tical Availability", beginning on page 910 with the words "Exclusionary Aspects" and ending on page 916 with the words "intended to condemn."

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

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

Commissioner Elman dissenting.

IN THE MATTER OF

HENDERSON TOBACCO MARKET BOARD OF TRADE, INC., ET AL.

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

Docket 8684. Complaint, May 18, 1966—Decision, June 15, 1967

Order requiring a Henderson, N.C., tobacco warehousing trade association and its members to cease restraining competition in the buying and selling of leaf tobacco through the adoption of bylaws and other rules which favor established warehouses and penalize new entrants.

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 each and all of the parties named in the caption hereof, and hereby made respondents herein, and more particularly hereinafter described and referred to as respondents, have violated the provisions of Section 5 of said Act (U.S.C., Title 15, § 45), and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, the Commission hereby issues its complaint charging as follows:

PARAGRAPH 1. The following is a description of the respondents:

1. Respondent Henderson Tobacco Market Board of Trade, Inc., hereinafter referred to as respondent Board, is a corpora-

tion duly organized under the laws of the State of North Carolina, with its principal office and place of business located in the city of Henderson, North Carolina. Membership in respondent Board is limited to those persons, firms, corporations, and associations engaged in or about to engage in business as leaf tobacco warehousemen, buyers or rehandlers of leaf tobacco on the Henderson tobacco market.

The following named individuals are now, or have been during the time mentioned here, officers of respondent Board and as such and individually, are named as respondents herein, and in that capacity have dominated, controlled and directed, and are now dominating, controlling and directing, the affairs of respondent Board, including the policies and practices as hereinafter set forth:

Charles Brooks Turner, President
W. J. Alston, Jr., Vice President
William H. Hoyle, Secretary-Treasurer.

2. Respondents George T. Robertson and Samuel E. Southerland are individuals engaged in the operation of five tobacco auction warehouses, four trading and doing business under the name and style of Liberty Warehouse, more commonly known, referred to and described as Liberty #1, Liberty #2, Liberty #3 and Liberty #4, and one under the name and style of Robertson & Southerland, all of which are located in or near the city of Henderson, North Carolina, where respondents have their principal office and place of business, and as such and individually are named as respondents herein. Said respondents are members of the Henderson Tobacco Market Board of Trade, Inc.

3. Respondent W. J. Alston, Jr., an individual trading and doing business under the name and style of Farmer's Warehouse, is engaged in the business of operating four tobacco auction warehouses commonly known, referred to and described as Farmer's Warehouse, Alston #1, Alston #2 and Alston #3, all of which are located in or near the city of Henderson, North Carolina, where respondent has his principal office and place of business, and as such and individually is named as respondent herein. Said respondent is a member of respondent Henderson Tobacco Market Board of Trade, Inc.

4. Respondents A. H. Moore and C. E. Jeffcoat, individuals trading and doing business under the name and style of Moore's Big Banner Tobacco Warehouse, are engaged in the business of operating three tobacco auction warehouses commonly known, referred to, and described as Big Henderson #1, Big Henderson #2,

and Big Banner, all of which are located in or near the city of Henderson, North Carolina, where respondents have their principal office and place of business, and as such and individually are named as respondents herein. Said respondents are members of respondent Henderson Tobacco Market Board of Trade, Inc.

5. Respondents F. H. Ellington, Gilbert F. Ellington, and John Ellington, individuals trading and doing business under the name and style of Ellington Warehouse, are engaged in the business of operating two tobacco auction warehouses commonly known, referred to, and described as Ellington Warehouse and Planters Warehouse, both of which are located in or near the city of Henderson, North Carolina, where respondents have their principal office and place of business, and as such and individually are named as respondents herein. Said respondents are members of respondent Henderson Tobacco Market Board of Trade, Inc.

6. Respondent M. L. Hight is an individual engaged in the operation of a tobacco auction warehouse trading and doing business under the name and style of Hight Warehouse, which is located in or near the city of Henderson, North Carolina, where respondent has his principal office and place of business, and as such and individually is named as respondent herein. Said respondent is a member of respondent Henderson Tobacco Market Board of Trade, Inc.

7. Carolina Tobacco Warehouse is a partnership comprised of the subsequently named individuals who formulate, direct and control the acts and practices of the said partnership, including the acts and practices hereinafter set forth. The principal office and place of business of respondent partnership is located in or near the city of Henderson, North Carolina.

8. Respondents M. L. Hight, B. W. Young and J. S. Royster, copartners trading and doing business under the name and style of above partnership, are engaged in the business of operating six tobacco auction warehouses commonly known, referred to and described as follows:

Carolina Warehouse.
Royster-Hight No. 1 (known also as
Golden Belt Warehouse).
Royster-Hight No. 2.
Royster-Hight No. 3.
Big Four Warehouse No. 18.
Big Four Corporation House No. 17.

All of the above-named warehouses are located in or near the city of Henderson, North Carolina, where respondents have their

principal office and place of business. Said respondents are members of respondent Henderson Tobacco Market Board of Trade, Inc., and as such and individually are named as respondents herein.

9. Respondent Royster-Hight Corporation is a corporation organized under the laws of the State of North Carolina with its principal office and place of business in Henderson, North Carolina. Respondent corporation was chartered in 1954 for the purpose of conducting the business of the above-named Royster-Hight Warehouses No. 1, No. 2 and No. 3 and as such said corporation is named a respondent herein.

The following named individuals are now, or have been during the time mentioned herein, officers and directors of respondent Royster-Hight Corporation, and in that capacity they have dominated, controlled and directed and are now dominating, controlling and directing the affairs of said respondent corporation, and as such and individually are named as respondents herein:

Fred S. Royster—President
W. G. Royster—Vice President
J. S. Royster—Secretary
M. L. Hight–Treasurer.

10. Respondents C. B. Turner, R. E. Tanner, S. P. Flemming and R. E. Flemming, individuals trading and doing business under the name and style of High Price Tobacco Warehouse, are engaged in the business of operating four tobacco auction warehouses commonly known, referred to and described as Dixie #1, Dixie #2, New Dixie, and High Price Warehouse, all of which are located in or near the city of Henderson, North Carolina, where respondents have their principal office and place of business, and as such and individually are named respondents herein. Said respondents are members of respondent Henderson Tobacco Market Board of Trade, Inc.

11. The membership of respondent Board includes, in addition to those warehouse owners and operators hereinabove described, other members whose names are not known at this time to the Federal Trade Commission but who may possess or own interests in one or more of the different warehouses operating on the Henderson tobacco market and thus be eligible under respondent Board's Constitution and By-Laws to vote on matters pertaining to the allocation of selling time to said warehouses operating on the Henderson market. Furthermore, such membership of said respondent Board is, or may be, changed from

time to time by the addition and withdrawal of such members. For these reasons, all of such members of said respondent Board at any given time cannot be properly described and set forth herein for the purpose of naming them as respondents without considerable inconvenience and delay. Wherefore, the respondents hereinbefore named as respondents, as such officers and warehouse members, are also made respondents as generally and fairly representative of and as representing all of the warehouse members of said respondent Board, including those not herein specifically named and described.

PAR. 2. Flue-cured tobacco (type 11[b]) produced in the States of North Carolina and Virginia is brought to the Henderson tobacco auction warehouses, operated and controlled by respondent members of respondent Board, where it is sold at auction on such warehouse floors to purchasers, or agents or representatives thereof, who are also members of respondent Board and who are, in a great many instances, engaged in the export tobacco trade or in the domestic manufacture of tobacco products in States other than North Carolina. Said tobacco is then shipped or otherwise transported by such purchasers or by those to whom such tobacco is resold or for whom such tobacco is purchased, from said State of North Carolina to other States within the United States and the District of Columbia and foreign countries, and there has been, and now is, a constant and continuous current and flow of said tobacco and tobacco products between and among the several States of the United States and the District of Columbia, and with foreign countries.

PAR. 3. There are five types of flue-cured tobacco as classified by the United States Department of Agriculture, the primary bases of classification being the date of maturity and area of production:

Type 11(a): Grown in northwestern North Carolina and south central Virginia, an area commonly referred to as the "Old Belt."

Type 11(b): Grown in central North Carolina and southwestern Virginia, an area commonly referred to as the "Middle Belt."

Type 12: Grown in eastern North Carolina.

Type 13: Grown in southeastern North Carolina and northeastern South Carolina.

Type 14: Grown in southern Georgia and northern Florida.

In 1963, the total sales of all flue-cured tobacco (types 11[a], 11[b], 12, 13 and 14) was 1,463.4 million pounds worth

$843,980,000 or $56.67 per cwt. The State of North Carolina, which is the largest producer of flue-cured tobacco, accounted for 64 percent of this total or 933.3 million pounds worth $541,490,000. Thus, in North Carolina, the cash receipts from flue-cured tobacco accounted for 47 percent of the total receipts from the sale of all farm commodities.

PAR. 4. (1) The Henderson tobacco market, located in north central North Carolina, ranks as one of the largest markets engaged in the auction of type 11(b) flue-cured tobacco. Of the total 1963 sales of type 11(b) flue-cured tobacco (177.7 million pounds worth $101,356,000), the Henderson market accounted for 16 percent (27.9 million pounds worth $15,650,000 or $56 per cwt.). Among the ten markets engaged in the auction of type 11(b) flue-cured tobacco, the Henderson market ranks third in terms of pounds of tobacco sold. And among the 93 markets engaged in the auction of all types of flue-cured tobacco, the Henderson market ranks 16th.

(2) The perishable nature of flue-cured tobacco—once it is put "in order" by the grower for sale at auction—demands that there be a coordination of efforts between grower, warehouseman and purchaser. To a large extent, the Bright Belt Warehouse Association, a voluntary association comprised of the majority of warehousemen engaged in the auction of flue-cured tobacco, has fulfilled this coordinating function. This Association sets the opening and closing dates for each market engaged in the auction of flue-cured tobacco (the opening dates being determined by the projected date the type of tobacco sold on a particular market matures), establishes maximum rates of sale as well as the length of each selling day and the maximum allowable weight for each basket of tobacco, and declares market holidays to prevent or relieve a glutted market. There is no statutory authority for this action by the Association. Such authority is derived from the consent of its membership and the farmers and industry generally. The Association takes no action with respect to the internal allocations of selling time among warehouses on any market.

The selling season for the Henderson market generally opens the beginning of September and ends in November. The Henderson market is allowed a 5½ hour sale day at a rate of 400 baskets per hour (the maximum weight of each basket being set at 300 pounds) for a total of 2200 baskets per day per single set of buyers. And, because it is a two-buyer market—thus permitting two auctions to be held simultaneously in two different

warehouses—the number of baskets of tobacco which can be sold on the Henderson market is doubled.

(3) The auction sale of flue-cured tobacco must be accomplished within a short time after the tobacco is placed on the warehouse floors in order to prevent deterioration in the quality and value of the tobacco. Accordingly, after tobacco is delivered to a warehouse, it is weighed and identified in accordance with the provisions of the Tobacco Inspection Act of 1935, and, in most instances, auctioned within the next two sales days. After the tobacco is sold, it is either removed from the warehouse floor and shipped to the redrying plants of the purchaser or hauled to local redrying plants and subsequently shipped to the tobacco purchasers for further processing.

(4) The sale of flue-cured tobacco by means of the auction system is encouraged as a means of promoting competition among the buyers in bidding for the producers' tobacco. Consequently, the presence of buyers from the major tobacco manufacturing companies and independent buying companies and speculators and rehandlers is essential to a successful auction.

PAR. 5. (1) Prior to 1949, the sale of leaf tobacco at auction on the Henderson market was governed by the rules and regulations promulgated by the Henderson Tobacco Board of Trade, Inc., a corporation organized under the laws of the State of North Carolina in 1921. On October 3, 1949, respondent Board was organized and chartered as successor to the Henderson Tobacco Board of Trade, Inc.

