shows that boys nagged their parents to buy the cereals with baseball trading cards (CX 431-A–Z339), neither cereals nor gelatin desserts ordinarily are purchased by boys.

We have been instructed, by reason of Commission counsel's election as cited above (Hearing Examiner's order of August 8, 1964) that the market issue, to the extent that it is here a concern is:

(W)hether baseball picture cards are sufficiently distinct from other kinds of picture cards or similar picture devices to make their foreclosure to others who might wish to sell them or use them for promotional purposes competitively significant.

The respondent forecloses *all others* from the manufacture, publication and sale of current baseball picture cards alone. This is established by its contracts with the ballplayers.

This contractual monopolization of cards alone is silent testimony to the competitive significance of those cards as promotional devices. If cards could be printed and sold separately, their efficacy as a combination product with respondent's bubble gum would be destroyed.

The dollar sales of cards and combination products with cards demonstrate that current baseball cards are a cognizable "part of the trade or commerce among the several States."

The success of the food company's promotions of current baseball cards with cereals and with gelatin desserts attests to their value as a distinctive promotional device. The relationship of sales of current baseball picture cards to sales of gum alone and to total sales by Topps, Goudey and Haelan also attests to their significant value as a distinctive promotional device. The sales of marbles when packed with current baseball cards and the sales of a single cookie of doubtful quality when packed with current baseball cards also attest to

*Page references refer to pictorial exhibits which were omitted in printing.

their significant value as a distinctive promotional device. As noted above, Topps' recognition of their unique value as a promotional device is evident from its acquisition of the rights to the cards alone.

We have seen that current baseball picture cards have distinctive characteristics which set them apart from other baseball cards and all other picture cards in their appeal to and use by a particular segment of the economy. Their utility as a promotional device is particularly great because, although subject to great demand, their net cost can be quite small compared to the value of the product promoted. A number of wholesalers and jobbers testified to their promotional value and the handicaps resulting from a failure of access to them (Tr. pp. 1134–1138, 1274–1285, 1309–1312, 1341–1345, 1389, 1483–1498, 1575–1582). This, in view of all the other evidence in the record as to the special characteristics of these cards, is logical and is accepted by the Hearing Examiner.

The only conclusion which can follow is that current baseball picture cards are sufficiently distinct from other kinds of picture cards to make their foreclosure to others who might want to sell them or use them for promotional purposes competitively significant.

Topps' Control of Current Baseball Picture Cards as a Promotional Device

In this section we pass over the control of cards alone which is established by the contracts themselves.

Candies, gums and confectionery products form a very large part of trade or commerce. Confectionery sales of U.S. manufacturers amounted to $1,233,000,000 in 1961 and to $1,259,000,000 in 1962 (RX 283, p. 1). Every manufacturer of candies, gums and confectionery products except Topps is foreclosed from using current baseball picture cards as a promotional device. The remarkable factor about the Topps' contract is that it excludes every part of this great industry even though its principal business, bubble gum, involves less than one percent of it. There is no good reason for so sterilizing an entire industry. To counter this, Topps might argue, as it has demonstrated convincingly, that a very large proportion of the products of this industry are in competition with its bubble gum. This being so, all those products are being foreclosed from using baseball picture cards as a promotional device and Topps' contract so to exclude them is evidentiary of the significance of the cards as a promotional device.

Haphazard uses of the picture card of a single ballplayer or even of a few, cannot satisfy the demand for current baseball picture cards. There must be availability of a sufficient number to rise to the status of at least a *set*, if not a series. The cereal company used 200 out of 500 available and it would have used more but sufficient space was not available on its boxes (RX 144, Smart, p. 27). An adequate number, the evidence shows, cannot be attained for some years in cards alone or in the entire confectionery business because of the original five-year term of the Topps' contracts, the subsequent extensions, Topps' admitted control of 446 out of 450 major league players in 1961 and its contracts with more than 6,500 major and minor league players. The fact that Fleer had and paid 20 major league players in 1962 and 27 in 1963 (page 771 above) does not change materially this reasoning. Twenty-seven players out of 450 does not provide a base for meaningful competition (RX 144, Smart, pp. 28–29; Tr. pp. 1102–1103, 1252, 2164, 2596–2597). But even 450 is not a static figure. Respondent, in its brief, tells us it "is closer to 700," and estimates it may be as high as 860 in 1965. Because of its coverage of the minor leagues, the new major league players, in the same proportions as before, probably would belong to Topps. Moreover, the Fleer contracts are not exclusive and Topps' contracts are so drawn that the making of a Fleer contract does not deprive Topps of equivalent rights with respect to any ballplayer under contract to both.

Commission counsel says that the nature of the game is such that the headstart attained by Topps in its acquisition of the exclusive contracts with almost all the ballplayers in the major leagues and thousands of ballplayers in the minor leagues is such that it would take nine years for any competitor to make any progress at all in acquiring baseball rights (CXs 248, 432; RX 342; see also CX 128). Whether the figure is six years or nine years, or a little longer or a little shorter, is not of any great importance. The Hearing Examiner is quite convinced that the very nature of the game and the ballplaying life of the players is such that Topps' hold on them is bound to continue for a number of years and its proportionate position could stay substantially the same if there is not some limitation on the length of term of the contracts and on the length of the extensions or renewals. Out of the 446 major league players under contract with Topps in 1961, about 100 had signed one extension, about 120 two extensions, about 200 three extensions and about 6 four extensions. As many as 318 players signed extensions in 1961 (CXs 274, 278). The career movement in major league baseball presents something like a jagged, slowly changing bell curve. Topps' contracts certainly pervade almost all of that curve, starting with the initial entrants at the left end.

Respondent argues that its hold on the business is vulnerable. For authority it refers to *American Football League* v. *National Football League*, 205 F. Supp. 60. The Examiner believes that respondent does not give full effect to all that the Court said there. At page 77, it said:

> In 1959 the NFL had most of the ablest players under contract. However, colleges graduate annually large numbers of talented players, and because after the season starts professional football rosters are usually limited to around 35 players, many good players are released each year after the training season and are available to be signed by clubs in any league. Moreover, NFL players become free agents after a period of years.

The reasoning of the Court was that, with the limitation of 35 players to a football team, "many good players are released each year after the training season and are available to be signed by clubs in any league. Moreover, NFL players become free agents after a period of years." This is not our situation. Here we are not dealing with competition for players *qua* players. We are dealing with competition for *rights* to be granted by players. Professional baseball is different from professional football. In professional baseball, the major league teams, by reason of the cut-down roster, may be limited to 25 players each but those released may leave baseball, may transfer to another major league team, or may go back to the minor leagues and then may go up again to a major league (CXs 246-247). If they leave baseball, their contract rights are worthless from a baseball card viewpoint. If they go back down to the minor leagues, they are still in baseball and they may come back to a major league club. Their contracts are still in effect. It is a short trip from the colleges to the professional football teams in the leagues. It is a long trip from the colleges or sand lots through the rookie camps and minor leagues to the major leagues. Once in the major leagues, the players have an extended baseball life.

Topps is not competing with any team for baseball players to play on a team. There is no analogy between the District Court's observation in *American Football League* to the situation with which we are here confronted. If Topps is to be in competition with anyone, as far as baseball is concerned, the competition must come from those who want what Topps now has locked. This is the rights to publish or use or sell baseball cards alone or to sell them or use them as a promotional device in connection with the sale of candies, gums and confections.

ALLEGED ADDITIONAL RESTRAINTS

Counsel supporting the complaint claimed that Topps engaged in other restraints of trade. I ruled that these, not having been alleged in the complaint, were not to be considered as *issues*, but that evidence thereof would be received because of the bearing they might have on the general charge of monopoly (page 752 above). With the exception of the Haelan acquisition set forth in detail at page 764 hereof, the evidence generally is oral testimony based on the recollection of witnesses at the time of the testimony, of events which they claimed took place some years before. Their testimony, in my opinion, was influenced to a large extent by subsequently formed opinions and by attitudes toward the respondent. This is not unusual. See Footnote 12, *American Football League* v. *National Football League*, 205 F. Supp. 60.

What Commission counsel sought to prove as arbitrary control of the market or tie-in sales was not established by substantial evidence of probative value. Respondent, in its brief, has made an exhaustive analysis of the testimony given. I see no need to burden this decision with this although I agree with respondent that the testimony just cannot be accepted as substantiating the claim. Not for analysis but only as illustrations, a few remarks are appropriate. One witness whose testimony is cited at length (Tr. pp. 1321–1323, 1346) testified, "*It seemed* as though the amount of baseball gum that we were going to get depended on the amount of other products of the Topps Gum Company that we were willing to buy." This impression of the witness is then supported only by hearsay evidence and a Topps' order card which had lines on it providing for ordering of Topps' products as well as baseball cards. Another witness (Tr. pp. 1459–1460) testified that a Topps' salesman told him that "(T)o get more five-cent card gum it would be necessary for (him) to increase (his) purchases of penny gum, penny, one-cent, Bazooka gum." There was no testimony by this witness that any specific quantity of other gum had to be bought in order to get any specific quantity of card gum. A third witness testified that the same salesman had told him "that he was dividing (the baseball gum) or giving it out according to the business that he has gotten." Here again, there is no evidence of specific quantities of one product tied to specific quantities of another product—just a general indication of allocation of a product in short supply. A fourth witness testified to what also might be regarded as an allocation and to the fact that he never got as much gum as he ordered (Tr. pp. 1129–1134). A fifth witness' testimony is generally to the effect that Topps restricted its sales of baseball gum to regular customers (Tr. pp. 1267–1273). Topps' former representative in two southwestern states testified as to alleged conversations with Topps' executives in 1959 just after the Haelan acquisition (Tr. pp. 1648–1649). Bearing in mind that this witness had been discharged by Topps in an administrative reorganization and that the alleged conversations five years ago were had at the time of the acquisition, whatever remarks might have been made to this witness by the Topps' people at that time very well could have been enthusiastic hopes for the future because of the position thus acquired and not instructions to resort to tie-in practices. The most favorable view of this testimony to Commission counsel's position is to quote the witness' words that he was advised he could use the baseball picture cards "as a leverage to get more business on Bazooka" and that the sale of picture cards could be restricted to Topps' regular customers.