(2) Membership in respondent Board is divided into two categories; warehousemen, and purchasers of leaf tobacco other than warehousemen. Each person, firm or corporation operating a tobacco auction warehouse on the Henderson market is automatically a participating member and is entitled to one vote per warehouse on matters coming before respondent Board. Membership among purchasers of leaf tobacco other than warehousemen may be either participating or non-participating. Purchasers who elect to become participating members are entitled to one vote each.

(3) The selling time allotted to the Henderson tobacco market by the Bright Belt Warehouse Association is distributed among the warehouse members of respondent Board in accordance with the rules and regulations of respondent Board now in effect. Pursuant to these rules and regulations, selling time is allocated to each warehouse on the basis of the unit system unless there is unanimous agreement as to the amount of sell-

ing time to be allotted to each tobacco auction warehouse firm.

(4) The authority of said respondent Board is respected, accepted and adhered to by the buyers, agents, and representatives of the principal tobacco manufacturing companies and by independent buyers whose presence is necessary for a successful tobacco auction sale. Consequently, it is virtually impossible for any person, firm or corporation to engage in the tobacco auction warehouse business on the Henderson market without first having been admitted into membership in respondent Board and becoming obligated to adhere to the by-laws, rules and regulations promulgated and prescribed by said respondent Board. No person, firm or corporation may purchase tobacco or operate a tobacco auction warehouse on the Henderson tobacco market who is not a member in good standing of respondent Board, and no warehouseman can conduct an auction without first receiving a portion of the selling time made available to the warehouse members by respondent Board.

PAR. 6. (1) Although respondent Board was organized and chartered in 1949 with the announced and stated purpose of associating together those persons, firms and corporations interested in the buying, selling and handling of flue-cured tobacco on the Henderson tobacco market, and its tobacco trade territory, and for the purpose of adopting and maintaining such reasonable rules, regulations and requirements as are necessary to promote the honest and efficient conduct of said tobacco business, including the allocation of selling time to each tobacco auction warehouse operating on the Henderson market, it is now and has been since its organization an instrumentality or vehicle for effectuating and carrying out the designs and purposes of those respondents who own, control or operate tobacco auction warehouses on the Henderson market, and, who, through the exercise of their influence and voting privileges possess the means and ability to formulate, adopt and put into effect any rule, regulation, system or plan governing the operations of the Henderson tobacco market which they may decide to pursue, including the unlawful acts and practices hereinafter set forth.

(2) Respondent Board, acting under and through the direction, control and authority of its officers and respondent members of respondent Board has in the past and now continues to conduct and exercise control over the operations of the Henderson tobacco market under certain by-laws, rules and regulations, prescribed, approved and promulgated by respondent Board, which by-laws, rules and regulations, among other things, allot, appor-

tion, regulate and adjust the selling time among the tobacco auction warehouses operating on the Henderson market. Furthermore, respondent Board passes upon applications for membership and imposes fines and penalties for violations of its by-laws, rules and regulations; and at all times herein mentioned, the Henderson tobacco market has been dominated and controlled and is now under the domination and control of respondent Board, its officers, and respondent members of respondent Board.

PAR. 7. The respondents named herein are in competition with each other in the purchase, sale and handling of flue-cured tobacco through the facilities owned, leased or operated by them for the purpose of conducting auction sales of flue-cured tobacco brought to the market and placed on the various auction warehouse floors for sale at auction, and in the buying and selling of such tobacco for export to foreign countries or for domestic use in the manufacture of cigarettes and other tobacco products for sale and distribution in various States in the United States and in the District of Columbia and for export to foreign countries, except insofar as said competition has been hindered, lessened or restrained, or potential competition among them and with others, forestalled, prevented, hindered, or suppressed by the unfair acts, practices, methods and policies of said respondents as hereinafter set forth.

PAR. 8. Respondent warehouse members acting between and among themselves and also through and by means of respondent Board, for a number of years last past and particularly since about 1949, and continuing to the present time, have, by means of agreements and understandings between and among themselves, and by other means and methods, conspired and combined in a planned common course of action to adopt, carry out and maintain, and did adopt, carry out and maintain, in commerce between the several States of the United States and in the District of Columbia and with foreign countries, an undue and unreasonable hinderance, restriction and suppression of the establishment and operation of market facilities and market opportunities and competition in the purchase and sale of flue-cured tobacco on the Henderson market.

PAR. 9. Pursuant to, and in furtherance and effectuation of, the aforesaid agreements, combinations, understandings and planned common course of action, said respondents, and each of them, through and by means of respondent Board, have done and

performed, or have caused to be done and performed, the following acts and practices, including, among others:

(1) Adopted by-laws, rules or regulations for the purpose or with the intent or effect of restricting, preventing or foreclosing firms, persons and corporations from engaging in the tobacco auction warehouse business on the Henderson tobacco market;

(2) Adopted by-laws, rules or regulations for the purpose or with the intent or effect of discouraging or preventing firms, persons and corporations from erecting, building or operating new tobacco auction warehouses on the Henderson tobacco market;

(3) Adopted by-laws for the purpose or with the intent or effect of discouraging or preventing firms, persons and corporations now engaged in the business of operating tobacco auction warehouses on the Henderson market from expanding their present tobacco auction warehouse facilities thereon;

(4) Included or caused to be included, as a basis for the allocation of selling time certain warehouse facilities which are unsuitable and/or unavailable for use in connection with the sale of tobacco at auction on the Henderson market for the purpose or with the intent or effect of:

a. Restricting, preventing or foreclosing firms, persons and corporations from engaging in the tobacco auction warehouse business on the Henderson tobacco market;

b. Discouraging or preventing firms, persons and corporations from erecting, building or operating any new tobacco auction warehouse on the Henderson tobacco market;

c. Discouraging or preventing firms, persons and corporations now engaged in the business of operating tobacco auction warehouses on the Henderson market from expanding their present tobacco auction warehouse facilities thereon.

PAR. 10. The aforesaid agreements, understandings and planned common course of action, together with the acts and practices of respondents, and each of them, as hereinbefore alleged, have each and all operated to prevent a substantial volume of tobacco from being sold or purchased by persons, firms and corporations who sought to compete, or who were already engaged, in the market operations of the Henderson tobacco market, and thereby unduly and unreasonably hindered, restricted, suppressed and prevented competition in the sale and purchase of tobacco at auction on the Henderson tobacco market. Among the specific effects in this respect are the following:

a. Persons, firms and corporations seeking to erect, expand

and use tobacco auction warehouse facilities for the sale of flue-cured tobacco at auction on the Henderson market, and persons, firms and corporations desiring to enter the Henderson tobacco market as competitors in the tobacco auction warehouse business on the Henderson tobacco market, have been and are presently being restricted, foreclosed or discouraged from so doing by reason of the unlawful acts and practices as described in Paragraph Nine, above.

b. Persons, firms and corporations presently engaged in the business of operating tobacco auction warehouses on the Henderson market have been deprived from receiving fair and reasonable credit for the suitable and available warehouse space which they maintain for the purpose of conducting tobacco auctions as a result of the unlawful acts and practices as described in Paragraph Nine, above, which cause, and have caused, selling time to be allocated to warehouse facilities which are unsuitable and/or unavailable for use in connection with the sale of tobacco at auction on the Henderson market.

c. Tobacco growers whose farms are located in the area normally serviced by the Henderson tobacco market have been and are being deprived of the privilege of selling their tobacco at the warehouse of their choice through the unlawful and unreasonable acts and practices as described in Paragraph Nine, above, and as a result thereof, said growers have, in many instances, transported and sold their tobacco in other markets at a cost far in excess of that which said growers would have incurred in the sale of their tobacco if they had been able to sell it at the warehouse of their choice on the Henderson tobacco market.

d. Respondents have acquired control of such a nature and to such an extent over the purchase and sale of tobacco on the Henderson tobacco market that they threaten to create, and have created in certain aspects, through the instrumentality of respondent Board, a monopoly in the business of buying and selling flu-cured tobacco on the Henderson market.

PAR. 11. The acts and practices of respondents as herein alleged are all to the prejudice of respondents' existing and potential competitors and to the prejudice of the public; have a tendency to hinder and suppress, and have actually hindered and suppressed competition between respondents and others in the purchase and sale of tobacco at auction; have a tendency to obstruct and restrain, and have actually obstructed and restrained, trade in the purchase, sale and distribution of tobacco and tobacco products in commerce, as "commerce" is defined in the

Federal Trade Commission Act; have created or have a tendency to create in said respondents a monopoly in the auction sale of tobacco on the Henderson tobacco market; and are contrary to public policy 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. Americo M. Minotti and *Mr. John Ohanian* supporting the complaint.

Mr. Francis E. Winslow and *Mr. Thomas L. Young*, of *Battle, Winslow, Merrell, Scott & Wiley*, Rocky Mount, N.C., and *Mr. Robert S. Hight*, Henderson, N.C., attorneys for respondent Henderson Tobacco Market Board of Trade, Inc., and all other respondents except the Liberty and Ellington warehouse groups.

Mr. A. Augustus Zollicoffer, Mr. John H. Zollicoffer, and *Mr. John H. Zollicoffer, Jr.*, of *Zollicoffer and Zollicoffer*, Henderson, N.C., attorneys for respondents *Mr. George T. Robertson* and *Mr. Samuel E. Southerland*, individually and trading as Liberty Warehouse.

Mr. George T. Blackburn, of *Perry, Kittrell, Blackburn & Blackburn*, Henderson, N.C., *Mr. Arthur A. Bunn*, Henderson, N.C., and *Mr. Robert B. Morgan*, Lillington, N.C., attorneys for respondents *Mr. F. H. Ellington, Mr. Gilbert F. Ellington* and *Mr. John Ellington*, trading as Ellington Warehouse.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

MARCH 2, 1967

Pleadings, Procedures, and General Summary

Essentially, as the examiner sees it, the complaint alleges unfair acts and practices and unfair methods of competition under Section 5 of the Federal Trade Commission Act on the part of respondent Henderson Tobacco Board and its warehouse members—acting, incidentally, in unlawful combination or conspiracy to violate the antitrust laws—in connection with the allocation of selling time, particularly to new entrants. The Board and its members are authorized by virtue of North Carolina statute to exercise control of the Henderson tobacco selling market, including control of the allocation of selling time. Under the North Carolina statute, the validity of which is not questioned herein, no warehouse may sell tobacco produced by the growers except through the Board or similar organization in a local area. Under the statute nothing may be done in restraint of trade, and Board by-laws or regulations must be reasonable. The reasonable-

ness of the exercise, by the Board and its members, of the authority granted by North Carolina statute is the controlling issue in this case.

The alleged unlawful acts, insofar as concerns their ultimate effects, are in two categories:

First, there is the adoption or repeal of *by-laws,* so as to restrict or foreclose new entrants from opening up warehouses in the Henderson market for the sale of tobacco.—It is also alleged that established or old-time warehouses desiring to expand are adversely affected, presumably those which do not have capital resources as great as others. *Second,* there are the alleged unsuitable and unavailable warehouses.

The main proof herein relating to the by-laws of respondent Board was three-fold:

(1) The by-laws provided for the so-called *unit system.*—Under the unit system, an applicant warehouse desiring to enter the market as a new entrant, no matter what its size, will be allocated selling time on a basis not to exceed a predetermined average unit of 56,000 square feet, although it will receive less if its square footage is less than the average unit. If the new entrant is admitted and receives a unit, or less, of time credit, the allotment is deducted from the grand total available and the remainder of the selling time is divided up among the prior established firms proportionately, each thus taking some cut in time.—It is true that this unit system also applies to warehouses added by the established firms, or to any expansion of space by them, but this appears to be of rather subordinate importance in connection with the unit system as it has worked out in the Henderson market.

(2) The by-laws were radically amended in 1955 by the *repeal of the two-thirds time and space allocation rule.* This prior provision of the by-laws prohibited, except by unanimous consent of the warehouse members, selling time to be allocated to a warehouse unless it actually sold on its premises two-thirds of the tobacco sold. Thus, for a warehouse not actually selling tobacco to be allowed an allocation of time was something of an impossibility. The repeal of this strict control on the allocation of selling time obviously served as an inducement to established warehouses to bring other warehouses into the market solely for the purpose of obtaining additional selling time, even though such warehouses did not themselves sell tobacco. This was particularly so because a number of the established warehouses had standby warehouses (many of them engaged in storing tobacco) or were financially able to build new warehouses.