The hearsay testimony of two Topps' competitors as to rumors or reports of alleged tie-in sales is wholly unacceptable, not so much because it is hearsay but rather because of their obvious bias and the lack of specific details demonstrating actual tie-in requirements. On the other hand, the unbiased testimony of the Managing Director of the National Association of Tobacco Distributors is to the effect that respondent had no tie-in practices (Tr. pp. 3501–3535). Respondent categorically denied that it had resorted to any tie-in practices.

In my opinion, the worst that Topps did in this respect merely was to follow the normal business practice of making allocations of short-supply products and preferring regular customers to customers who wanted to confine their purchases to a short-supply product (Tr. pp. 2477–2486). Nevertheless, while I do not find that Topps engaged in tie-in practices, I do find that, had it been so inclined, because of its control of baseball cards and baseball card gum, it had the power to impose tie-in requirements even though it did not.

Commission counsel points to the fact that respondent engaged in cross-product promotion and used its dominant position in baseball as one of the vehicles for such promotions (Tr. pp. 461; CXs 21, 73, 164 and 221). Such a practice is neither unfair nor evidentiary of monopoly power. Nor do I find, as urged by Commission counsel, that because Topps has a minimum weight limit for free shipment of an order it thereby compels a purchaser of baseball gum to order other Topps' products (Tr. 2449). Minimum weight limits to justify free shipment are not unusual in business. Unless there were some evidence of probative value that a minimum weight package had to be made up of particular proportions of baseball gum and other Topps' products, there could be nothing wrong in such a practice.

The testimony by vending machine operators as to alleged discriminations against them, apart from the fact that the credibility of one of them was completely destroyed, is generally no more than present-day opinion testimony of alleged events of several years ago. It is categorically denied by respondent (Tr. p. 459). In no case did Commission counsel present any direct evidence showing that a candy dealer actually had received a delivery of a particular set of cards at a time earlier than the time at which a vending machine operator got his delivery. My suggestion as to how this might be proven was ignored (Tr. 699–700). The nature of the vending machine business is such as to explain away completely the opinions which the operators might have formed as to late deliveries. A vending machine must be serviced. It takes time to service it. A delivery of cards to an operator is in bulk, 500 to a carton. It is not clear whether the cards come separated in sets, are all mixed up, or are duplicates in bundles. Presumably the bulk shipment must be broken down and organized for filling of machines. The operator must travel from one machine to another in order to service his machines (Tr. pp. 604, 674, 955; CX 28–C). A vending machine enterprise may have routes in several cities and sometimes consignees cannot be located by truckmen (Tr. pp. 667, 714, 787, 793–797; RX 25). Frequently the vending machine operator has other business interests which take precedence (Tr. p. 551) and the servicing of the vending machines is only a part time, often only a night time or weekend occupation. The documentary evidence showed also that, in some cases where deliveries admittedly had been delayed, this was due to credit verification prior to sale or holding back of deliveries because of failure to pay bills past due (Tr. pp. 665, 706, 710, 714, 931–932, 957; RXs 35–42). Finally, as one operator testified, the machines were so constructed that they permitted alternate sales of cards. He would separate his old unsold cards from his new cards and arrange them alternately so that sometimes a purchaser actually would receive old cards at a time when new cards were already in the machine (Tr. p. 700). This was reason enough for the boys to complain that they were getting old cards out of the machines. The fault for this lay not in Topps but rather in the vending machine operator.

I do not overlook, however, the fact that Topps, which controls current baseball picture cards and also is in the gum business for which baseball cards are a promotional device, has the power to withhold from the vending machine industry the baseball cards which would compete with its baseball gum. This is a power, even though not exercised, which is evidentiary of monopoly. This conclusion is reached despite, but not in disregard of respondent's reliance on *United States* v. *Twentieth Century Fox*, 137 F. Supp. 78, which recognizes the right of a manufacturer to prefer his major line of distribution over a minor line. I am not convinced that that case is analogous with the case at bar. It is easy enough to understand why people who might want to see a motion picture could prefer to see one free at home on television rather than go out and pay to see another in a motion picture theater. On the other hand, to say that the boy collecting baseball picture cards can have his demands satisfied by similar or even identical cards that come along "free" in limited quantities with cereals or gelatins is unreasonable.

Commission counsel cites two inconclusive conversations to which two vending machine operators testified as to alleged price control by Topps. One said that a Topps salesman told him that he did not think that "it was a good idea" to sell the cards seven for five cents (Tr. p. 702), and the other testified that another Topps' salesman told him "that Topps wanted to know about anybody that was not selling at the price of six for a nickel" (Tr. p. 601). Salesmen's expressions of opinions or recommendations when not enforced or not the basis for punitive measures do not constitute resale price control. Nor does a company's desire to be informed as to the prices at which its products are being sold constitute such control. [As a matter of fact, under the Commission's Guides Against Deceptive Pricing, issued January 8, 1964, manufacturers, at their peril, must keep informed about the prevailing prices at which their goods are sold at retail.] All this does not mean that Topps did not have the power, had it so chosen, to dictate prices. Having this power, it is incumbent on it and its representatives not to make careless remarks which persons, sensitive to the realization that it has the power, may interpret as instructions or conditions being imposed.

It appears that control of baseball cards also gives Topps the power to vary, as to card gum, the industry's general policy of accepting returns (Tr. pp. 1127, 1166–1167, 2026–2030).

RESPONDENT'S ARGUMENTS ON ISSUE OF MONOPOLY

Most of respondent's arguments on the issue of monopoly have been disposed of in various preceding parts of this decision. A few remain.

It contends that there is no evidence in the record from which any conclusion can be made as to how many *exclusive* contracts it now has with ballplayers because of Fleer's activities resulting in the signing up of "thousands" of ballplayers in both the major and minor leagues. The *in camera* exhibits can be analyzed for the purpose of determining ultimate expiration dates of Topps' contracts, whether for initial five-year terms or for terms extended by reason of one or more renewals. CX 278, reproduced below at page 817, shows the volume and years of extensions or renewals. There is no evidence as to all the persons with whom Fleer has made its non-exclusive contracts, whether ballplayers who never were under contract with Topps or ballplayers who at one time or another had signed contracts with Topps. Those contracts are so drawn that they will take effect or already have taken effect at the expiration of Topps' contracts. As to these, and also as to any later contracts which Topps may make with previously unsigned ballplayers with whom Fleer contracted first, Topps' contract is so drawn that even if it does not have or get *exclusive* rights, it does get non-exclusive rights. Consequently, Topps' predominant position continues regardless of how many contracts Fleer procures with ballplayers previously signed or unsigned by Topps. True, the record would be better if we knew precisely with what ballplayers Fleer had made contracts. I am not so sure that it was incumbent on Commission counsel to obtain this evidence. Certainly respondent could have had it in the record had it so desired. This it did not do. Nevertheless, four tables, Commission Exhibits 275, 276, 277 and 278, are enlightening:

(CX 275)
NUMBER OF PLAYERS ON ROSTER
AS OF MAY 10 AND 11, 1961

29
30
29
31
30
30
30
31
31
31
31
28
30
30
29
450

18 Teams, 25 Players each

744

Answer

Number of players who signed extensions to Topps contracts (CX 278)

Page	1958	1959	1960	1961
1	12	14	11	19
2	17	21	7	19
3	12	21	8	18
4	15	16	12	21
5	20	20	7	20
6	16	16	10	23
7	12	16	9	23
8	19	18	11	20
9	19	15	13	21
10	16	20	10	23
11	18	23	5	23
12	17	17	10	22
13	19	17	9	26
14	18	19	9	22
15	17	20	5	18
Total	247	273	136	318

Year in which Topps' contract was signed (CX 277)

Page		1956	1957	1958	1959	1960	1961	Total
1		15	3	6	6	1	------	31
2		16	6	4	3	------	------	29
3		15	4	10	1	1	------	31
4		16	4	3	6	1	1	31
5		19	2	4	5	1	------	31
	1955							
6	1	11	5	6	5	2	------	30
7		10	4	7	7	3	------	31
8		16	6	6	2	1	------	31
	19—							
9	1	18	6	------	5	1	------	31
10		13	9	3	4	------	------	29
	1954							
11	1	13	5	9	3	1	------	32
12		14	6	5	4	2	------	31
13		16	3	6	4	2	------	31
14		16	8	2	4	1	------	31
15		10	8	6	6	------	------	30
Total	3	218	79	77	65	17	1	460

Total contracts	460
Number of more than 1 contract	16
	444
Total number players	450
Less number without Topps' contract	6
	444

Tabulation of American and National League player contracts with Topps Chewing Gum, Inc. and Frank H. Fleer Corp. as of May 10 and 11, 1961 (CX 276)

Page	X	–	0	Total
1	20	1	------	21
2	18	------	1	19
3	18	------	------	18
4	19	3	------	22
5	17	1	1	19
6	18	3	------	21
7	22	------	------	22
8	22	------	------	22
9	18	2	------	20
10	20	------	1	21
11	25	------	------	25
12	21	1	------	22
13	15	1	1	17
14	22	1	------	23
15	19	1	1	21
Total	294	14	5	313

x=Number of players that signed a Fleer's contract while under contract to Topps.
–=Number of players that signed a Topps' contract while under contract to Fleer.
0=Number of players signed by Fleer with no Topps' contract.

Source: Topps Chewing Gum, Inc., microfilm rolls No. 29–32 and positive rolls No. 62–1 and 62–2 and copies of Fleer Corp. contracts with Major League baseball players.

These tables show the number of players on the major leagues' roster on two days in 1961, the crossing of Topps' and Fleer's contracts with major league baseball players, the years in which Topps contracts were signed with major league ballplayers, and the numbers of extensions which were signed for Topps in 1958, 1959, 1960 and 1961. They demonstrate the creeping progressiveness of Topps' hold on the ballplayers. We know that Fleer, as mentioned above at pages 809–810, was able to avail itself of the rights of 20 players in 1962 and 27 in 1963. We can assume that, if the process is continued, these numbers will increase in the years to come. We can assume also that the process will continue to be quite gradual. Nevertheless, Topps does not thereby lose those ballplayers because, as noted, the Fleer contracts are not exclusive. If Topps' contracts actually have resulted in a monopoly, we do not have to await its erosion by time. The task of ending such a monopoly is not Fleer's but is the Federal Trade Commission's.

Respondent's over-all attack on the monopoly issue is grounded on the familiar yardstick—power over prices, characteristics and uses, distinct users, industry and public recognition, unique production facilities, all ultimately telescoped into what was said in *United States* v. *Du Pont & Co.*, 351 U.S. 377 at 404:

> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price. use and qualities considered.

Assuming these tests to be valid, the nature of current baseball picture cards, the marketing pattern involving sets and series, the specialized use for which they are singularly suited, and the well-defined and narrow confines of their buying public, all support a conclusion that they are to be cast into their own single submarket. The mere fact that a user or collector of current baseball picture cards may be diverted at times and with more or less facility to another type of picture card does not tear down the submarket concept of the current baseball picture card. Certainly, a Spook card or a Beatles card, or a one-time Baseball Great card, or any other kind of picture card, has no place in a set of current baseball picture cards. There is no interchangeability as, for example, bank or pit sand with lake sand noted in *Erie Sand and Gravel Co.* v. *Federal Trade Commission*, 291 F. 2d 279 (3rd Cir. 1961).

If we were confined in our conclusions with respect to the facts of particular cases by blind formulae without regard to the peculiar characteristics of the products under consideration in those cases, we rarely could reconcile a relevant market sufficiently inclusive to be meaningful in terms of trade realities without abdicating our responsibility to meet and deal with new situations in a constantly growing and changing economy. In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 at 489, the Court said:

> The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed.

See also *Crown Zellerbach Corp.* v. *Federal Trade Commission*, C.A. 9th Cir. 296 F. 2d 800.

Even if the price for baseball picture card gum has remained constant since 1951, and even if quantity or weight of gum has not been changed, and even if respondent's prices are generally the same as the industry's prevailing gum and candy prices, all as can be concluded fairly from evidence in the record, this means only that

Topps has not misused its power over baseball picture card product prices (CXs 28-A, 28-B; RXs 141, 197; Tr. p. 2658).

Given the control which the record shows it has over current baseball picture cards, even though not exercised, Topps could raise the price or reduce the quantity of gum that goes along with the cards. Moreover, what is equally as important but sometimes overlooked, is that in a competitive economy mere failure to increase a price or adherence to popular price brackets is not enough. Absent control and faced with competition, prices might go lower. The public is entitled not to be deprived of this possibility.

Respondent has been forced by Commission counsel's emphasis on bubble gum to enter into a large comparison of its bubble gum with other products in the gum industry. It has been forced similarly to discuss the competition of a host of other candy products. We are not confined narrowly to bubble gum. The Commission and I have made it clear that the primary concern of this case is with baseball picture cards and not with gum. The fact that bubble gum is confronted with competition from hundreds of other confections similarly priced is not material.

To argue, as respondent does, that there are no unexpired patents relating to the manufacture or production of picture cards or that other manufacturers have facilities equivalent to its own for producing picture cards misses the point. To what avail are facilities when their utilization is prevented by the contracts which Topps has amassed? Respondent's statement, "There are no unexpired patents * * * ." overlooks the similarity between patents and exclusive contracts.

It is correct to say that exclusive contracts resulting from competitive bidding such as in the transportation cases are not always within the contemplation of § 2 of the Sherman Act. *United States* v. *Yellow Cab Co.*, 332 U.S. 218. *Parmelee Transportation Company* v. *Keeshin*, 292 F. 2d 794 (1961) C.A. 7th Cir. The difficulty with this, however, is that because of the manner in which and the length of time over which Topps procured and has been procuring exclusive contracts with the ballplayers, a true competitive bidding situation does not exist. Certainly, Topps would not suggest that the termination of all its contracts with all the ballplayers on a particular date and the making of competitive bids to them or their agent at one time would be a solution for this case. A limited monopoly acquired through competitive bidding, to be legal, presupposes that all parties have the opportunity to submit their bids simultaneously and not that one of them have a headstart measured by years over which individual contracts were separately executed with thousands of ballplayers. If Topps had acquired its rights by competitive bidding in the same way that the rights to football cards were acquired, the argument might be valid. Under the circumstances of this case it is not.

In competition for business, as was said in the very beginning of this decision, ineptitude and inefficiency are neither rewarded nor aided by antitrust legislation (page 750). This does not mean, however, that all should not have an equal opportunity to compete. Where, by reason of wealth and an unusual combination of circumstances, as opposed to normal internal growth, a company acquires control of a market, the antitrust laws do provide remedial procedures to make the race more equal. I am fully convinced that Fleer could have been more successful in its effort to acquire baseball picture card rights had it not started as late as 1959 and had it utilized more efficient means, of which it was fully capable, to procure the contracts sought by it. I am convinced, also, that it would have been more successful in the promotion of its baseball cookies had it engaged in better merchandising methods. I am convinced, also, that had Leaf not given up the battle just because it lost its litigation to Bowman, it could have had by now a sizable arsenal of baseball contracts. It was free of all restrictions after January 1, 1951 (Tr. p. 2402).

The law, however, does not excuse monopoly by reference to any qualifying conditions. Its object is that the opportunities to do business in our competitive economy be equal. If, in the course of time, what has once been equal becomes unequal, remedial measures may become appropriate. Respondent's characterizations of inefficiency, ineptitude or lack of interest, true as they may be, even though not a defense to monopoly, may be justification for concluding that whatever measures may be taken against it, assuming measures are taken, will not be harmful to it in the long run. Inefficiency, ineptitude and lack of interest are not going to be corrected or changed by remedial action in this proceeding. Any advantages the Topps' contract has over the Fleer contract will not be affected by appropriate remedial action, should the same be taken (compare CXs 408–418 with CX 429). Topps' policy of indiscriminate offering of contracts, as opposed to Fleer's selective offering of contracts, its binding commitment to the ballplayer, its favorable position in baseball due to its successful public relations programs and what may be the camaraderie of baseball players, all may enable it successfully to market baseball cards and baseball card products despite the opening of competitive opportunities to others.

RESPONDENT HAS MONOPOLIZED A PART OF TRADE OR COMMERCE WITHIN THE MEANING OF § 2 OF THE SHERMAN ANTITRUST ACT

Prior to the Haelan settlement respondent had embarked upon a campaign to obtain exclusive rights to the utilization of baseball picture cards as a promotion device for the sale of its product, bubble gum. By its acquisition of all the Haelan baseball card rights contracts it solidified whatever progress it had made prior to the ultimate disposition of the litigation. It never thereafter relaxed its efforts to enlarge and spread out the numbers of ballplayers under contract with it. Instead, it engaged in numerous public relations activities to solidify its position in baseball. This facilitated its access to individual ballplayers at the threshold of their entry into professional baseball. It was ever vigilant for the protection of the rights acquired by it. It was alert and firm in the policing of such rights and the discouragement of any encroachment on them. It diligently fought all efforts of competitors to make contracts with ballplayers. It acquired contract rights for the exclusive exploitation of the picture and biographical rights of 95 percent of the major league baseball players and an equivalent or greater percentage of minor league players with major league potential. It has extended and consolidated the exclusive nature of its contracts so that they have become so broad as to foreclose to all others any legal right to manufacture or sell almost all current baseball picture cards as separate articles of commerce or to use them for promotional purposes in the entire gum, candy and confectionery business. These actions and attitudes are evidentiary of motive, purpose or intent to accomplish the result proscribed by § 2 of the Sherman Antitrust Act. By all these actions and accomplishments: it has attained the power to control the price of current baseball cards sold alone and the price of its own product, bubble gum, when sold with such baseball cards; it has attained the power to control and limit the production, supply and availability of either such baseball cards alone or bubble gum when sold with such baseball cards; it has attained the power to discriminate between vendors of its own current baseball cards alone and vendors of its own products, whether bubble gum alone or baseball gum. It has excluded from access to the utilization of current baseball cards as a promotional device the entire candy, gum and confectionery business, even though its own participation in that business is only about one percent.

All these, when put together, are the ingredients which result in monopoly within the meaning of cases like *United States* v. *Griffith*, 334 U.S. 100, *Continental Co.* v. *Union Carbide*, 370 U.S. 690, *United States* v. *Paramount Pictures*, 334 U.S. 131, *American Tobacco Co.* v. *United States*, 328 U.S. 781, *International Boxing Club* v. *United States*, 358 U.S. 242.

Current baseball picture cards are an appreciable part of the trade or commerce among the several states. Their nature is such as to make them distinct in a business sense from other kinds of picture cards or similar picture devices. They have a great and significant value as promotional devices in the sale of products purchased by or for teenage boys. Their foreclosure to others who might want to sell them alone or who might want to sell or use them as promotional devices in any market created by the demands of teenage boys has competitive significance.

It may be that Topps has acquired this monopoly position either by default of potential competitors or by their lack of interest or their lack of competitive skills and enterprise. As a matter of fact, perhaps the revival of current baseball picture cards as articles of trade or promotional devices is due in large measure to Topps' creative merchandising and the spade work it has done in the minor leagues and in baseball activities. This, however, does not mean that the position thus acquired by it is legal.

THE FORM AND CONTENT OF THE ORDER

Together with the complaint, there was proposed an order which would (a) restrain Topps from entering into exclusive contracts such as those which the respondent now uses for periods in excess of one year, (b) restrain it from continuing in operation or effect any such existing contract which has more than one year to run from the date of service of the order, (c) restrain it from restricting in its contracts the freedom of professional athletes, managers or coaches to grant future picture card rights to others, and (d) require it to furnish every person with whom it so contracts "an exact copy of said contract at the time of the execution of that contract." This is the order which would have been entered had respondent not answered the complaint.

In Pretrial Orders, I ruled that an order broader than that served with the complaint would not be entered (Orders of October 12, 1962 and August 8, 1963). I did this in the belief that if a broader order were issued it would be punishing the respondent for defending rather than allowing the proceeding to go by default. I observed also that for counsel supporting the complaint to obtain such relief the complaint would have to be amended. See 49 C.J.S. § 214b(2), pp. 378–379. Cases like *Armand Co.* v. *Federal Trade Commission*, 84 F. 2d 973 and *Ekco Products Co.*, Docket No. 8122, should be distinguished because they arose under the old rules and no proposed order had been served with the complaint. Counsel supporting the complaint did not appeal from that portion of the pretrial orders and, although the Commission from time to time had those orders before it and commented on parts, it did not at any time make adverse reference to this particular part.