By adding other warehouses, as they did, the established warehouses doing so in effect increased their own selling time at the expense of the only two new entrants that have been permitted in this market, even on a limited basis, in years, and did so at the expense or to the detriment of all potential new entrants. In other words, as the proof in this case shows, the time value of the unit of a new entrant, already strictly limited to a unit, would be reduced by reason of the vast amount of additional warehouse space brought into the market, and so brought into the market by established firms even though not used by them to sell tobacco. For the new entrant the time unit became largely a bogus unit, or an illusory one—entitling him to about one-third of the percentage of time he would have received had the time-space rule not been repealed—due to the fact that two-thirds of total time came to be allotted to non-selling warehouses of the established firms.

Practice and experience demonstrate that a new entrant comes into the market only with a selling warehouse. The established warehousemen, as might be expected, do not let him come in with additional non-selling warehouses so that he may augment his time the way they do by adding non-selling warehouses. This, of course, contrasts sharply with the practice of established firms, which, due to the repeal of the ⅔ time-space rule,[1] were able to have auxiliary warehouses not selling tobacco at all although receiving a full allocation of time. Moreover, to add insult to injury so far as concerns new entrants, the established firms were and are also able to receive rents for these warehouses by leasing them for the storage of green tobacco, and even storage of redried tobacco already in kegs, as well as for completely non-tobacco purposes.

As the proof in this case also shows, if an established warehouse increases its time by adding another warehouse not selling tobacco, there may, of course, also be an adverse effect on other established warehouses. Such additional time decreases the share of all other established warehouses, *i.e.*, in the amount of time left over after the assignment of time to any new entrant. The other established firms may and do, however, act in kind, if they too have sufficient financial resources or stand-by warehouses. They too bring in warehouses of their own, even though not selling tobacco, so as at least to restore their old percentages of time. The addition of such warehouses to the market must, of

[1] Referred to in most portions of the decision as ⅔ sales rule.

course, meet with the approval of the other warehousemen generally, and actually, to be sure, was usually accomplished in this case by unanimous consent or no dissenting vote, largely based, however, on what appears to be ordinary vote swapping.

(3) The definition in the by-laws of "warehouses," *i.e.*, for the purposes of receiving time, is (even despite the repeal of the ⅔ rule) only that they be "suitable" for selling tobacco. There is no provision that warehouses be "available." Nor is there any provision that they be "reasonably necessary," or any other added device to substitute for the control exercised by the repeal of the ⅔ time rule.

Moreover, although the word "suitable" is spelled out in the by-laws in terms of a few physical characteristics, the number so spelled out is by no means reasonably comprehensive. The by-laws contain no reference to "available" at all, let alone a detailed definition. Tight definition is particularly for the protection of new entrants against having unsuitable or unavailable warehouses counted against them in seeking an honest allocation of time.

Board counsel herein, incidentally, construe the by-laws as actually meaning, by necessary implication, that a warehouse must be available to receive time allocation. But the only definition they have proposed is that the warehouse be "available when needed," which is hardly helpful in a market where so much of the warehouse space is not needed at all.

Board counsel's expressed position on availability unintentionally points to what appears to be the most important defect in the by-law definition of a qualified warehouse—more important than the meaning of either suitable or available—namely, that the by-laws now have no requirement or control whereby warehouses to receive time shall be *"necessary,"* or "reasonably necessary," to the market. There is, as above noted, no device or procedure in the by-laws operating to that end or anything replacing the ⅔ time allocation rule which did eliminate unnecessary space.

This is so unless "suitable" or some other wording is construed to embrace the meaning of "reasonably necessary"—particularly as applied to established firms seeking to increase their time by adding non-selling warehouses or even building new ones, *i.e.*, for the purpose of minimizing the impact of new entrants or of potential new entrants, who must under the antitrust laws have reasonable opportunity to come into the market.

Returning back to the unlawful acts deriving from the Board's

by-laws, referred to under "First," above, the position of respondent Board may be expounded as follows:

(1) Counsel for respondent Board have recognized from the very beginning of this case that the Henderson unit system, allowing irrespective of size *no more than one unit of time* to a new entrant, or for added space, is unlawful under the *Asheville* [2] case.

The Board answer (p. 16), although still claiming that the present system is reasonable, offers to amend the by-laws to provide that new space shall no longer be limited to a credit for one unit, but may receive 50 percent for the first unit of excess space, and 25 percent for each additional unit of excess space. This is a provision which obtains in one or more other tobacco markets. At the conclusion of the hearing, Board counsel stated (R. 1643) that they "would consent to a cease and desist order" against enforcement of the by-laws stating that a newcomer gets no credit for excess space. The offer in the answer was repeated in oral argument after the hearing, as evidenced by the amended proposed order submitted by Board counsel, who also made it clear that this contemplates allowance of time for any fractional excess unit.

Without regarding these offers as binding as stipulations, the decision herein provides for an order expressly directing that there be an allowance for new warehouse space in excess of a unit.

The Board defense is that the by-laws were promulgated in 1949 whereas the *Asheville* decision was handed down in 1961. Since intent is hardly a defense, certainly not a complete defense, to a Section 5 charge of unfair methods of competition and unfair trade practices, it is held herein that this defense deserves little or no consideration on the question of violation itself. As to whether or not, in view of the defense, an order should issue to bring about a correction in the by-laws, such a direction is included in the order actually issued inasmuch as the Board has allowed so many years to go by without making the correction.

However, the decision adopts the view that the entire question is a relatively minor one, as compared with the question of the allocation of time to unnecessary warehouses, as well as to unsuitable or unavailable warehouses.

(2) As to the repeal of the ⅔ space and time rule and the

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[2] Citations to cases will be found in the portion of the present decision bearing the caption Legal Discussion.

flooding of the Henderson market with unnecessary space—*i.e.*, surplus warehouses not used to sell tobacco but used chiefly to obtain allocation of time, while also earning rent on the side—the Board's position seems to be that although this is indeed an economic evil, it has not been brought about by evil design, but only in the rough and tumble of individual warehousemen seeking to preserve their time position; that, therefore, it should not invoke any cease and desist order, and certainly not one upsetting the status quo as distinguished from future corrective procedures, if any. On oral argument after hearing, Board counsel suggested, in an amended proposed order, that established warehouses should receive substantially less credit for added warehouses than new entrants for entrant warehouses. The decision herein regards the suggestion, although offered in good faith, as providing an inadequate remedy. The order issued herein is designed, by its strong provisions, to bring about a remedy of the unnecessary space problem, as embracing the outstanding issue in this case.

(3) As for the definition of warehouses in the by-laws as merely those which are "suitable," with some added but limited definition of the word, the Board's position seems to be that further definition is not necessary and also, as already stated, that the by-laws include the meaning "available." Furthermore, its position seems to be that the definition in the by-laws requires no further addition such as "reasonably necessary for the market."

The decision and the order issued herein are to the contrary. The order is drafted so as to bring about detailed definitions of both "suitable" and "available" in the by-laws or regulations.

However, the decision regards this suitability and availability question as definitely subordinate to the unnecessary space question. The latter is covered by the provisions in the order referred to in (2), immediately preceding.

Returning now to "Second," *supra*, as to whether or not warehouses, as a matter of fact and of Board enforcement, have received allocations of time even though the warehouses were not suitable or available, the Board position is that this has not been proved except, perhaps, by very literal or unrealistic standards. The other two sets of respondents, as well as complaint counsel, take an opposite position. The decision herein does likewise. It is found in the decision herein that allocations of time have, indeed, been made to unsuitable warehouses, although not to the extent and in the degree found in *Wallace Tobacco Board*, known as the "chicken coop" case. It is also found that such allocations

have been made to unavailable warehouses. The order issued contains appropriate provision accordingly.

However, this enforcement aspect of the suitability and availability question, just as the definition aspect, is found to be definitely subordinate to the unnecessary space question.

In the present case there are three sets of answers interposed through three different sets of attorneys.

I. First, and in a practical sense foremost, is the Board answer, interposed in behalf of respondent Board and of respondent members (and officers), except the two newcomer groups in behalf of which the other two answers have been interposed.—Furthermore, the Board answer is interposed in behalf of all respondents except the two newcomer groups, *i.e.*, including respondent Fred S. Royster, a former member (who also testified as an expert witness for the Board), and the respondent Royster-Hight Corporation, a nonmember, of which Fred S. Royster and other Roysters are directors and officers, and which allegedly dominates the Carolina Tobacco Warehouse respondents.

II. Then there is the Liberty answer, interposed in behalf of the 1947–49 newcomer Liberty warehouse group, of which respondent George T. Robertson is the leading and original member, and respondent Samuel E. Southerland the other member. "Liberty" and "Robertson" are somewhat interchangeable names in this case, both being used to refer to the Liberty group and to pleadings or submissions in its behalf. The Liberty answer asks for dismissal of the complaint as against all respondents, although it particularly sets forth Robertson's difficulties as a new entrant in the Henderson market, even after being admitted.

III. Finally, there is the Ellington answer, interposed in behalf of the 1953 newcomer Ellington warehouse group, comprising respondents F. H. Ellington and John Ellington. (Gilbert Ellington is also included by the complaint as a full member of the group and as a named respondent, but apparently this was by error, and complaint counsel's motion to strike him as a party respondent by reason of error is hereby granted.) The Ellington answer in substantial measure joins in the motion for relief made by complaint counsel. The name "Ellington" may be used in the decision either to refer to the group or a member. Board counsel claim that Ellington more or less instigated the filing of the present complaint.

There were two formal prehearing conferences in this case. There was also a comprehensive prehearing order of directions, which all parties diligently followed.

Due to the initiative of complaint counsel and the splendid co-

operation of each of the three sets of counsel for respondents, various stipulations of fact were entered into with complaint counsel. A separate stipulation of fact was preliminarily entered into by complaint counsel with each of the counsel for each of the three sets of respondents. This resulted in three stipulations, each different from the other in a number of respects, although also agreeing in a number of respects. The stipulations are referred to herein by the examiner as the Board stipulation, the Liberty stipulation, and the Ellington stipulation, respectively.

There also eventuated, after much effort on the part of all counsel, and only after the hearing was already well advanced, a further stipulation by complaint counsel with all three sets of counsel for respondents. This is the Joint Stipulation, as the examiner refers to it, which, however, is shorter and less comprehensive than originally hoped for.

(It may also be stated here that there was a still further joint stipulation—actually very brief and devoted to a limited factual matter—signed by complaint counsel and all counsel for the respondents, although this was almost a month after the hearing as such was concluded, when it was received in evidence and marked as an exhibit.)

Inasmuch as the main four stipulations are referred to by different designations in the submissions in this case, the examiner sets forth the following tabulation for convenience:

Designations of stipulations

By examiner	By board	By exhibit number
Joint	First	CX 193
Board	Second	CX 194
Liberty	Third	CX 195
Ellington	Fourth	CX 196 (A & B)

In citing these stipulations by his own designations the examiner refrains in his decision from also referring to the exhibit numbers.

The hearing was held in Henderson, North Carolina, and lasted for most of eight hearing days. The transcript consists of 1,650 pages, including the prehearing portion. There are almost 200 exhibits, which, due to their nature, comprise a sizeable volume.

After the hearing and after the usual submissions by all parties, oral argument, heretofore referred to, was held in Washington, D.C. on February 13, 1967, devoted entirely to the question of the

use of unnecessary space, distinguished from unsuitable or unavailable space, as a basis for allocations of time. At the oral argument Board counsel submitted an amended proposed order, which was marked as an exhibit auxiliary to the argument.