Now, at the conclusion of this proceeding, counsel supporting the complaint has submitted a proposed order which is very much broader than that which had been served together with the complaint. He now proposes (a) that respondent be prohibited from making or continuing in effect *any exclusive* contracts with the ballplayers, (b) that respondent be prohibited from making or continuing in effect *any* contracts with ballplayers which restrict their freedom to grant future picture card rights to others, (c) that respondent be restrained from engaging in tie-in practices, (d) that respondent be restrained from imposing on customers or prospective customers obligations with respect to the size of the retail package in which any of its products are sold or the price at which they are sold, (e) that respondent be compelled to make simultaneous deliveries to all its customers who are in competition with each other, and (f) that respondent be required to furnish every person with whom it contracts for baseball rights an exact copy of the contract at the time of its execution. The broadened order submitted by Commission counsel is not supportable on the basis of the evidence in this record. The record does not support the entirely new paths taken by it such as tie-in practices, control of size of retail packages, control of retail price and discriminatory delays to different classes of vendors.

The conclusion that the respondent has monopolized requires that an appropriate remedial order be entered. Such an order must, however, be tailored to the particular facts of this case, the nature of the business and the nature of the monopoly. The proposed order which was served with the complaint follows that entered in *Federal Trade Commission* v. *Motion Picture Advertising Co.*, 344 U.S. 392. (See 47 F.T.C. Decisions 378, at page 390.) The difficulty is that the Motion Picture order was one of several identical orders entered against the majority of the motion picture advertising service companies in an area of business in which the theaters had been left with little or no access to other outlets to which they might sell their limited available advertising screen time. Moreover, many, if not a majority of the contracts, already were limited to one-year terms—a sort of industry-formed pattern.

This may be why questions which respondent raises in this proceeding were not raised in or considered by the courts in the *Motion Picture Advertising Co.* case. The questions are: Can the Federal Trade Commission, by order entered in a proceeding to which the ballplayers are not parties, terminate the ballplayers' contractual rights against Topps resulting from their contracts with it? Can the Federal Trade Commission abridge or shorten those contracts so that their terms are reduced? Can the Federal Trade Commission take away from the ballplayers a property right, the right to make exclusive grants of publicity exploitation, which the Circuit Court of Appeals for the Secon^ Circuit held they had in *Haelan Laboratories* v. *Topps Chewing Gum*, 202 F. 2d 866, *cert. den'd* 346 U.S. 516? I am very much concerned with these questions and believe that they are of serious import. The problems seem to have been resolved by the District Court in *United States* v. *Standard Oil Co.* in its order quoted at page 891 in 78 F. Supp. 850, *affirmed sub nom Standard Oil Co.* v. *United States*, 337 U.S. 293. There the Court did not undertake to cancel or abridge the contracts so that third persons would lose their rights under them. The Court merely restrained enforcement of the contracts leaving it to the third persons to elect whether they would be bound by them or not.

Consequently, the form of order which I shall enter will follow more closely that entered in *Standard Oil.* Although the record does not support a finding that respondent had a practice of withholding copies of contracts when ballplayers signed them, the players seem to have been very lax about their handling of such copies. Legislation recognizing this human frailty is becoming increasingly frequent and so a provision in this regard may be appropriate even if not effective in changing the habits of the players.

Next, consideration must be given to the length of time of the restriction. The order served with the complaint provided for an over-all restriction of just one year from its date, whether the original contract or any extension ran beyond a year. During the course of this decision, from time to time I have touched on the various difficulties, complications and business problems involved in the obtaining of baseball picture card rights. Topps has obtained its position without resort to methods which were illegal *per se* and without resort, when isolated, to unfair business practices. Its position may be attributed in large measure to the lack of interest and the inefficiency of potential competitors. Moreover, three factors must be noted. The first is that the baseball rights are sales products or tools in only a few months of a calendar year—not all year as were the rights in the *Motion Picture Advertising* case. The second is that the established pattern, as appears from the seemingly satisfactory exclusive rights contracts in football, is three years, not one year as seems to have been the pattern in *Motion Picture Advertising* case. Third, contracts have to be solicited and signed months before the beginning of the market period.

For all these reasons and the general impression which I have of everything that is involved in this case, I am of the opinion that any restriction against the term of respondent's exclusive contracts (whether applicable to original contracts or extensions) should be not less than two years from November 1, 1964. The nature of the restriction to be imposed (a no-enforcement provision), following the pattern of the *Standard Oil* case, will leave open to the ballplayers the ultimate decision as to whether his existing contract shall extend beyond two years. Under that form of order, he may, if he chooses, be relieved from its obligations or he may elect to enforce it against Topps.

The foregoing is a detailed statement of my findings of fact, my conclusions of fact, my conclusions of law and the reasoning on which I base them. Now, upon the whole record, and with the express statement that I do not thereby minimize or negate any finding of fact or conclusion thus made, I hereby make the following ultimate:

Findings of Fact

1. Respondent, Topps Chewing Gum, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business located at 254 36th Street, Brooklyn 32, New York.

2. It now is, and for many years last past has been, engaged in the manufacture, distribution and sale of bubble gum. It also sells picture cards separately or in packages containing cards and a slab of bubble gum (herein referred to as baseball gum).

3. Topps' factory is in Brooklyn, New York and it ships or causes to be shipped its products via common carriers to purchasers and distributors located in most of the states of the United States. It is, and for many years last past has been, engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

4. Topps Chewing Gum, Inc. is a family business. It was incorporated in 1947 and is the successor to a partnership started in

about 1939. It is the largest manufacturer of bubble gum in the United States and in the world.

5. It has three regional warehouses in addition to its plant in Brooklyn and it has a subsidiary which manufactures raw material for bubble gum. It employs more than 500 persons among whom are about 30 field representatives who, in addition to conventional middlemen, brokers and distributors, call on and sell to its customers.

6. In 1958 shipments and other receipts for all chewing gum manufacturers in the United States exceeded $176,000,000. The chewing gum industry consists of about 30 manufacturers, but three of them, Wrigley's, American Chicle and Beech-Nut, control about 80% of it. These concerns manufacture conventional chewing gum which is sold in the familiar five-cent package of five sticks. The conventional chewing gum market is not confined to any particular segment of the populace.

7. The remaining 20% of the chewing gum business includes a few small manufacturers of stick gum and specialty gum, and those in the bubble gum industry.

8. No bubble gum company in the United States manufactures conventional chewing gum in any appricable quantity. No conventional chewing gum company in the United States maufactures bubble gum in any commercially important quantity for the domestic market.

9. Bubble gum differs from conventional chewing gum in that it is purchased generally by children in their grammar school years. There is a physical difference between bubble gum and conventional chewing gum in that the former has a harder base so that it is easier to blow into a bubble. Bubble gum is generally so advertised.

10. Seven manufacturers of bubble gum have sales of more than a million dollars a year. The respondent is the largest of these and, since 1959, its total sales have averaged about $14,000,000 annually.

11. Souvenir picture cards date back beyond recorded history. They included picture post cards, display cards, playing cards and greeting cards. Advertising cards were used in the United States in the Colonial days. They showed pictures of stores and products. For almost a hundred years, insert cards have been packed with a product and sold to the customer in that manner. From 1885 until the 1930's, tobacco companies used such cards with their product. Thus they have an ancient, established commercial importance.

12. Picture cards, whether sold alone or in combination with another product, have come to be known as "trading cards." Children collect them. They trade them or engage in various games of chance

or skill, such as flipping or throwing, to increase or complete their collections.

13. Starting in 1933, bubble gum companies exploited the children's market for insert cards sold with bubble gum. Bubble gum manufacturers so used them extensively until World War II at about when the production of bubble gum was curtailed.

14. Topps manufactures, distributes and sells bubble gum in a large variety of shapes, sizes and brands, its predominant brand being "Bazooka." Bazooka is not sold with picture cards. It is sold throughout the year in a square wrapped 1¢ package and in a 5¢ roll. Topps sells gum products not only with baseball picture cards but with other picture cards as well.

15. The baseball gum package contains a slab of gum plus five or more current baseball picture cards. Sometimes it includes also a promotional device like a baseball picture stamp. It sells for 5¢ at retail.

16. Current baseball gum is a staple product. It enjoys an identifiable marketing period, the baseball season, every year. Current baseball cards fall into the same category. They are 3½ by 2½ inches in size. On one side are the name and picture of a baseball player and on the other his statistical record. A current baseball picture card is that depicting an active major league player or a minor league star.

17. Current baseball picture cards also are sold separately, 12 to a package, retailing for 10¢, and in bulk packages of 500 to vending machine operators who retail them at five cards or more for 5¢.

18. Purchasers and collectors of current baseball trading cards generally are boys between the ages of five and fifteen. They constitute a well-defined, recognizable segment of the purchasing public. This purchasing segment of the public is permanent in that as older boys withdraw from it younger boys grow into it.

19. Boys in this purchasing segment of the economy, because baseball is the national pastime and because they are constantly exposed to publicity concerning it, develop a hobby of collecting current baseball cards and prize the information therein contained. The nature of the hobby is such that extensive coverage of all the major league ballplayers as well as some minor league stars is essential for its gratification.

20. There were about 576 different current baseball picture cards in Topps' 1963 series. A series may contain as many as seven sets of 70 or more cards, each issued about three or four weeks apart to sustain interest among consumers.

21. Topps initially sold baseball picture cards with a piece of candy in 1951. Eventually, because of the concentration of its business in bubble gum, it sold them with the gum. At first, it acquired current baseball picture cards either through arrangements made by an affiliate or from a company engaged in the business of producing them.

22. Another bubble gum company (to be referred to below as Haelan) engaged in independent solicitation of ballplayers for current baseball picture rights. By 1951, it had acquired a great many such contracts. Many of the cards at that time utilized by respondent in its business contained pictures of ballplayers under contract with Haelan. Haelan brought suit against Topps claiming that its contracts with the ballplayers were being infringed.

23. This litigation ultimately resulted in victory for Haelan. The parties then settled all their differences. This settlement included not only the damages to which Haelan became entitled but other factors as well. Topps paid $200,000 for all of Haelan's gum-producing assets, all its contracts with the ballplayers, and a covenant that Haelan would not manufacture or sell chewing gum or picture cards for five years.

24. To supplement all the current baseball contracts then owned by it (those acquired by its own efforts prior to the Haelan litigation and those resulting from the Haelan acquisition), respondent thereafter engaged in a most extensive and active campaign for the solicitation and acquisition of more and more contracts with active baseball players and other luminaries in the game. This campaign was conducted by utilizing persons employed directly by it and many casual solicitors having connections with and access to ballplayers.