The complaint alleges, at least in part, a charge of conspiracy, even though this may not be an entirely necessary allegation. However, unlawful conduct is found herein without any evidence of conspiracy extrinsic to the overt acts of respondent Board itself, mostly through its by-laws and time allocations, and the overt acts of its members in supporting the Board, ordinarily by unanimous vote. There is also, of course, the obvious collaboration, inherent in the Board and membership setup under state law—prima facie lawful, to be sure, but here clearly directed against new entrants and their rights as fostered by the antitrust laws and our free competitive system.

It may be, therefore, that many matters were covered at the hearing which are relatively unimportant in retrospect. Moreover, it may be that too much time was spent by all counsel in connection with what now appears to be a rather unimportant issue as to whether or not there should be individual liability on the part of respondent Fred S. Royster, who has not been a member of respondent Board for some years (incidentally, he was its "expert" witness at the hearing), and on the part of Liberty (Robertson) and Ellington, the two newcomer groups.

However, the extensive transcript and comprehensive exhibits herein do afford an intensive and relevant picture of the Henderson market, and thus may have an additional, although incidental, importance in connection with compliance procedure under the decision.

The decision herein is two-fold:

First, as to the by-laws, it is found that unlawful conduct is proved by (1) the lack of time allowance for excess space, (2) the repeal of the ⅔ time allocation system, and (3) the limited definition of a warehouse as "suitable" to qualify for allocation of time, and no express requirement at all as to being "available."—The basic evil, mostly deriving from (2) is the allocation of selling time to warehouses which are not even "necessary" to the space-inflated Henderson market.

Second, it is found that as a matter of practice and enforcement there was actual allocation of time to some warehouses either not suitable under the by-laws, or not available—although this is the less important of these two basic findings, or to the outstanding finding as to unnecessary warehouses.

The unlawful conduct, as so found, is held to be particularly injurious to potential new entrants, although also injurious to the vitality of competition in the Henderson market generally.

It is also held and concluded that respondent Board and its members have exercised unreasonably the power conferred upon them by North Carolina statute, particularly in connection with the allocation of selling time to tobacco warehouses, and that they have done so in restraint of trade contrary to express provision in the statute, as well as contrary to the laws of the United States.

The lack of allowance of time allocation for space exceeding a unit, is held to be clearly, and concededly, unlawful. But the repeal of the ⅔ space and time allocation rule, depriving the market of its automatic control over the use of unnecessary warehouses for time allocation, is regarded as far more obnoxious than the limitation to one unit. The failure of the by-laws to have any definition of warehouses qualified for time allocation beyond their limited provisions as to "suitable" warehouses, intensifies the evil brought about by repeal of the ⅔ rule, by actually encouraging the bringing in of unnecessary warehouses.

The ultimate evil found in this decision is that the time unit accorded a new entrant has become, as already stated, a bogus or illusory unit, due to the inflation of market space by unnecessary warehouses.

The cease and desist order issued herein does not include by name either respondent Fred S. Royster (or Royster-Hight Corporation), who has not been a member of the Board for some years in any event, nor any of the individuals in the two newcomer groups, Liberty (Robertson) or Ellington. Entirely apart from the question of violation, or technical violation, it is held that neither public interest nor any practical consideration requires that they be held individually.

However, the order to desist which is issued herein is directed not alone against respondent Board as such, but against its members, agents, and instrumentalities, *i.e.*, even though not named—following fairly common or analogous practice in regard to such an organization or even corporations generally. The members, apart from the newcomers, are nevertheless named in the order individually, as is appropriate in the public interest.

The order prohibits, of course, the practice of not according to a new entrant warehouse irrespective of size any time credit in excess of the average space unit.

More importantly, on the question of unnecessary space, the order issues two dominant mandates. It prohibits the adding of

further warehouses by the old firms for a period of five years without approval of the Federal Trade Commission. It also prohibits the practice of issuing to new entrants the present illusory time unit without a supplemental allowance graduated over the five years so as ultimately to give new entrants equitable time value.

Finally, the order has provisions directed against unsuitable or unavailable warehouses, designed to induce the Board to amend its by-laws and enforcement procedures in connection therewith.

The order is preceded by a legal discussion, largely devoted to the January 27, 1967, opinion of the Court of Appeals in the *Danville Tobacco Association* case.

All motions now pending before the examiner are deemed disposed of in accordance with the decision herein, and any motion not so disposed of is hereby denied.

FINDINGS OF FACT

The following are the Findings of Fact herein, supplemented, however, by such findings as are made in the discussion immediately following these Findings proper, *i.e.*, under the principal captions of Unit System and of Repeal of Two-Thirds Rule, or elsewhere in this decision generally.

All proposed findings not found by the examiner as above indicated are hereby disallowed. Disallowance of proposed findings, however, does not necessarily mean that the proof has not been sufficient.

The first and larger part of the present formal Findings is predicated on the extensive stipulations of fact in this case, as well as on admissions in the answers. In view of the paucity of evidence as to conspiracy apart from specific Board action, mostly in connection with the by-laws, and the usual unanimous consent of the members thereto, it has been unnecessary to make detailed formal findings upon conspiracy apart from these Board actions and membership support, as well as obvious collaboration.

However, the discussion following these formal Findings contains sufficient factual findings to illuminate the entire situation adequately, in the examiner's opinion. The discussion also shows up by facts the relevant picture in connection with the individual liability sought to be imposed on respondent Fred S. Royster, and the newcomer Robertson and Ellington respondents, none of whom are named by the examiner in the order to desist issued herein.

Formulating the first part of these Findings by utilizing the

various stipulations of fact has been more than a purely mechanical task. This is because, although there are some 40 or more paragraphs (excluding additional paragraphs in the supplemental part of the Ellington stipulation) in each of the varying stipulations of the three sets of respondents, only a little over half of the 40 or more have found their way into the Joint Stipulation and even there only with some modification. However, the three sets of separate stipulations substantially agree on over ten additional paragraphs.

There are some three further paragraphs appearing only in the Board stipulation which, by proper identification as to evidentiary source, seem reliable enough considering that the liability found in this case is essentially that of the Board and its members.

Thus, the first and larger part of these Findings can be tabulated (except Finding 22, used by examiner for an explanation) as to how they derive from the stipulations as follows:

Par. 1–21 Joint Stipulation.

Par. 23–36 Three separate stipulations (in essential agreement).

Par. 37–39 Board stipulation only.

The above numbered Findings (1–39) are also subcaptioned by reference to complaint paragraph numbers to show their relationship to Par. One through Par. Five of the complaint.

The above are followed by the rest of the formal Findings, which are based not on stipulations, but, first, on admissions in the answers or evidence in the record, and, second, determinations of illegality by the examiner, to wit:

Par. 40–41 Admitted basic findings.

Par. 42–49 Findings of violation.

The above numbered Findings (40–49) are also subcaptioned by reference to complaint paragraph numbers, to show their connection with the allegations in Par. Six through Par. Ten of the complaint.

Description of Respondents
(Paragraph One of Complaint)

1. Respondent Henderson Tobacco Market Board of Trade, Inc., hereinafter referred to as respondent Board, is a corporation duly organized under the laws of the State of North Carolina, with its principal office and place of business located in the city of Henderson, North Carolina. Membership in respondent Board is limited to those persons, firms, corporations, and associations engaged in or about to engage in business as leaf tobacco warehousemen,

buyers or rehandlers of leaf tobacco on the Henderson tobacco market.

The following named individuals are now, or have been during the time mentioned herein, officers of respondent Board and as such and individually, are named as respondents in this proceeding: Charles Brooks Turner, president, W. J. Alston, Jr., vice president, William H. Hoyle, secretary-treasurer.

(All four stipulations, par. 1. R. 1111–12, 1126–27, 1161–62, 1182–83. Admissions in the answers.)

2. Respondents George T. Robertson and Samuel Southerland are individuals who, with others, including Gene Robertson, John Wilson, and Billy Luce, are engaged in the operation of four warehouses under the name and style of Liberty Warehouse; the said warehouses being designated as Liberty #1, Liberty #2, Robertson, and Robertson and Southerland. In 1963, E. C. Huff joined the Liberty group and has since chosen to have his respective share of selling time allotted to Dixie Warehouse #2, which he owns together with C. B. Turner and L. B. Wilkinson, sold by the Liberty group. C. B. Turner's and L. B. Wilkinson's respective shares of selling time allotted to Dixie #2 are sold by the High Price Warehouse. All of said warehouses are located in or near the city of Henderson, North Carolina, where respondents George T. Robertson and Samuel E. Southerland are members of the respondent Henderson Tobacco Market Board of Trade, Inc.

(All four stipulations, par. 2. R. 1112, 1127, 1162, 1183. Admissions in the answers.)

3. Respondent W. J. Alston, Jr., an individual trading and doing business under the name and style of Farmer's Warehouse, is engaged in the business of operating four warehouses commonly known, referred to, and described as Farmers Warehouse Alston #1, Alston #2, and Alston #3, all of which are located in or near the city of Henderson, North Carolina, where respondent has his principal office and place of business. Said respondent is a member of respondent Henderson Tobacco Market Board of Trade, Inc.

(All four stipulations, par. 3. R. 1112–13, 1127–28, 1162–63, 1183–84. Admissions in the answers.)

4. Respondents A. H. Moore and C. E. Jeffcoat, individuals trading and doing business under the name and style of Moore's Big Banner Tobacco Warehouse, are engaged in the business of operating three tobacco auction warehouses commonly known, referred to, and described as Big Henderson #1, Big Henderson #2, and Big Banner, all of which are located in or near the city of

Henderson, North Carolina, where respondents have their principal office and place of business. Said respondents are members of respondent Henderson Tobacco Market Board of Trade, Inc.

(All four stipulations, par. 4. R. 1113, 1128, 1163, 1184. Admissions in the answers.)

5. Respondents F. H. Ellington and John Ellington, individuals trading and doing business under the name and style of Ellington Warehouse, are engaged in the business of operating two tobacco auction warehouses commonly known, referred to, and described as Ellington Warehouse and Planters Warehouse, both of which are located in or near the city of Henderson, North Carolina, where respondents have their principal office and place of business. Said respondents are members of respondent Henderson Tobacco Market Board of Trade, Inc.

(All four stipulations, par. 5. R. 1113, 1128, 1163, 1184. Admissions in the answers.) This is as modified by the Ellington motion to strike the name of Gilbert F. Ellington as included by mistake, and the examiner's granting said motion. Complaint counsel state in their proposed findings, etc. (p. 8), that they do not oppose, and no opposition has been expressed or suggested by counsel for other two sets of respondents.

6. Respondent M. L. Hight is a member of respondent Henderson Tobacco Market Board of Trade, Inc.—by reason of his connection with Carolina Tobacco Warehouse, as found in par. 8 below, but not by reason of any connection with Hight's Warehouse, as also alleged in the complaint.

(The first part of this finding is supported by all four stipulations, par. 6, and admissions in the answers. The Board stipulation, par. 6, adds that he is a member "as a partner in Carolina Warehouse." Complaint counsel in their proposed findings, etc., pp. 9–10, concede that Hight is a member only by reason of his connection with Carolina Tobacco Warehouse, and not by reason of any connection with Hight's Warehouse, as also alleged in the complaint. The examiner accordingly grants, by consent, the motion to dismiss as to him as operator of Hight's Warehouse.)

7. Carolina Tobacco Warehouse is a partnership comprised of the subsequently named individuals who formulate, direct and control the acts and practices of the said partnership. The principal office and place of business of respondent partnership is located in or near the city of Henderson, North Carolina.

(All four stipulations, par. 7. R. 1114, 1129, 1163–64, 1184–85. Admissions in the answers.)

8. Respondents M. L. Hight, B. W. Young, and J. S. Royster,

copartners trading and doing business under the name and style of Carolina Tobacco Warehouse, are engaged in the business of operating four tobacco auction warehouses commonly known, referred to, and described as follows:

Carolina Warehouse.

Royster-Hight No. 1 (This warehouse also known as Golden Belt Warehouse, was operated in 1962 in place of the Carolina Warehouse, which was burned in 1962 and rebuilt in 1963.)

Royster-Hight No. 2.

Royster-Hight No. 3.

All of the above-named warehouses are located in or near the city of Henderson, North Carolina, where respondents have their principal office and place of business. Said respondents are members of respondent Henderson Tobacco Market Board of Trade, Inc.

(All four stipulations, par. 8, the expanded parenthetical note on Royster-Hight No. 1 being found in the Joint Stipulation. R. 1114, 1129, 1164, 1185. Admissions in the answers.)

9. Respondent Royster-Hight Corporation is a corporation organized under the laws of the State of North Carolina with its principal office and place of business in Henderson, North Carolina. Respondent corporation was chartered in 1954 for the purpose of conducting the business of the above-mentioned Royster-Hight Warehouses No. 1, No. 2, and No. 3.

The following named individuals are now, or have been during the time mentioned herein, officers and directors of respondent Royster-Hight Corporation, and in that capacity they have dominated, controlled and directed and are now dominating, controlling and directing the affairs of said respondent corporation:

Fred S. Royster—President

W. G. Royster—Vice President

J. S. Royster—Secretary

M. L. Hight—Treasurer

(All four stipulations, par. 9. R. 1114–15, 1129–30, 1164,5, 1185–86. Admissions in the answers.)

10. Respondents C. B. Turner, R. E. Tanner, S. P. Flemming, and R. E. Flemming, individuals trading and doing business under the name and style of High Price Tobacco Warehouse, are engaged in the business of operating three tobacco auction warehouses commonly known, referred to and described as Dixie #1, New Dixie, and High Price Warehouse, all of which are located in or near the city of Henderson, North Carolina, where respondents have their principal office and place of business. Said respondents

are members of respondent Henderson Tobacco Market Board of Trade, Inc.

(All four stipulations, par. 10. R. 1115, 1130, 1165, 1186.)

Nature of Tobacco Industry
(Complaint Paragraphs Two through Five)

11. The bulk of the proof as to the nature of the tobacco industry is covered by the stipulations, with support from the record, but the preliminary portion of the findings thereon will commence with admissions in the answers as to Paragraphs Two and Three of the complaint. This will be followed by findings supported by the stipulations and the record as such, as well as by admission of portions of Paragraphs Four and Five of the complaint.

Interstate Commerce. Paragraph Two of Complaint

Flue-cured tobacco (type 11[b]) produced in the States of North Carolina and Virginia is brought to the Henderson tobacco auction warehouses, operated and controlled by respondent members of respondent Board, where it is sold at auction on such warehouse floors to purchasers, or agents or representatives thereof, who are also members of respondent Board and who are, in a great many instances, engaged in the export tobacco trade or in the domestic manufacture of tobacco products in states other than North Carolina. Said tobacco is then shipped or otherwise transported by such purchasers or by those to whom such tobacco is resold or for whom such tobacco is purchased, from said State of North Carolina to other States within the United States and the District of Columbia and foreign countries, and there has been, and now is, a constant and continuous current and flow of said tobacco and tobacco products between and among the several States of the United States and the District of Columbia, and with foreign countries.

(Par. Two of complaint is admitted by all of the answers. See also four stipulations, par. 11.)

Production. Paragraph Three of Complaint

There are five types of flue-cured tobacco as classified by the United States Department of Agriculture, the primary bases for classification being the date of maturity and area of production:

Type 11(a): Grown in northwestern North Carolina and south central Virginia, an area commonly referred to as the "Old Belt."

Type 11(b): Grown in central North Carolina and southwestern Virginia, an area commonly referred to as the "Middle Belt."

Type 12: Grown in eastern North Carolina.

Type 13: Grown in southeastern North Carolina and northeastern South Carolina.

Type 14: Grown in southern Georgia and northern Florida.

(Admitted in the answers. R. 1116, 1131, 1166, 1187.)

Nature of Industry as Stipulated. Findings 11 (this portion) through Finding 18)

Flue-cured tobacco, the principal type of tobacco produced in North Carolina, is sold at auction through the facilities of tobacco warehouses by farmers to manufacturers of tobacco products and to independent buyers for shipment in interstate and foreign commerce. In 1963, the total sales of all flue-cured tobacco (types 11(a), 11(b), 12, 13 and 14) was 1,463.4 million pounds worth $843,980,000 or $57.67 per cwt. The State of North Carolina, as the largest producer, accounted for 64 percent of this total or 933.3 million pounds worth $541,490,000. Thus, in North Carolina, the cash receipts from flue-cured tobacco accounted for 47 percent of the total cash receipts from the sale of all farm commodities.

(All four stipulations, par. 11. R. 1116, 1131, 1166, 1187. CX 91 through CX 110. Admissions in the answers.)

Henderson Market. Bright Belt Association; Flue-Cured. Par. Four of Complaint

12. A tobacco market consists of a group of warehouses which operate under public license. Virtually all of the flue-cured tobacco grown in the United States is sold at 93 tobacco auction markets, 44 of which are in North Carolina. The Henderson tobacco market, located in north central North Carolina, ranks as one of the largest markets engaged in the auction of type 11(b) flue-cured tobacco. Of the total 1963 sales of type 11(b) flue-cured tobacco (177.7 million pounds worth $101,356,000), the Henderson market accounted for 16 percent (27.9 million pounds worth $15,650,000 or $56 per cwt.). Among the ten markets engaged in the auction of type 11(b) flue-cured tobacco the Henderson market ranks third in terms of pounds of tobacco sold. And among the 93 markets engaged in the auction of all types of flue-cured tobacco, the Henderson market ranks 16th.

(All four stipulations, par. 12. R. 1116, 1131, 1166, 1187. CX 91 through 110. Admissions in answers, particularly as to Par. Four (1) of complaint.)

The perishable nature of flue-cured tobacco—once it is put "in order" by the grower for sale at auction—demands that there be a coordination of efforts between grower, warehouseman and pur-

chaser. To a large extent, the Bright Belt Warehouse Association, a voluntary association comprised of the majority of warehousemen engaged in the auction of flue-cured tobacco, has fulfilled this coordinating function. This Association sets the opening and closing dates for each market engaged in the auction of flue-cured tobacco (the opening dates being determined by the projected date the type of tobacco sold on a particular market matures), establishes maximum rates of sale as well as the length of each selling day and the maximum allowable weight for each basket of tobacco, and declares market holidays to prevent or relieve a glutted market. There is no statutory authority for this action by the Association. Such authority is derived from the consent of its membership and the farmers and industry generally. The Association takes no action with respect to the internal allocations of selling time among warehouses on any market.

(Complaint, Par. Four (2), first paragraph thereof, as admitted by the answers although subject to "corrections and explanations" pleaded by the Board answer but not deemed by the examiner contrary to the present finding, at least in its generality and read in conjunction with other findings herein.)

The selling season for the Henderson market generally opens around the beginning of September and ends in November, the closing date being fixed by respondent Board. A five and one-half hour sales day has prevailed in the past as a normal sales day at a rate of 400 baskets per hour (maximum weight of each basket being set at 300 pounds) for a total of 2,200 baskets per day per single set of buyers. However, since, say, 1961, the pattern of marketing has been changing with shorter overall time for sales. The 1966 sales schedule adopted by the Bright Belt Warehouse Association provides for only a five hour sales day, and after ten selling days a four and one-half hour sales day (maximum weight of each basket being set at 200 pounds) for a total of 2,000 baskets per day (or 1,800 at 4½ hours) per single set of buyers—all limited to a five day week.—Since it is a two-buyer market, permitting two auctions to be held simultaneously in two different warehouses, the number of baskets which can be sold on the Henderson market is double each basket total given above.

(Complaint, Par. Four (2), second paragraph thereof, as admitted and as qualified in the answers, and supported by the evidence. See, particularly, Finding 18 herein, based on par. 18 of the Joint Stipulation, expounding on the above in greater detail.)

The auction sale of flue-cured tobacco must be accomplished within a short time after the tobacco is placed on the warehouse

floors in order to prevent deterioration in the quality and value of the tobacco. Accordingly, after tobacco is delivered to a warehouse, it is weighed and identified in accordance with the provisions of the Tobacco Inspection Act of 1935, and, in most instances, auctioned within the next two sales days. After the tobacco is sold, it is either removed from the warehouse floor and shipped to the redrying plants of the purchaser or hauled to local redrying plants and subsequently shipped to the tobacco purchasers for further processing.

(Complaint Par. Four (3) admitted by Board answer, and in effect by the two other answers.)

The sale of flue-cured tobacco by means of the auction system is encouraged as a means of promoting competition among the buyers in bidding for the producers' tobacco. Consequently, the presence of buyers from the major tobacco manufacturing companies and independent buying companies and speculators and rehandlers is essential to a successful auction.

(Complaint Par. Four (4) admitted by all answers.)

Board Authority. Necessity for Membership. Complaint, Par. Five

13. This finding largely reflects Par. Five of the complaint:

(1) Prior to 1949, the sale of leaf tobacco at auction on the Henderson market was governed by the rules and regulations promulgated by the Henderson Tobacco Board of Trade, Inc., a corporation organized under the laws of the State of North Carolina in 1921. On October 3, 1949, the respondent Board of Trade was incorporated as its successor. Apart from respondent George T. Robertson, the incorporators of the succeeding respondent Board of Trade were the individuals and members of the predecessor Board of Trade then operating on the Henderson market.

(All four stipulations, par. 12–A in Joint Stipulation (par. 13 in the others). R. 1117, 1132, 1166–67, 1187–88. CX 2, pp. 1–4. Admissions in answers, particularly as to Par. Five (1) of complaint.)

It is also true, as stated in one additional sentence in the Liberty stipulation (par. 13), that respondent Robertson was not a member of the predecessor Board of Trade.

(2) Membership in respondent Board of Trade is open to warehousemen and purchasers of leaf tobacco other than warehousemen. Each person, firm or corporation operating a tobacco auction warehouse on the Henderson market is automatically a participating member and is entitled to one vote per warehouse on matters coming before respondent Board. Purchasers may hold either

participating or non-participating memberships; participating members only are entitled to vote. The Board of Directors is the governing body of the Board and consists of nine members. Each of the six warehouse firms is represented by one member. The members are elected annually by the membership in annual meeting to serve for one year or until their successors are elected and qualified.

(All four stipulations, par. 13 in Joint Stipulation (par. 14 in the others), although the Ellington stipulation lacks two additional sentences explaining the functions of the Board. R. 1117, 1132, 1167, 1188. CX 1, pp. 1–4, 10. Admissions in answers, particularly as to Par. Five (2) of complaint.)

(3) The selling time allotted to the Henderson tobacco market by the Bright Belt Warehouse Association is distributed among the warehouse members of respondent Board in accordance with the rules, regulations and by-laws of respondent Board now in effect, by unanimous consent thereunder, or as otherwise authorized.

(This is the first sentence of Par. Five (3) of the complaint—adding, however, the words "or as otherwise authorized." In explanation, the by-laws themselves may be amended by the Board of Directors without unanimous consent; and there is no absolute prohibition ruling out control by majority, *i.e.*, in all respects. The quoted words are added in response to references to majority action contained in the Board answer.)

Pursuant to said rules, regulations and by-laws selling time is allotted to new space, including new entrant warehouses, on the basis of the unit system—with 56,000 square feet established in 1949 as the average size of all warehouses constituting the unit. Under this unit system no time is allotted for space in excess of the unit, or 56,000 square feet, contained in a warehouse desiring to come in—a provision particularly challenged here by the Commission insofar as it is applicable to a new entrant warehouse. If such an allotment is made the remainder of the selling time is prorated to or among the old firms.

(This reflects the second sentence in Par. Five (3) of the complaint and affirmative statements in the Board answer. As a general statement, at least, it hardly seems to be in dispute.)

(4) The authority of said respondent Board is respected, accepted and adhered to by the buyers, agents and representatives of the principal tobacco manufacturing companies and by independent buyers whose presence is necessary for a successful tobacco auction sale. Consequently, it is virtually impossible for any

person, firm or corporation to engage in the tobacco auction warehouse business on the Henderson market without first having been admitted into membership in respondent Board and becoming obligated to adhere to the by-laws, rules and regulations promulgated and prescribed by said respondent Board. No person, firm or corporation may purchase tobacco or operate a tobacco auction warehouse on the Henderson tobacco market who is not a member in good standing of respondent Board, and no warehouseman can conduct an auction without first receiving a portion of the selling time made available to warehouse members by respondent Board.