25. This program was so successful that in the year 1961, Topps had exclusive contracts with 446 out of 450 active major league ballplayers and with more than 6,500 active minor league players.

26. Although the form of the contracts has been changed from time to time, in substance, Topps is granted two broad rights, the first being "the exclusive right to exhibit, print, reproduce, publish, distribute and sell (the ballplayer's) picture, signature and facsimile thereof and a description and/or biographical sketch of (him) in any form, size, manner, material, color or language, including but not limited to the form of trading cards to be sold" *alone*, and the second being the same broad exclusivity when the materials reproduced or published (whether in trading card form or another form) are utilized "in combination with chewing gum, candy and confection, or both."

27. Apart from other forms in which the rights granted might be utilized, as far as this proceeding is concerned current baseball trading cards are the product.

28. Under the contract, no one but Topps may engage in any commercial activity involving the particular ballplayer's baseball picture trading card as a separate article of commerce.

29. Similarly, in the entire chewing gum, candy and confection industry, no one but Topps may use that baseball trading card, or any other rights sold in the contract, as a promotional device in connection with the sale of products of that industry.

30. In 1961, sales of the confectionery industry amounted to $1,233,000,000 and in 1962 $1,259,000,000. Topps' position in that industry, since its total sales are in the area of $14,000,000 per year, is hardly more than one percent of that entire industry. Thus, about 99 percent of that entire industry is foreclosed from access to every current baseball trading card subject to a Topps' contract as a vehicle for the promotion of its products.

31. Topps' principal competitor is Frank H. Fleer Corporation, also engaged in the production and sale of bubble gum. Fleer is the only bubble gum company that has been trying actively to procure contracts with baseball players for rights similar to those acquired by Topps.

32. It has acquired thousands of such contracts with ballplayers in all leagues but, by May 1961, had contracted with only five major league ballplayers who had not contracted with Topps and with 308 who had contracted with Topps. Of those 308 contracts, 294 of them do not become effective until after the Topps' contracts expire.

33. By the Fleer contracts only non-exclusive rights are granted to it. Consequently, Topps may avail itself of trading card rights from ballplayers even though they are under contract to Fleer, whether such contract with Fleer becomes effective by reason of the expiration of a prior Topps' contract or by reason of the fact that the ballplayer had not made a prior contract with Topps.

34. To forestall Fleer's efforts to acquire baseball trading card rights and to delay as long as possible the effectiveness of such contracts as Fleer may make subsequently with ballplayers, Topps has instituted a practice whereby, for additional consideration, it procures and has procured initial and additional extensions of original or basic contracts with ballplayers. In this way the relationship between the individual ballplayers and Topps may be extended and continued from an original five years to as many as seven or nine years or more.

35. The nature of a ballplayer's career is that, once having reached a major league team, he may continue there for as many as five, six and up to nine or ten years or more. If his stay on a major league team is shortened, he does not cease to be a baseball luminary necessarily. Even a drop back to a minor league team does not mean that he will not, at a future time, again become a member of a major league team.

36. The effect of this, using 1961 as a base and 446 out of 450 major league players as a nucleus, backed up by the thousands of contracts with minor league players, is that Topps has a continuing hold on a sufficient number of major league ballplayers to leave only so few players not under exclusive contract with it as to render impractical, from a commercial viewpoint, the utilization or exploitation of those few players' picture cards either as articles of commerce alone or as promotional devices in connection with the sale of gums, candies or confections.

37. A realistic and commercially practical number of ballplayers whose pictures may be utilized in the manufacture, production, sale and use of picture cards must be sufficient in the very least to make up a set of cards. A set of cards ought to be at least 50 and probably as many as 75.

38. The continuing hold which Topps has on major league ballplayers is progressive. The great number of contracts it has made with minor league ballplayers means that even newcomers to the major leagues, being subject automatically to the binding contracts which Topps has made with them while they were in the minor leagues, automatically remain bound to Topps.

39. Although Fleer started its aggressive efforts to obtain contracts with active ballplayers at the end of 1958, by 1962 its contracts with such ballplayers materialized to the point where it paid 20, and by 1963, the number was 27. These quantities are insufficient to make commercially practical the utilization of the reproduction rights for trading cards thus available to it.

40. The nature of current baseball trading cards is such that no other cards are compatible with them for the purpose of satisfying the desire of the baseball card-buying segment of the population to amass or acquire the sets which are the subject matter of their hobby.

41. While current baseball trading cards have become available and may be acquired by the members of that segment of the population from sources other than Topps because they have been packed and offered for sale either with marbles or with a cookie or as imprintings on boxes of cereals and gelatin desserts, the members of

that class of the population who desire baseball cards for their collections cannot, because of the exclusive nature of the Topps' contracts, acquire them alone except from Topps. Except for the combination package of marbles or a cookie, their efforts to acquire them are defeated or impaired further because of the relatively large expenditure necessary to obtain the few inferior, one-sided cards which may come on a cereal box or a box of gelatin dessert.

42. The promotions by the food company whereby it used current baseball trading cards in connection with the sale of its cereals and gelatin desserts were successful and the sales of the products so promoted constituted a profitable undertaking on its part.

43. The sales by Topps of current baseball card gum over a long period of years have averaged more than 40 percent of the total sales of its major staple product, Bazooka. The sales of another bubble gum company between the years 1933–1942, before both Topps and Haelan utilized baseball card promotions, showed great variations in the proportion of baseball pack sales to sales of gum alone, but in most of those years the proportions exceeded 10 percent, and in many of them were far greater. Before Haelan was taken over by Topps in 1956, its sales of baseball gum averaged from as little as 15 percent to as much as 30 percent of total sales. The sales of current baseball cards with marbles and with a cookie amounted to $100,000 and $200,000 a year respectively.

44. Topps' solicitation of baseball card contracts has been active and widespread, permeating almost the entire minor leagues in addition to the proportion already cited for the major leagues. It zealously has furthered, nurtured and protected the position it has thus acquired and it has caused that position to grow continuously by utilization of the funds at its disposal resulting from its preeminence in the bubble gum business. It zealously has kept itself informed of every potential use of baseball picture cards either as separate articles of commerce or as promotional devices. It has promptly and firmly informed every potential user, whether in the confectionery business or in any other business, of the extent and nature of its rights under its contracts. It has used the funds and facilities at its disposal to make it difficult for others seeking to make rights contracts with ballplayers.

45. Although it actually has not done so, by reason of its control of baseball trading cards, it has the power to increase or decrease at will the price of cards when sold alone or the price of combination packages of gum and cards. It has the power to and could at will require that dealers who desire to stock and have available for sale

baseball trading cards purchase other of its products as a condition for sales and deliveries of baseball picture cards. It could, if it so chose, withhold from the market all baseball trading cards as separate articles of commerce and thus reserve them for use solely in the promotion of the sale of its own bubble gum in the form of a combination product of baseball cards and bubble gum, even to the extent of depriving persons engaged in the vending machine business of the opportunity to vend such cards in their machines.

From the foregoing I make the following:

CONCLUSIONS

A. That current baseball picture cards are sufficiently distinct from other kinds of picture cards or similar picture devices to make their foreclosure to others who might wish to sell them or use them for promotional purposes competitively significant.

B. That Topps Chewing Gum, Inc. has attempted to monopolize and has monopolized the business of manufacturing, producing and selling current baseball picture cards as separate articles of commerce.

C. That Topps Chewing Gum, Inc., although it constitutes only about one percent of the candy, confectionery and chewing gum industry, has attempted to and has monopolized rights to utilize current baseball picture trading cards as promotional devices in connection with the sales of products in that entire industry and has foreclosed all others in that industry from the use of such rights for promotional purposes.

D. The production and sale of current baseball trading cards constitutes an appreciable and substantial part of the trade or commerce among the several states.

E. The utilization of or availability for utilization of current baseball picture cards as promotional devices in connection with the sale of candies, gums and confections constitutes an appreciable and substantial part of the trade or commerce among the several states of the United States.

F. By reason of all the foregoing, competition in interstate commerce has been substantially lessened.

G. The result thus attained by Topps Chewing Gum, Inc. is in violation of Section 2 of the Sherman Antitrust Act.

H. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

I. The result thus attained by respondent constitutes an unfair practice in violation of the Federal Trade Commission Act.

J. This proceeding is in the interest of the public.

K. The order hereinafter set forth is necessary and reasonable to effectuate the purposes and policy of the Federal Trade Commission Act.

MOTION TO OPEN IN CAMERA EXHIBITS

Viewing this case in its entirety, and after considering the sensitive nature and business value of most of the materials *in camera* as well as the fact that practically all of it is *in camera* by reason of the stipulation of counsel supporting the complaint, his present motion to have the *in camera* designations removed is denied.

Wherefore, and for the reasons stated in other parts of this decision, the following is entered as the

ORDER

It is ordered, That respondent, Topps Chewing Gum, Inc., its officers, representatives, agents, employees, subsidiaries, successors and assigns, directly or through any corporate or other device, during the course of or in connection with its business activities in interstate commerce, forthwith cease and desist from:

1. Entering into any contract with any professional baseball player, manager or coach for exclusive rights to use any such person's picture, name or biography on picture cards to be sold alone or to be sold in connection with or as a combination or promotional product with bubble gum or any other confection if any such contract or the rights granted thereunder shall continue or extend for a period in excess of two years from November 1, 1964, or from such later day or date on which it may be executed.
2. Enforcing after October 31, 1966 any such contract now in effect, whether such contract be an original contract, a contract as extended, or a contract as renewed.
3. Entering into any extension or renewal of any such contract prior to the expiration of one year from the date when it was executed, last extended or last renewed.
4. Entering into, or enforcing any extension or renewal of, any such contract for or during a period in excess of two years from the date on which it is or has been extended or renewed.
5. Entering into any such contract, extension or renewal of any such contract unless, at the time of the execution of such contract, extension or renewal, it shall tender to the person

with whom the same is made a true copy of such contract and, if a prior contract is being extended or renewed, a true copy of such extension or renewal together with a true copy of the contract being extended or renewed and of all previous extensions or renewals, if any.

6. Providing for or enforcing any condition, provision, clause or term in any such contract, extension or renewal if the same restricts in any manner the right of any person at any time to enter into any agreement purporting to grant, assign or license any rights on a non-exclusive basis to any other person, firm or corporation to take effect at a time following the expiration of the contract, extension or renewal in which it appears.