(This is Par. Five (4) of the complaint admitted by all three answers (somewhat obliquely by Ellington answer).)

(Authority for all findings comprehending this Finding 13 may be further stated as follows:—All four stipulations, in various respects. R. 1132,7; 1166,7; 1171; 1187; 1192. CX 1, pp. 1–10. Admissions in answers.)

14. Various aspects of the production and marketing of tobacco are subject to certain restrictions, statutory or otherwise, over which each individual Board of Trade has no control.

(All four stipulations, par. 14 of Joint Stipulation (par. 15 of others).)

Examples of such restrictions, in addition to those heretofore mentioned, are (1) the grading requirements of the U.S. Department of Agriculture and the assignment of graders or "sets" by the United States Tobacco Inspection Service (Finding 17, *infra*), (2) the need for speed after tobacco is placed on the warehouse floor, including removal to redrying plants, (3) the whole mechanics and purpose of the auctioning system (Par. Four of the complaint, as essentially admitted), and (4) the two sets of both graders and buyers assigned to the Henderson Market (Finding 17, *infra*)—all making selling time assigned to each warehouse the crucial element in tobacco sales (Finding 20, *infra*).

(This statement of examples is in response to the proposals of complaint counsel on pp. 21 and 22 of their proposed findings.)

15. After the tobacco is harvested by the farmers, it is delivered by them to a warehouse of their choice at one of the auction markets. At this point the tobacco auction warehouse operators compete for the farmers' tobacco. They seek patronage of the tobacco farmers through personal contact as well as through the advertising of the facilities and services they have to offer. Farmers in the area generally desire and undertake to deliver their

tobacco to the warehouses as soon as possible during each selling season. The ten Middle Belt markets, of which Henderson is a member, were open 41 sales days in 1965. However, nearly two-thirds of the crop was sold within the first 15 days.

(All four stipulations, par. 15 in Joint Stipulation (par. 16 in others). R. 1118, 1133, 1167–68, 1188–89. Admissions in answers.)

16. By common consent the Bright Belt Warehouse Association, a voluntary interstate organization, assigns selling time to all flue-cured tobacco markets. The auction season at Henderson begins in early September, usually around the third, and continues until all of the tobacco in the area served by the Henderson market is sold. This generally takes from eight to ten weeks, and beginning in 1966 will extend over a longer time because of the shortening of the hours and days of sale and the cut in the maximum weight of the basket, and the sale of loose-leaf tobacco during the first twelve days, which slows the sale, and the process of redrying.

(All four stipulations, par. 16 of Joint Stipulation (par. 17 of other stipulations), with a shorter last sentence in the Ellington stipulation. As to Findings 16–19, which include this one, see also R. 1118,21; 1133,6; 1168,70; 1189,91. Admissions in answers.)

17. The basket or pile is the unit of measurement in the warehouse for sales purposes. A "basket" or "pile" in the flue-cured markets is a stack of tobacco which may presently not contain more than 200 pounds. The United States Government requires all tobacco to be inspected and graded before it is sold. The United States Tobacco Inspection Service assigns to each market graders who are referred to as "sets." The buying companies assign buyers to each market. One such buyer from each of the companies buying tobacco on a market is known as a "set" of buyers. During the seasons 1947 through 1966, two sets of graders and two sets of buyers were assigned to the Henderson market, making possible two simultaneous auctions.

(All four stipulations, par. 17 of Joint Stipulation (par. 18 of other stipulations), except that the Ellington stipulation varies by referring to baskets of 300 pounds instead of 200 pounds. As to Findings 16–19, including this one, see also R. 1118,21; 1133,6; 1168,70; 1189,91.)

Limitations of Selling Time

18. The amount of tobacco that can be sold on one market in a day depends ultimately on the capacity of the processing ma-

chinery located within convenient range of the market, and the amount of storage space the buying companies have available for temporary storage of green tobacco awaiting their processing machinery. For example, the hours of sales per day per set of buyers in 1963, 1964 and 1965 were initially set by the Bright Belt Warehouse Association at 5½ hours per day. However, because of the impossibility of certain purchasers to store green tobacco and to keep current with their processing, it was necessary to amend this schedule in 1963 by limiting the hours per day to 4 the week of September 16–20. In 1964 it was necessary to declare 7 marketing holidays in Type 13, 12 in Type 12, 12 in Type 11(b), and 10 in Type 11(a). In 1965 it was necessary to declare 10 marketing holidays in Type 13, 12 in Types 11(b) and 11(a). Furthermore, it was necessary to reduce hours per day for a number of sales days. For these reasons, the two sets of graders and buyers on the Henderson market will not grade and buy more than 4,400 baskets per day. Consequently, it has been determined that the sales capacity of the Henderson market is limited to 4,400 baskets per day or 2,200 baskets per set of graders and buyers. Rules and regulations provide that the rate of sales shall not exceed 400 baskets of sales per hour and that the operating day of every warehouse shall be limited to 5½ hours. At the maximum rate of sales per hour with two sets of graders and buyers, 4,400 baskets can be sold in 5½ hours. This means that a basket is sold every 4½ seconds. The duration of sales per day is usually 5½ hours and is set on a belt-wide basis by the Bright Belt Warehouse Association.

(All four stipulations, par. 18 of Joint Stipulation (par. 19 of other stipulations), first paragraph thereof. Only the Joint Stipulation contains, as here found verbatim, the reference to "amount of storage space" (first sentence) and "store green tobacco" (third sentence).)

The Bright Belt Warehouse Association is comprised of the various Belt Associations in the flue-cured area, and the Belt Associations fix the opening dates of the market. The local Boards of Trade determine the closing dates for each market. A five and one-half hour sale day prevailed as the normal sale day through the year 1961, 2,200 baskets per set of buyers. Since then, the pattern of marketing has changed because of curtailment of redrying facilities, resulting in the frequent shortening of the sale day and in frequent sales holidays.

The original sales schedule for 1966, adopted by the Bright Belt Warehouse Association, was as follows:

The first ten days in each Belt, five hours per day, five days per week. After the first ten selling days in each Belt, four and one-half hours per day, five days per week. After fourteen days at four and one-half hours a day, sales are limited to three hours a day, five days a week. This has since been changed. This, of course, meant that a total of 2,000 baskets per set of buyers per day on a five-hour day, 1,800 baskets on a four and one-half hour day and 1,200 baskets on a three-hour day. Furthermore, the maximum basket weight has been reduced from 300 pounds to 200 pounds.

(This is the second paragraph of the Joint Stipulation, par. 18, and of the Board stipulation, par. 19. There is no exact counterpart in the Liberty stipulation or the Ellington stipulation.)

(As to Findings 16–19, including this one, both parts, see R. 1118,21; 1133,36; 1168,70; 1189,91. See also admissions in answers.)

19. By agreement of the operators of the warehouses on the market, a schedule of rotation of sales is followed whereby each warehouse receives its allotted percentage of selling time each day. If a warehouse does not have enough tobacco on its floor to consume all of its allotted time, "free time" results and passes on until the sale reaches a warehouse which has enough tobacco on hand to use the free time on that day. A warehouse is said to be "blocked" when it has more tobacco on its floor than can be sold on its allotted time. And the market is blocked when all warehouses are full to the limit of their allotment of selling time, or when there is offered for sale on the market as a whole one or more piles of tobacco than can be sold by the market on that day.

(All four stipulations, par. 19 of Joint Stipulation (par. 20 of other stipulations), except that the Liberty and the Ellington stipulations do not contain the last sentence. As to Findings 16–19, including this one, see also R. 1118,21; 1133,36; 1168,70; 1189,91.)

Allocation of Selling Time

20. Given this method of selling, which is a product of certain natural and economic forces, well accepted in the market place, the crucial element in tobacco sales on a market is the selling time allocated to each warehouse.

(All four stipulations, par. 20 of Joint Stipulation (par. 21 of other stipulations). See also admissions in answers.)

21. N.C. Gen. Stat. § 106–465 authorizes local tobacco boards of trade to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction,

but does not authorize the control of prices or the making of rules and regulations in restraint of trade. The boards adopt regulations governing the allotment of selling time to the warehouses on the market, and to new warehouses. Said statute requires that every warehouse offering tobacco for sale at auction must be a member of its local board of trade and membership in good standing is a condition precedent to the business of operating a tobacco warehouse. The respondent Board of Trade has adopted by-laws requiring each member of the Henderson Tobacco Market Board of Trade to conform to and observe all rules, regulations and by-laws of the corporation.

(All four stipulations, par. 21 of Joint Stipulation (par. 22 of other stipulations). Admissions in answers.)

22. [There will be no finding for this paragraph number. This is in order to switch smoothly from the numbering of the Joint Stipulation heretofore used herein to the numbering of the three other stipulations, which have a greater number of paragraphs. The Joint Stipulation, commencing from paragraph 22 through paragraph 25 will be cited under its appropriate scattered counterparts in the new numbering.]

23. This finding is broken up into several subdivisions, each containing thereunder the authority therefor:

(1) In 1946, and for several years prior thereto, the Henderson market had six warehouses, with a total of 288,000 square feet of floor space; three firms operated all of them as follows: (1) the High Price firm operated the High Price and Banner Warehouses; (2) the Carolina firm operated the Carolina and Coopers Warehouses, and (3) the Farmers firm operated the Planters and Farmers Warehouses.

(Not in Joint Stipulation, but in all other three stipulations (par. 23).)

(2) Also prior to the 1947 market season the Board of Trade had allocated selling time on the floor space system, *i.e.*, the percentage of the selling time allotted to each warehouse was in direct proportion to its floor space.

(Not in Joint Stipulation, but in all three other stipulations, par. 23, although the Board stipulation does not use these exact words in its longer paragraph 23, as will immediately appear.)

(3) [The following does not appear in the Joint Stipulation. Moreover it appears only in the Board stipulation, and therefore, strictly speaking, is not binding on the Liberty and Ellington respondents as such.]

Prior to 1940, selling time was allotted on the Henderson market on the basis of floor space suitable and available for the sale of leaf tobacco at auction; that is to say, each warehouse firm was allocated an amount of the total available selling time which was in direct ratio to its total square foot area to the total market square floor warehouse area. If there were one million square feet of warehouse space, suitable and available on the market, and Warehouse A had 100,000 square feet, it would have received 10 percent of the selling time.

From 1940 through 1946, the available selling time was allotted among the several warehouses operating firms by unanimous agreement based on floor space suitable and available for the sale of leaf tobacco at auction.

In 1947 and 1948, selling time was allotted under the then regulations of the Henderson Tobacco Board of Trade on the unit-performance system; that is to say, the initial allocation was on the basis of the allotment in the year 1946 and the allotment in succeeding years was in proportion to producers' sales at the various warehouses.

(Not in Joint Stipulation and in Board stipulation only, par. 23, as above stated.)

(4) In 1949, one of the warehouse firms brought action in the United States District Court for the Eastern District of North Carolina for treble damages and injunction to prohibit the future allotment of selling time on the unit-performance basis. This action resulted in a verdict directed for the Henderson Tobacco Board of Trade and the other operating firms. The plaintiff in the action, in consideration of a unanimous agreement allotting selling time in 1949 and conditionally in future years among the seven warehouses then operating, agreed to forego an appeal in that case. Selling time was allotted on the basis of this unanimous agreement dated August 18, 1949. The selling time is allotted to the Henderson Tobacco Market by the Bright Belt Warehouse Association on the basis of two sets of buyers and is distributed among the warehouse firms in accordance with the rules and regulations of respondent Board now in effect, supplemented by the common law of trade organizations and the North Carolina Statute G.S. 106–465, which authorizes boards of trade to allot selling time. Pursuant to these rules and regulations, selling time is allotted to the several established warehouse firms operating on the market on the basis of the unanimous agreement if there is one; if there is no unanimous agreement and there is no expansion of facilities on

the market by investment in warehouses suitable and available for the sale of leaf tobacco at auction, the allotment is made under authority of the common law and the statute by majority vote of the members of the Board of Trade, among the operating firms; if there is no unanimous agreement and there is an expansion of the facilities by new investment in warehouse space suitable and available for the sale of leaf tobacco at auction, selling time is allotted first to the new facilities on the basis of the unit system with 56,000 square feet established in 1949 as the average size of all the warehouses, and the remainder of the selling time is pro-rated to the old firms on the 1949 agreement as adjusted for withdrawals, and additions and modifications made either in accordance with unanimous agreement, or by majority vote.

(Not in Joint Stipulation and in Board stipulation only (par. 23), as above stated.)

24. In 1947, respondent George T. Robertson came into the Henderson market as a new entrant. He requested an allocation of selling time and space for the 1947 season in the proportion that the floor space of his new warehouse (in excess of 104,000 square feet) would bear to the total available floor space, including his new warehouse (Liberty Warehouse), on the Henderson market. With Robertson's Liberty Warehouse, the total floor space on the Henderson market for the selling season of 1947 was 392,000 square feet. Under the floor space system of allocating selling time, the Liberty Warehouse would have been entitled to receive 26.53 percent of the total available selling time. However, upon Mr. Robertson's entry into the market, resolutions were adopted which: (1) discarded the floor space system on the books, (2) adopted a "performance system" for the allotment of selling time to existing warehouses, *i.e.*, the percentage of the selling time allotted to each warehouse is in direct proportion to producers' sales in such warehouse during the year preceding the allotment, and (3) set up a "unit" system for the allocation of selling time. Under the "unit" provision, only 56,000 square feet (obtained by dividing the 392,000 square feet total floor space on the market in 1947 by the then existing seven warehouses) was considered as qualified space. Thus, no credit was given to the Liberty Warehouse for space in excess of said unit. Since Robertson's new warehouse raised to seven the number on the market, it was allotted 14 percent of the selling time, *i.e.*, 1/7 of the total selling space. The remainder of the time was pro-rated among the other warehouses in accordance with their selling time during the 1946 season.

(Not in Joint Stipulation, but appears in all three other stipulations, par. 24.)

25. In 1947, the Liberty Warehouse (as a new entrant in its first year of operation) sold less tobacco than could be sold in its allotted selling time and because of the "performance system," the selling time allotted to Liberty Warehouse for the year 1948 selling season declined to 12.07 percent. Immediately after the allocation of his 1948 selling time, Robertson filed suit in the United States District Court for the Eastern District of North Carolina (Raleigh Division) for injunctive relief and treble damages. This action resulted in a directed verdict for the Board of Trade and the other named defendants. Pending an appeal, a settlement in the form of written agreement, dated August 19, 1949, was unanimously reached by all warehousemen on the market, and approved by the Henderson Tobacco Board of Trade, Inc., under which the Liberty Warehouse received 16 percent of the total available time and no appeal was taken. The following table (Table I) shows the percentage of selling time and allocations under the 1949 agreement:

Table I

Warehouse	Square feet base	Percentage of selling time on basis of agreement
High Price	[1]75,000	20.84
Farmers	50,000	13.34
Carolina	50,000	17.62
Banner	43,000	14.32
Coopers	42,000	10.74
Planters	28,000	7.14
Liberty No. 1	[2]104,000	16.00
Totals	392,000	100.00

[1] The High Price Warehouse was destroyed by fire in 1947 and replaced by the present warehouse, which is 19,800 square feet larger. However, no change was made in the calculations which established 56,000 square feet as a unit.

[2] In allotting time to the Liberty Warehouse, only 56,000 square feet of it was considered as qualified space giving Liberty Warehouse 14% of the selling time. This percentage was increased to 16% by unanimous agreement.

(Not in Joint Stipulation, but in all three other stipulations, par. 25, except the statement that the Robertson (Liberty) suit "resulted in a directed verdict for the Board of Trade and the other named defendants," and the reference to "an appeal," and except footnote 2 as here worded. The directed verdict is proved

by the evidence and by RX 22, p. 17, and the "appeal" is conceded. The 14% and 16% information in footnote 2, appears only in the Board stipulation; however, the information is fully supported by the evidence.)

26. After the above agreement was reached, it was incorporated by reference into Article 4, Section 1–D of the newly organized respondent Board of Trade as a basis of allocation of selling time to the aforementioned warehouses upon the entry of a new warehouse and/or a warehouse which did not operate on the market during the preceding season. Under Article 4, Section 1–B of said By-Laws, it was provided that selling time would be allotted to new warehouses on the basis of units, and "no consideration in selling time" would be given to a new warehouse for space in excess of the established 56,000 square feet.

(Not in Joint Stipulation, but in all three other stipulations, par. 26 in part.)

Under Article 3, Section 5 of said By-Laws further provided that "Any concern operating more than one warehouse, may transfer sales from one warehouse to another as they see fit; however, at least two-thirds of sales allotted to any warehouse for that particular season must be sold in that particular warehouse unless the warehousemen agree unanimously to alter this provision." On the 23rd of April, 1955, the above provision requiring that "at least two-thirds of sales allotted to any warehouse for that particular season" be sold in that particular warehouse was deleted from the By-Laws (CX 1, p. 5).

(Only in Board stipulation, par. 26, in this form except for an incorrect by-law reference. But beyond dispute—as attested by the By-Laws themselves (CX 1, p. 5) and by Liberty and Ellington stipulations, pars. 26 and 28, as well as by the Joint Stipulation, par. 22.)

Addition of New Warehouses

27. In April of 1953, respondent F. H. Ellington addressed a letter to the members of the respondent Board of Trade and informed them of his intention to build a new warehouse on the Henderson market. He requested an allocation of selling time and space for the 1953 season on the basis of approximately 56,000 square feet. Ellington was the first new entrant to enter the Henderson market since Robertson's entry in 1947. Two existing firms, Carolina and Farmers, added a combined total of 108,000 square

feet of floor space (Big Henderson #1 and Alston #1, respectively) in 1951. Big Henderson had a base of 52,000 square feet and was given credit for .93 of a unit. Alston #1 had a base of 56,000 square feet and was given credit for 1.00 unit.

(Not in Joint Stipulation, but in all three other stipulations, par. 27. The Liberty stipulation, par. 27, adds to the last sentence the words "thereby reducing selling time available to all other warehouses, including the Liberty Group." This, of course, is true.)

28. After the Ellington application was accepted on May 1, 1953 (CX 26, p. 1), the warehouse members agreed on May 23, 1953 (CX 27, p. 3) that any firm operating more than one warehouse could transfer sales from one warehouse to another as it saw fit, provided that no more than one-third of the time of a warehouse could be transferred; excepting that any firm operating more than one warehouse could decline to conduct sales in that warehouse and transfer that time to their other warehouse or warehouses in which sales were conducted, provided the firm paid a minimum of $1,500 or the rent received by that warehouse for the months of September, October, and November, whichever was greater, to the Board for advertisement purposes; (and that "under these circumstances the warehouse in which sales are not actually conducted shall be construed in subsequent years to be operating upon the market for the 1953 season with the selling time allotted to said warehouse in connection with Article 4, Section 1–D of the By-Laws of the Henderson Tobacco Board of Trade." (CX 27, p. 3)) Upon Ellington's application being accepted on May 1, 1953, application for selling time for Moore's Big Henderson Warehouse No. 2 was accepted the same day (CX 26, p. 2), and Liberty Warehouse No. 2, mentioned in minutes on May 23, 1953 (CX 27, p. 2), was also accepted by the respondent Board of Trade. Liberty No. 2, containing 50,000 square feet was given credit for .89 of a unit. Big Henderson No. 2 contained 39,000 square feet and was given credit for .70 of a unit of selling time. The Ellington Warehouse was allotted 1.00 unit of selling time. With the addition of these three warehouses in 1953, the total floor space on the Henderson market for the selling season of 1953 was 616,800 square feet divided among 11.52 units.

(This happens to be Joint Stipulation, par. 22. It is also paragraph 28 of all three other stipulations, par. 28 except that the short quotation and accompanying citation "CX 27, p. 3" in the above finding is only in the Board stipulation.)

29. At a warehouse meeting on April 5, 1955, the Carolina firm was allowed by unanimous agreement to substitute the Golden Belt Warehouse for the Planters Warehouse with an increase of approximately 45 piles per day to Golden Belt in view of its being larger than Planters (CX 36); consequently no selling time was allotted to Planters Warehouse in 1955 (CX 49).

(Not in Joint Stipulation, but in all three other stipulations, par. 29 A.)

No further warehouse changes took place on the Henderson market until 1956 when the number of warehouses on the market increased from 12 in 1955 to 22 in 1956.

(Not in Joint Stipulation, but in all three other stipulations, par. 29 B.)

The names of these ten additional warehouses, together with square feet and units assigned are as follows:

Name of warehouse	Square feet	Units
Robertson	56,000	1.00
Robertson and Southerland	56,000	1.00
New Dixie	56,000	1.00
Dixie No. 1	21,000	.38
Dixie No. 2	42,000	.75
Alston No. 2	37,000	.66
Alston No. 3	34,000	.61
Royster-Hight No. 2	37,000	.66
Royster-Hight No. 3	56,000	1.00
Planters	28,000	.50

With the addition of these ten other warehouses in 1956, the total space on the Henderson market for the selling season of 1956 was 1,052,800 square feet divided among 19.31 units.

(Contained only in Liberty and Ellington stipulations, par. 29 B, but appears to be correct and is definitely binding on complaint counsel, except that perhaps the figure should be 1,050,800; see Board stipulation, par. 37 A.)

30. The following table (Table II) shows the number of warehouses drawing selling time on the Henderson market by firms from the year 1946 to present. [Page 1009.]

(Not in Joint Stipulation, but in all three other stipulations, par. 30.)

31. [The following Finding, featuring Table III, is not binding on the Liberty respondents as such. It is found only in the Board stipulation and the Ellington stipulation.]

Table II

Ellington group	Liberty group	High Price group	Carolina group	Farmer's group	Moore's group
Ellington	Liberty No. 1	High Price	Carolina	Farmer's	Big Henderson No. 1
1953–	1947	1946–	1946–[1]	1946–	1951–
Planters	Liberty No. 2	Banner	Coopers	Planters	Big Henderson No. 2
1956–	1953	1946–1962	1946–1950	1946–1950	1953–
	Robertson's	Coopers	Planters	Alston's No. 1	Banner
	1956	1951–1960	1951–1955 [2]	1951–	1963–
		[Destroyed]			
	Robertson & Southerland	Dixie No. 1	Big Henderson No. 1	Alston's No. 2	
	1956–	1956–	1951–1953	1956–	
	Dixie No. 2	Dixie No. 2	Golden Belt	Alston's No. 3	
	1963–	1956–1962	1955–	1956–	
	New Dixie	Royster-Hight No. 2			
	1956–	1956–			
		Royster-Hight No. 3			
		1956–			

[1] Carolina burned in 1962. In that year its selling time was used in Golden Belt.
[2] No sale in Planters in 1955.

The following table (Table III) shows the number of warehouses drawing selling time on the Henderson market for the year 1948, to present, and the number and identity of those warehouses used for the sale of tobacco at auction for the same years.