Opinion of the Commission

By Elman, *Commissioner:*

Respondent is the nation's largest manufacturer of bubble gum. Its sales of $14.3 million in 1960 represented 39% of the industry total. About 25% of respondent's bubble gum sales consist of baseball card bubble gum—a slab of gum sold in a package which also contains several picture cards of baseball players. In addition to selling bubble gum, respondent sells baseball picture cards separately, although this is a very small part of its total sales. For several years respondent has been the only firm using picture cards of currently active baseball players to promote a confectionery product, and the only firm selling such cards alone, as separate articles of commerce, as well as in combination with another product such as bubble gum.

Because it could not lawfully use the players' pictures for a commercial purpose without their agreement,[1] respondent has entered into numerous contracts with both minor and major league baseball players. These contracts provide that respondent shall, during the player's first five major league seasons, have the exclusive right to use his picture in the promotion of confectionery products and in the sale of picture cards alone, and that during the term of the contract the player shall not grant the exclusive right to use his picture for these purposes after the contract expires. Respondent, in exchange, agrees to pay the player $125 for each major league season he plays during the term of the contract, whether or not respondent actually uses the player's picture.

[1] "[A] man has a right in the publicity value of his photograph, *i.e.*, the right to grant the exclusive privilege of publishing his picture." *Haelan Laboratories, Inc.* v. *Topps Chewing Gum, Inc.*, 202 F. 2d 866, 868 (2d Cir. 1953).

Respondent has sought to place as many major and minor league players as possible under such contracts and to obtain renewals or extensions thereof as the contracts expire. As a result of its efforts, respondent has nearly all of the active major league players under contract. This enables it, and it alone, to sell a substantially complete series of current baseball picture cards both as separate articles of commerce and in combination with bubble gum. Respondent also has contracts with a great many minor league players although it only markets picture cards of major leaguers.

The Commission's complaint, issued on January 30, 1962, challenges respondent's conduct in obtaining and enforcing these exclusive contracts with baseball players as "unfair methods of competition and unfair acts and practices," in violation of Section 5 of the Federal Trade Commission Act. The proposed order served with the complaint would require respondent to cease and desist from entering into such exclusive contracts for periods in excess of one year.

After full evidentiary hearings, the hearing examiner, on August 7, 1964, filed an initial decision in which he found that although respondent's exclusive contracts and other practices, viewed separately, were not unfair, respondent had monopolized the sale of current baseball picture cards both as separate articles of commerce and as a promotional device for the sale of confectionery products, and had thereby violated Section 5.[2] The examiner entered a cease and desist order intended primarily to limit the term of respondent's exclusive contracts to two years. Both sides have appealed from the examiner's decision and order.

We meet at the threshold the contention that, whether or not respondent has violated the law, there is no public interest in this proceeding;[3] that the struggle between respondent and its competitors for rights to use baseball players' pictures in the promotion of bubble gum is a purely private controversy not warranting a proceeding by the Federal Trade Commission. We reject the contention. The bubble gum industry is a substantial industry, with total sales in 1960 of more than $35 million. If the allegations of the complaint are well founded, and respondent, the largest firm in the industry, has monopolized a promotional device of great value and importance in the sale of the industry's product, the public interest in abating the

[2] Conduct forbidden by the Sherman Act, such as monopolization, is also forbidden by Section 5 of the Federal Trade Commission Act, which proscribes "unfair methods of competition." E.g., *F.T.C.* v. *Cement Institute,* 333 U.S. 683; *Fashion Originators' Guild* v. *F.T.C.,* 312 U.S. 457.

[3] The Commission is authorized to issue a complaint only "if it shall appear to the Commission that a proceeding . . . would be to the interest of the public." Federal Trade Commission Act § 5(b). See *F.T.C.* v. *Klesner,* 280 U.S. 19.

monopoly is plain. Moreover (again if the allegations are well founded) respondent has foreclosed the use of a valuable promotional device to the entire confectionery industry, since respondent's contracts with the baseball players provide that respondent shall enjoy the exclusive right to use the player's picture in the promotion of any confectionery product; and the confectionery industry is a major industry whose annual sales exceed a billion dollars.

In any event, the dollar size of the lines of commerce involved in a Commission proceeding is only one index of public interest. Another is the importance of the legal and factual issues presented by the case. Many noteworthy cases in the antitrust field have involved markets no larger than the one here.[4] The reason is that if a case involves issues of general significance, the decision is likely to have repercussions extending far beyond the particular parties and products involved.[5] The charges of unfair and monopolistic practices made in the complaint in the present case raise novel and unexplored issues of wide significance in the antitrust field. The Commission's resolution of these issues should provide guidance not only to the members of the bubble gum and confectionery industries, but to all firms subject to the Commission's jurisdiction.

Finally, the fact that a complaint issued by the Commission may, after full evidentiary hearings, be dismissed by the Commission because the allegations of the complaint have not been proved does not mean that the Commission's initial determination of public interest was erroneous. A complaint is not issued unless the Commission has "reason to believe" that the respondent has committed a violation of law. Federal Trade Commission Act § 5(b). But reason to believe is not proof that a violation has occurred, and conduct which on the basis of *ex parte* investigation might have appeared unlawful may, after the facts have been fully developed in an adversary proceeding, prove not to have been unlawful after all.

The significance of a Commission decision generally lies not in the type of order entered, whether a cease and desist order or an order dismissing the complaint, but in the Commission's analysis of the issues presented, by which businessmen desiring to comply with the laws administered by the Commission can be guided. And the im-

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[4] See, e.g., *F.T.C.* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392; *Reynolds Metals Co.* v. *F.T.C.*, 309 F. 2d 223 (D.C. Cir. 1962).

[5] A recent example of such a decision is *United States* v. *Grinnell Corp.*, 236 F. Supp. 244 (D. R.I. 1964). The principal charge was monopolization of the central station protective service business, in the court's words, "a small industry." *Id.*, at 258. Yet Judge Wyzanski in his opinion laid down an important new rule of decision of general importance in all monopolization cases. See p. 838 & n. 6, *infra*. See also *F.T.C.* v. *Consolidated Foods Corp.*, April 28, 1965 (Sup. Ct. No. 422, October Term 1964).

portance of a case, as a precedent and as a general guide to industry, is no less because the complaint is dismissed.

With the preliminary issue of public interest out of the way, we turn to the merits of the case.

It has recently been suggested that once a defendant is shown to have a monopoly, no further evidence need be adduced by the proponent to establish unlawful monopolization, and the burden shifts to the defendant to show that monopoly was thrust upon him or was otherwise lawful.[6] Monopoly in the antitrust sense means control of an economically meaningful market. *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377. The only seller of a product that has numerous very close substitutes over which he has no control does not have monopoly power in any sense relevant to a monopolization case. Every holder of a trademark has a "monopoly" of the trademarked item. But this does not mean that he has substantial monopoly power; the same product may be widely sold under different trademarks. Respondent in the present case denies that it has monopoly power in any economically meaningful market.

If current baseball picture cards (assuming *arguendo* that such cards have no close substitutes) were customarily sold as separate articles of commerce rather than in combination with other products, then respondent, the only firm that sells such cards as separate articles of commerce, would enjoy a monopoly in a meaningful market. However, respondent sells relatively few cards alone and seems to have little interest in selling cards save with bubble gum as baseball card gum. Plainly, the real commercial significance of such cards is as a promotional device. The firms that from time to time have been interested in marketing baseball picture cards have generally been manufacturers of bubble gum, cereal or other products who believed that offering baseball cards in combination with their product would help it sell.

Complaint counsel argue that when baseball picture cards are sold in combination with bubble gum (or other products), it is the picture

[6] "To this Court it appears that the day has come for it, and more important for counsel, to proceed on the acknowledged principle that once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of § 2. The Government need not prove, and in a well-conducted trial ought not to be allowed to consume time in needlessly proving, defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies while in this predominant role. If defendant does wish to go forward, it is free to do so and to maintain the burden of showing that its eminence is traceable to such highly respectable causes as superiority in means and methods which are 'honestly industrial', as Judge Hand characterized the suppositions socially desirable monopolizer." *United States* v. *Grinnell Corp.*, 236 F. Supp. 244, 248 (D. R.I. 1964).

cards the purchaser really wants and buys, not the bubble gum. But whether it is the cards or the gum that the child really wants when he buys baseball card gum, the fact remains that baseball picture cards are characteristically sold in combination with some other product, and not alone. Respondent's "monopoly" in the sale of current baseball picture cards as separate articles of commerce lacks economic significance because a market composed of baseball picture cards alone is not "meaningful in terms of trade realities." *Crown Zellerbach Corp.* v. *F.T.C.*, 296 F. 2d 800, 811 (9th Cir. 1961). The relevant market comprises, rather, current baseball picture cards sold to the consumer in combination with other products; for this is how such cards are in fact generally marketed.

Respondent does not have a monopoly in this market. It does not have the right to use the pictures of the baseball players with whom it contracts in the promotion of any but confectionery products. The player may grant the right to use his picture in the promotion of any other kind of product to some other firm or firms. If current baseball picture cards are, as complaint counsel claim, an item much in demand by a substantial segment of the consuming public, there is nothing to prevent manufacturers of the many non-confectionery products marketed to the young boys who collect such cards—toys, comic books and magazines, sports equipment, food, clothing, games, novelty items, etc.—from selling current baseball picture cards in combination with their products; and this has in fact been done extensively. Neither the contracts respondent has signed with baseball players, nor any other practice respondent has followed in marketing baseball picture cards, justifies an inference that respondent has the power to prevent the marketing of current baseball picture cards through such other channels.

Complaint counsel lay great stress on the examiner's finding that some of the combinations in which current baseball cards have been marketed (namely, with marbles and with cookies) are "sham". Initial decision, p. 808. But the examiner did not find, as complaint counsel argue, that such combinations (sham, in the examiner's view, because the real object was to sell cards—the cookies or marbles being wholly incidental) violated respondent's contracts with the baseball players and could be stopped by respondent. See *id.*, pp. 821, 831. The existence of these "sham" combinations shows only how easy it is to market current baseball picture cards, in competition with respondent, despite respondent's exclusive contracts. And the examiner expressly found, we think correctly, that children who want current baseball picture cards will purchase them whether they are sold in combination with bubble gum or with one of the myriad other products not subject to respondent's contracts. *Id.*, p. 761.

The record does not establish that respondent monopolized the sale of current baseball picture cards in combination with other products. Nor does it establish an attempt to monopolize; no plan by respondent to prevent distribution of such cards in combination ("sham" or otherwise) with non-confectionery products has been proved. But this does not end the case. It is clear that respondent has made efforts, largely successful, to gain exclusive use of current baseball picture cards vis-a-vis competing sellers of bubble gum and confectionery products. If its foreclosure of such cards as a promotional technique to other members of the bubble gum and confectionery industries has placed its competitors at an unfair advantage, threatening a substantial lessening of competition in the bubble gum industry,[7] its conduct has been unfair within the meaning of Section 5 of the Federal Trade Commission Act wholly apart from any question of monopolization.[8]

On this record, we cannot find that respondent's control over current baseball picture cards as a technique for the promotion of confectionery products was detrimental to vigorous and fair competition in the sale of bubble gum, as alleged in the complaint. Respondent's sales of baseball card gum represent only a fraction of its total bubble gum sales. Its major brand, "Bazooka," is not sold with cards; and the hearing examiner found (initial decision, pp. 812, 813), we think correctly, that respondent has not used baseball card gum as a tying product to push sales of its non-card gum. For aught that appears, offering current baseball picture cards in combination with bubble gum is not essential, or even important, to the ability of a firm to compete effectively in the sale of bubble gum. Only one of respondent's competitors, Frank H. Fleer Corporation, has shown any real interest in selling baseball card gum in recent years, and Fleer, despite its failure to break respondent's hold over current baseball picture cards, remains the second largest manufacturer of bubble gum. There is insufficient factual basis for a conclusion that Fleer or any other industry member has been, or is likely to be, harmed competitively by being denied current baseball picture cards, or that the ability or incentive of new competitors to enter the industry has been weakened thereby.

Complaint counsel, in short, have failed to prove that current baseball picture cards are so unique and indispensable a promotional

[7] It is not contended that respondent's conduct has caused competitive injury in the broad market composed of all confectionery products or even the market composed of all chewing-gum products; respondent is not a major factor in either of these markets.

[8] Section 5 forbids any trade practice in commerce that has a "dangerous tendency unduly to hinder competition or create monopoly." *F.T.C.* v. *Gratz*, 253 U.S. 421, 427.

technique in the bubble gum industry that a firm denied use of the technique cannot compete on fair and equal terms with respondent. The record is replete with examples of other promotional techniques which have been highly successful in selling bubble gum. Football cards, "Beatle" cards, "Spook Theater" cards, and cards featuring famous baseball players no longer active are among the many promotional devices which have been used successfully in this industry and over which respondent has no control. As for the fact that respondent is the largest seller of bubble gum, complaint counsel have not shown that its market position is attributable to baseball picture cards.

Our finding that current baseball picture cards are not a uniquely valuable means of promoting the sale of bubble gum disposes of the final monopoly issue in this case: whether respondent monopolized or attempted to monopolize the sale of baseball card gum. Bubble gum sold in combination with current baseball picture cards has not been shown to be an economically meaningful market; many other combinations (e.g., "Baseball Greats" card gum) appear to be close substitutes for it.

Although we do not find that respondent's conduct challenged in the complaint was unfair in the sense of promoting monopoly or injuring competition, we must also consider whether such conduct was not unfair in a broader sense. The prohibition in Section 5 of unfair methods of competition and unfair acts and practices has long been construed to reach not only monopolistic and anticompetitive practices, but also trade practices that are unscrupulous, oppressive, exploitive, or otherwise indefensible.[9] Thus, such practices as commercial bribery, inducing breach of competitors' contracts, physical interference with competitors' goods or property, and industrial espionage are forbidden by Section 5 regardless of whether there has been a general adverse effect on competition.[10]

The complaint charges that respondent used unfair methods of competition and unfair acts and practices to obtain control of baseball picture cards. If in fact respondent, to secure control and prevent Fleer from shaking its hold on current baseball picture cards, resorted to withholding copies of contracts from the players, commercial bribery, litigation designed to harass, and other unfair business practices, as contended by complaint counsel, respondent

[9] The leading case is *F.T.C. v. R. F. Keppel & Bro.*, 291 U.S. 304, upholding the Commission's determination that it is an unfair method of competition to market goods to children by means of a lottery or gaming device.

[10] See, e.g., *F.T.C. v. Grand Rapids Varnish Co.*, 41 F. 2d 996 (6th Cir. 1929); *Carter Carburetor Corp. v. F.T.C.*, 112 F. 2d 722 (8th Cir. 1940); *Hastings Mfg. Co. v. F.T.C.*, 153 F. 2d 253 (6th Cir. 1946); *Philip Carey Mfg. Co. v. F.T.C.*, 29 F. 2d 49 (6th Cir. 1928).

would not be exonerated simply because its unfair tactics have not been shown to have had substantial monopolistic or anticompetitive effects. However, we agree with the examiner, who gave meticulous consideration to this phase of the case (see initial decision, pp. 773–800), that complaint counsel failed to prove by substantial evidence that respondent engaged in any such tactics.

In particular, we find nothing inherently unfair in respondent's efforts to sign up as many minor league players as possible, in the hope that it would thereby enjoy exclusive rights to their pictures when and if they became major league players. Respondent's competitors were at liberty to compete with respondent for these exclusive rights. To be sure, once he had signed with respondent, a player was forbidden under the contract to grant any other exclusive rights during the term of the contract. But this left respondent's competitors free to sign such players for non-exclusive rights to vest after expiration of respondent's contracts; upon expiration, the players could grant them exclusive rights as well. Given the large influx of new players into the minor leagues every year, it should not take Fleer or some other firm long to shake respondent's hold by competing vigorously for new minor league players as well as for major leaguers as their contracts with respondent expire.

The other alleged unfair tactics are adequately discussed in the initial decision. The evidence, in short, does not show that respondent dealt Fleer or anyone else any foul blows such as Section 5 forbids. The hearing examiner, indeed, attributed respondent's success in the marketing of baseball picture cards to its superior competitive vigor and skill. See, e.g., initial decision, pp. 771–772, 821.

For the reasons stated, no violation of law has been proved. The complaint must, therefore, be dismissed.

Commissioner MacIntyre does not concur.

Final Order

This matter is before the Commission on cross-appeals of the parties from the initial decision of the hearing examiner. For the reasons stated in the accompanying opinion,

It is ordered, That the initial decision be, and it hereby is, adopted by the Commission to the extent consistent with the accompanying opinion, and rejected to the extent inconsistent therewith.

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

Commissioner MacIntyre not concurring.

IN THE MATTER OF

BENJACK SALES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-896. Complaint, May 12, 1965—Decision, May 12, 1965

Consent order requiring New York distributors of sleeping bags, camping equipment and clothing to retailers for resale, to cease misrepresenting the size of sleeping bags by stating a "cut size" on attached labels larger than the actual size; representing falsely the quality of said products by listing in catalogs and other advertising as, "Gov't duck," "U.S." and "Gov't surplus," and made to government specifications, when in fact such products were not government surplus or made to government specifications; representing falsely the nature of their business by using the legend "manufacturers" on sales invoices;

To cease violating the Textile Fiber Products Identification Act by failing to disclose the fiber content of textile fiber products in advertisements, and using fiber trademarks in advertising textile fiber products in an improper manner.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Benjack Sales, Inc., a corporation, and Benjamin Schector and Jack Rubenstein, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification 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 Benjack Sales, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Said corporation has its office and principal place of business located at 655 Broadway, New York, New York.

Respondents Benjamin Schector and Jack Rubenstein are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Said individual respondents have their office and principal place of business located at 655 Broadway, New York, New York.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of sleeping bags, camping equipment and clothing to retailers for resale to the public.

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

PAR. 4. Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of misrepresenting the size of said products, misrepesenting the quality of said products, and misrepresenting the nature of their business, by various methods and means typical but not all inclusive of which are the following:

1. By attaching or causing to be attached to their said sleeping bags labels stating the "cut size" of the sleeping bags, which "cut size" is larger than the actual size of the bag in question. The term "cut size" when used in the manner alleged above, is confusing and tends to indicate that such a description is the actual size of the finished product. In truth and in fact, this is almost never the case, as the actual size of the finished product is smaller than the size set out on the labels.

2. By listing in their catalogues and other advertising media: "Gov't duck," "U.S.," "U.S.M.C.," and "Gov't surplus," respondents have thereby represented that these products are government surplus, or are made for the United States Government or to government specifications.

In truth and in fact said products are not government surplus and have not been made for the United States Government or to government specifications.

3. By issuing sales invoices which bear the legend "manufacturers" respondents have thereby represented that they own, operate or control manufacturing plants. In truth and in fact, respondents do not own, operate or control any manufacturing plant.

Therefore, the statements and representations and acts and practices set forth above are misleading and deceptive.

PAR. 5. By the aforesaid statements, representations, acts and practices respondents place in the hands of the retailers means and instrumentalities by which they may mislead the public as to the size of said products.

PAR. 6. By the aforesaid statements, representations, acts and practices respondents mislead retailers and the public as to the quality of said products.

PAR. 7. By the aforesaid statements, representations, acts and practices respondents mislead retailers as to the nature of respondents' business.

PAR. 8. In the course and conduct of their said business, and at all times mentioned herein, respondents have been engaged in substantial competition in commerce with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken beliefs.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act.

PAR. 11. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960 respondents have been and are now engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising and offering for sale in commerce and in the importation into the United States of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 12. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote and to assist directly or indirectly in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among the aforesaid disclosures and implications as to fiber content, but not limited thereto, were the terms "celacloud," "fiber-wool" and "fibertex."

Among such textile fiber products, but not limited thereto, were sleeping bags which were falsely and deceptively advertised by the means of catalogues and window display sheets, and other printed matter distributed by the respondents throughout the United States, in that the true generic names of the fibers contained in such products were not set forth.

PAR. 13. Certain of said textile fiber products were further falsely and deceptively advertised in violation of the Textile Fiber Products Identification Act in that they were not advertised in accordance with the Rules and Regulations promulgated thereunder.

Among such textile fiber products, but not limited thereto, were sleeping bags which were falsely and deceptively advertised by means of catalogues, window display sheets, and other printed matter distributed by the respondents throughout the United States in the following respects:

A. The required information as to fiber content was not set forth in the required information in such a manner as to separately show the fiber content of each section of textile fiber products containing two or more sections, in violation of Rule 25(b) of the aforesaid Rules and Regulations.

B. Fiber trademarks were used in advertising textile fiber products, mainly sleeping bags, without a full disclosure of the fiber content information required by the Act and Regulations, in violation of Rule 41(a) of the aforesaid Rules and Regulations.

C. Fiber trademarks were used in advertising textile fiber products, mainly sleeping bags, containing more than one fiber and such fiber trademarks did not appear in the required fiber content information in immediate proximity and conjunction with the generic names of the fibers in plainly legible type or lettering of equal size and conspicuousness, in violation of Rule 41(b) of the aforesaid Rules and Regulations.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, in the aforesaid Paragraphs Eleven, Twelve and Thirteen, are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder and along with the other aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and to 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(a)(1) of the Federal Trade Commission Act.

Decision and Order

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

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

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

1. Respondent Benjack Sales, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 655 Broadway, in the city of New York, State of New York.

Respondents Benjamin Schector and Jack Rubenstein are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Benjack Sales, Inc., a corporation and its officers and Benjamin Schector and Jack Rubenstein, individually and as officers of said corporation and respondents' representatives, agents and employees, directly or through any corporate or other device in connection with the manufacture, 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:

1. Advertising, labeling, representing in a catalogue or otherwise representing the "cut size," or dimensions of material used in the construction of sleeping bags or other products, unless such representations are accompanied by a description of the finished or actual size, with the latter description being given at least equal prominence.
2. Misrepresenting the size of sleeping bags or other products on labels or in any other manner.
3. Furnishing to others any means or instrumentalities by which they may mislead the public as to the size of sleeping bags or other products.
4. Representing directly or by implication by means of terms such as "Gov't duck," "U.S.," "U.S.M.C.," or any other method that musette bags, duffel bags, gas cans, water cans and other products are United States Government surplus when in truth and fact such products are not United States Government surplus.
5. Representing directly or by implication, that musette bags, duffel bags, gas cans, water cans, and other products are made to United States Government specifications, when in truth and in fact such products have not been made to United States Government specifications.
6. Misrepresenting in any manner that the respondents are manufacturers or own, operate or control the plants in which their products are made.

It is further ordered, That respondents Benjack Sales, Inc., a corporation, and its officers and Benjamin Schector and Jack Rubenstein individually and as officers of said corporation and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber products" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from falsely and deceptively advertising textile fiber products by:

1. Making any representations, by disclosure or by implication, as to the fiber contents of any textile fiber product in any written advertisement which is used to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Section 4(b) (1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Failing to separately set forth the information as to fiber content in the required fiber content disclosure in such a manner as to separately show the fiber content of the separate sections of textile fiber products containing two or more sections where such form of marking is necessary to avoid deception.

3. Using a fiber trademark in advertising textile fiber products without a full disclosure of the fiber content information required by the Act and Regulations.

4. Using a fiber trademark in advertising textile fiber products containing more than one fiber without such fiber trademark appearing in the required fiber content information with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness.

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

IN THE MATTER OF

TOY MERCHANDISING CORP. ET AL.

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

Docket C-897. Complaint, May 13, 1965—Decision, May 13, 1965

Consent order requiring a New York City corporation engaged in selling toys through individual distributors who service "toy routes," to cease misrepresenting the quality and origin of its toys, and making deceptive earnings, location, routes and other claims to promote its distributorships.

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 Toy Merchandising Corp., a corporation, and Fred Holm and Tim Johnson, 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 Toy Merchandising Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 34–10 58th Street, Woodside 77, Queens, New York.

Respondents Fred Holm and Tim Johnson are officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of toys and toy shops to distributors for resale to the public.

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

PAR. 4. In the course and conduct of their aforesaid business, respondents insert advertisements in newspapers soliciting distributors to service established toy routes. Persons responding to said advertisements are contacted by respondents or their agents or representatives. Said respondents or their agents or representatives then display to the prospective distributors a variety of respondents' promotional literature purporting to furnish to prospective distributors the manner in which prospective distributors may reasonably anticipate earnings and profits through an investment in respondents' distributorships. Among and typical, but not all inclusive, of the statements and representations made in newspapers, circulars and other printed material disseminated by respondents to prospective distributors, are the following:

MAN OR WOMAN
To Service
PART TIME
TOY ROUTE
Very Small Starting Capital
GOOD INCOME
Operate from Home
Several Choice Territories
AVAILABLE SOON

We will appoint a sincere man or woman to service a number of sensational self-service "TOY SHOP" Displays located in markets, drug, variety stores, etc. Each "TOY SHOP" earns money. Simply replace toys each week and collect money.

REQUIRES ONLY FEW
HOURS EACH WEEK

This is not a job but a chance to get into something you may have always wanted—a business of your own. One that can be handled in spare time and still leave room for full time expansion.

NOT A GET-RICH-QUICK-SCHEME

If you have a desire to better yourself—if sober, honest, really sincere, have a car (min. $298 req.) apply at once—giving complete details about yourself, phone number. Airmail or wire:

TOY MERCHANDISING CORP.
34-10 58th Street
Woodside 77, New York

It takes but a few minutes to replace toys which are bought from the "TOY SHOP" Display—and collect the money. SERVICE to the stores is the key to success in our type of toy business.

While there is a small outlay at first for the newly appointed Distributor to get under way, WE PROVIDE FOR THE RETURN OF EVERY CENT OF THE STARTING CAPITAL over and above the regular profits.

NO SELLING is required to become a *success* in this field . . . .

We establish our authorized Distributors in the "TOY SHOP" business . . . .

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import but not specifically set forth herein, respondents represented, directly or by implication, that:

1. Respondents have established routes of their toys or toy shops prior to or at the time the offer of sale is made and that persons selected by respondents merely have to service said route by replacing toys and collecting money.

2. Beginning with the initial purchase, each toy shop earns a profit for the distributor, and that a person who purchases three toy shops can reasonably expect to earn a net profit of $65 a month if each toy shop sells a daily average of six toys.

3. The required minimum initial investment of $298 is secured by an inventory of comparative worth.

PAR. 6. In truth and in fact:

1. Respondents do not establish routes prior to or at the time of sale, and in fact neither respondents nor their agents obtain locations or assist in obtaining locations for the products purchased from respondents. Distributors are required to secure their own locations for the products purchased from respondents.

2. It is impossible for a distributor to make a profit from the initial purchase of respondents' products.

3. The required minimum initial investment of $298 is not secured by an inventory of comparative worth. The distributor who makes an initial minimum investment of $298, receives toys, which, if sold according to respondents' suggested retail prices, would receive $153.90 as gross proceeds of the retail sale of such toys. The distributor would then be obliged to deduct 40% from said gross proceeds of retail sale, which 40% amounts to $61.56. Said 40% of the retail gross, proceeds of sale, $61.56 under respondents sales program is paid to the location owners providing the selling space to the distributor. Therefore, after said payment of 40% of the gross retail proceeds to the location owner, the distributor retains only the remainder of 60% of the retail gross proceeds of sale, which 60% amounts to $92.34. Therefore from a required minimum initial investment of $298, the distributor receives only $92.34 for his initial investment of $298.

Therefore, the statements and representations as set forth in Paragraphs Four and Five herein were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their aforesaid business, respondents' agents or representatives call upon such persons responding to respondents' advertisements and solicit them to purchase distributorships for respondents' toys and other products through respondents' so-called "toy shops" sales program.

In the course of such solicitation, said agents or representatives, either directly or by implication, have made many oral statements and representations to prospective distributors. Typical, but not all inclusive are the following by way of illustration but not limitation:

1. Distributors would have exclusive territories.

2. Samples of products shown to prospective distributors were indicative of quality or value of the products which would appear on racks or available for placement.

3. Respondents' products were of domestic manufacture.

4. There is no selling or soliciting required by the distributor purchasing the respondents' products.

PAR. 8. In truth and in fact:

1. Distributors are not given exclusive territory in which to sell respondents' merchandise.

2. In most instances the quality or value of the merchandise purchased by distributors was inferior in quality and value to the samples shown by respondents or their agents or representatives.

3. In most instances respondents failed to clearly and conspicuously disclose to prospective purchasers that a substantial amount of their merchandise was of foreign origin.

4. Purchasers must engage in extensive selling or soliciting in order to establish, operate and maintain locations for the retail sale of products purchased from the respondents.

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

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of the same or similar products.

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

PAR. 11. The aforesaid acts and practices of the respondents, as herein alleged were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Decision and Order

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

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

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

1. Respondent Toy Merchandising Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 34–10 58th Street, Woodside 77, Queens, New York.

Respondents Fred Holm and Tim Johnson are officers of the corporation and their address is the same as that of the corporation.

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

ORDER

It is ordered, That respondents, Toy Merchandising Corp., a corporation, and its officers, and Fred Holm and Tim Johnson, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with advertising, offering for sale, sale or distribution of toys, toy shops or any other products, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, that respondents customarily establish or have established routes for their products prior to or at the time the offer of sale is made.

2. Representing, directly or indirectly, that distributors contracting with respondents merely have to service said routes by replacing toys and collecting money.

3. Misrepresenting the ease by which, or the extent to which, earnings or profits can be realized through the operation of a distributorship for respondents' products or representing, directly or by implication, that distributors will realize earnings or profits in any amount which is in excess of that which the respondents can establish as being the earnings or profits which may reasonably be attained.

4. Representing, directly or indirectly, that the initial cash investment required to purchase respondents' products is secured by an inventory of merchandise worth the amount invested.

5. Representing, directly or indirectly, that purchasers of respondents' products are given exclusive territory within which to sell such products.

6. Misrepresenting in any manner, by use of samples or otherwise, the grade, type, quality, variety or price of any merchandise offered to distributors.

7. Representing, directly or indirectly, in any manner or by any means, that products offered for distribution or sale are of domestic origin when said products, or substantial parts thereof are of foreign origin.

8. Placing in the hands of jobbers, dealers, distributors, retailers, and others, means and instrumentalities by and through which they may mislead and deceive the purchasing public concerning any merchandise in respect to the origin of merchandise made available for distribution or sale by respondents.

9. Representing, directly or indirectly, to purchasers that selling or soliciting is not required to establish, operate or maintain a route of respondents' products.

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