Table III

Year	Number of warehouses drawing selling time	Number of warehouses operating as tobacco auction warehouses	Names of warehouses operating as tobacco auction warehouses
1946	6	6	HP Car F B Coop P
1947	7	7	HP Car F B L#1 Coop P
1948	7	7	HP Car F B L#1 Coop P
1949	7	7	HP Car F B L#1 Coop P
1950	7	7	HP Car F B L#1 Coop P
1951	9	9	HP Car F B L#1 MBH Coop P A
1952	9	9	HP Car F B L#1 MBH Coop A P
1953	12	9	HP Car F B L#1 MBH P E A
1954	12	9	HP Car F B L#1 MBH E A P
1955	12	7	HP Car F B L#1 MBH E
1956	22	7	HP Car F B L#1 E MBH
1957	22	7	HP Car F B L#1 E MBH
1958	22	7	HP Car F B L#1 E MBH
1959	22	7	HP Car F B L#1 E MBH
1960	22	7	HP Car F B L#1 E MBH
1961	21	7	HP Car F B L#1 E MBH
1962	21	7	HP G-B F B L#1 E MBH
1963	21	6	HP Car F MBB L#1 E
1964	21	6	HP Car F MBB L#1 E
1965	21	6	HP Car F MBB L#1 E
1966	21	6	HP Car F MBB L#1 E

Key to Table III

HP—High Price
Car—Carolina
F—Farmers
B—Banner
MBH—Moore's Big Henderson
A—Alston No. 1
Coop—Coopers
P—Planters
E—Ellington
L No. 1—Liberty No. 1
MBB—Moore's Big Banner
G-B—Golden Belt

(Not in Joint Stipulation nor in Liberty stipulation. But, as above stated, in Board stipulation and Ellington stipulation, par. 31. Apparently fully supported by record.)

32. The Cooper's Warehouse was damaged by snow in 1959 and razed after the 1960 season. Its selling time has since been apportioned among the remaining 21 warehouses presently on the market.

(This happens to be in Joint Stipulation, par. 23 A, and is in all three other stipulations, par. 32 (par. 31, Liberty).)

33. The following table (Table IV) shows the names of warehouses controlled by each of the six firms presently in the market, together with the use to which each of the 21 warehouses listed was put in the year 1965:

Table IV

Liberty warehouse firm:	
1. Liberty #1	Operated as sales warehouse.
2. Liberty #2	Green tobacco storage.
3. Robertson's	Green and redried storage.
4. Robertson's & Southerland	Green storage.
5. Dixie #2	Redried storage.
Carolina warehouse firm:	
1. Carolina	Operated as sales warehouse.
2. Golden Belt	Redried storage.
3. Royster-Hight #2	Do.
4. Royster-Hight #3	Do.
Farmers warehouse firm:	
1. Farmers	Operated as sales warehouse.
2. Alston's #1	Sheet Association and parts pool (J.P.Taylor) and green tobacco storage.
3. Alston's #2	Redried tobacco storage.
4. Alston's #3	Do.
High Price warehouse firm:	
1. High Price	Operated as sales warehouse.
2. Dixie #1	Redried tobacco storage.
3. New Dixie	Do.
Big Henderson warehouse firm:	
1. Banner	Operated as sales warehouse.
2. Big Henderson #1	Fram Aire Corporation.
3. Big Henderson #2	Do.
Ellington warehouse firm:	
1. Ellington's	Operated as sales warehouse.
2. Planters	Wholesale grocery.

(Not in Joint Stipulation, but in all three other stipulations, par. 33 (Liberty, par. 32), except that in the Liberty stipulation the Liberty Warehouse portion of the table has the qualification that the storage by Liberty #2, by Robertson's, and by Robertson's and Southerland, was temporary storage. This qualification is reflected substantially by the immediately following paragraph in the present finding.)

During the 1965 selling season, four warehouses, namely, Liberty #2, Robertson's, Robertson's and Southerland, and Alston #1

were used by purchasers of tobacco for storage of green tobacco pending processing.

(Joint Stipulation, par. 23 B, signed, of course, by counsel for all parties.)

34. Consequently, for the 1965 sales season, 21 warehouses were considered by the respondent Board of Trade in the allocation of selling time. Of these 21 warehouses, only six were actually operated for the sale of tobacco at auction. Combined, those 21 warehouses total 994,800 square feet of floor space. The six operating warehouses have a total of 333,800 square feet of floor space.

(This also is in the Joint Stipulation, par. 24, and also is in all three other stipulations, par. 34 (par. 32 A, Liberty).)

35. Since there were 4,400 baskets of tobacco to be sold per day during the 1965 season, the average square feet per basket of tobacco was 226.04 square feet. If only the floor space contained by the six operating warehouses were counted, the average square feet per basket would then be 75.86 square feet.

(This also is in the Joint Stipulation, to wit, par. 25, as well as in all three other stipulations, par. 35 (par. 33 A, Liberty).)

36. On the basis of the foregoing, a new entrant on the Henderson market in 1965 would have had to build 226.09 square feet of warehouse space for every basket of tobacco he desired to sell. A new warehouse with 56,000 square feet of space (one unit) would receive an allocation of 247.69 baskets of tobacco. If only the floor space contained in the six operating warehouses were counted, a warehouse of only approximately 18,790 square feet would be necessary to obtain 247.69 baskets of tobacco.

(This is not in the Joint Stipulation, but is in all three other stipulations, par. 36 (par. 34, Liberty), although the Liberty and Ellington stipulations in addition include a statistic each as to the "basis"—said statistics being already stipulated and appearing in Finding 34, *supra.*)

Likewise, if one of the six old firms builds a new unit of 56,000 square feet, the total floor space would be increased to 1,050,800 square feet, the average square feet per basket would be increased to approximately 240 square feet, and any other old firm desiring to meet the competition in investment would have to build 240 square feet for every basket of tobacco he would lose to the new warehouse.

(Appears only in Board stipulation, par. 37 A, but merely reflects a mathematical computation which is undoubtedly correct.)

37. [The following finding is binding in haec verba only on

Board respondents, being stipulated in this form only by the Board stipulation.]

In 1955, Ellington was allotted 8.55 percent of the selling time and sold 7.41 percent of producers' sales (RX 13). The lease on Planters Warehouse by Carolina Warehouse expired prior to the 1956 selling season. It was then leased by Ellington. In 1955, no tobacco had been sold in Planters Warehouse. Its lessee, Carolina Warehouse, was allowed by unanimous agreement to use its selling time in the Golden Belt Warehouse, which had been built in 1951 but never allotted any selling time. In 1956, F. H. Ellington requested an allotment of time for Planters Warehouse notwithstanding that it had not operated in 1955. He stated that it was leased to a wholesale grocery concern from July 1, 1956, to July 1, 1957. He also stated on April 24, 1956 (CX 51, p. 2), "that he probably would build another warehouse." [3] Ellington's request was granted six to one (CX 51, p. 3). The other operators on the Henderson Tobacco Market immediately began to add additional units in an attempt to maintain their selling time. They applied for selling time for five warehouses that had already been built but had received no selling time, and other warehouses that were to be built, all for the purpose of maintaining the relative division of selling time that was in effect in the year 1955. A total of nine additional warehouses applied for selling time. Four of these warehouses were new, being Dixie 1 and 2 by High Price Warehouse; Robertson, and Robertson and Southerland by Liberty Warehouse, with the combined floor space of 175,000 square feet built at an approximate cost of $1.50 a square foot amounting to approximately $262,500. The five warehouses already built but never allotted selling time aggregated 206,000 square feet (RX 7, p. 1) which at $1.50 a square foot would be $309,000. The new building and the old building aggregate costs approximately $571,500 to maintain approximately the same proportionate shares of selling time that were in effect in the year 1955. After selling time was granted to Ellington for Planters Warehouse on April 24, 1956, at a meeting of the Directors on July 30, 1956, Mr. Ellington moved for a correction of the minutes of the April 24 meeting by deleting the words "and stated that he probably would build another warehouse" (CX 52, p. 1).

(In Board stipulation only, as above stated, par. 37 B, although substantially supported as to basic matters by exhibits cited therein. The examiner does not regard the motive stated for increasing

[3] Apparently stricken by pen and ink on CX 51, p. 2.

space, reproduced from the Board stipulation, to be the exclusive motive, or as excluding reckless disregard for if not animus toward new entrants. The Board stipulation is binding, of course, on complaint counsel, who are also bound, however, by the same subject matter as covered by a variety of details in the Ellington stipulation, particularly pars. 38–46.)

38. It is convenient to have a chronological summary regarding the allocation of time on the Henderson market from 1949 through 1956. Such a chronological summary is included in the Board stipulation signed by complaint counsel and Board counsel. Since it appears to be substantially correct—certainly, at least, for the purpose of affording a reliable chronological perspective—and since the Board respondents include most of the respondents herein, it is deemed appropriate to annex it to this decision as Exhibit A, deleting, however, an interpolation in the nature of narrative. As appropriately noted in the 1956 portion of the chronology as annexed, said narrative in the stipulation is deleted as outside the scope of a chronology.

39. There was in 1949, and there is now, more space on the Henderson market than is needed for the sale of 4,400 baskets (maximum number) that can be sold on the market on a 5½ hour day.

(In Board stipulation only, par. 39, last sentence. But clearly the fact, and quoted in complaint counsel's argument against the use of nonselling space for time allocation (Proposed Findings, p. 91).)

Power and Control of Board and Members
(Paragraph Six of Complaint)

40. (1) Although respondent Board was organized and chartered in 1949 with the announced and stated purpose of associating together those persons, firms, and corporations interested in the buying, selling, and handling of flue-cured tobacco on the Henderson tobacco market and its tobacco trade territory, and for the purpose of adopting and maintaining reasonable rules, regulations, and requirements as are necessary to promote the honest and efficient conduct of said tobacco business, including the allocation of selling time to each tobacco auction warehouse operating on the Henderson market, it is now and has been since its organization an instrumentality or vehicle for effectuating and carrying out the designs and purposes of its warehouse members who, through the exercise of their voting privileges, possess the means and ability to formulate, adopt, and put into effect any ruling, regula-

tion, system or plan governing the operations of the Henderson tobacco market which they may decide to pursue, including the acts and practices hereinafter set forth.

(Both the Board and Liberty answers do not seem to deny this, but merely allege that the Board and its members have acted reasonably and out of economic necessity. The Ellington answer admits it to the extent "it conforms with the record," a form of pleading favored by it.)

(2) Respondent Board, acting under and through the direction, control and authority of its officers and members of respondent Board, has in the past and now continues to conduct and exercise control over the operations of the Henderson tobacco market under certain by-laws, rules and regulations, prescribed, approved and promulgated by respondent Board, which by-laws, rules and regulations, among other things, allot, apportion, regulate and adjust the selling time among the tobacco auction warehouses operating on the Henderson market. Furthermore, respondent Board passes upon applications for membership and imposes fines and penalties for violations of its by-laws, rules and regulations; and at all times herein mentioned, the Henderson tobacco market has been dominated and controlled and is now under the domination and control of respondent Board, its officers, and members of respondent Board.

(Actually, this subparagraph is admitted by both the Board and Liberty answers except for any implication of illegal activity. The Ellington answer raises the point of being in a noncontrolling minority. The finding refers to "members" of the Board—instead of "respondent members," as used in the complaint.)

Competition. Interstate Commerce
(Complaint, Paragraph Seven)

41. The members of respondent Board herein have been and also are in competition with each other in the purchase, sale, and handling of flue-cured tobacco through the warehouses operated by them for the purpose of conducting auction sales of flue-cured tobacco brought to the market and placed on the various auction warehouse floors for sale at auction, and in the buying and selling of such tobacco for export to foreign countries or for domestic use in the manufacture of cigarettes and other tobacco products for sale and distribution in various States in the United States and in the District of Columbia and for export to foreign countries, except insofar as said competition has been hindered,

lessened or restrained, or potential competition among them and with others, forestalled, prevented, hindered, or suppressed by the acts, practices, methods and policies of said respondents as hereinafter set forth.

(The Board answer admits competition among the operating warehouse firms and admits that the sale of tobacco in the Henderson market is in interstate commerce. It appears to be conceded by all respondents that jurisdiction as to commerce is established in this case.)

Said acts and practices and the implications of said methods and policies, as hereinafter set forth, are in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

(This additional finding, in the nature of a conclusion, is added here by the examiner. See also Finding 42.)

Unlawful Acts

The following findings set forth the actual unlawful conduct and practices found herein. These facts will be set forth in greater detail than in the complaint, and with some supplementation, as well as some exposition.

Combination for Unlawful Ends in Commerce
(Complaint, Paragraph Eight)

42. The warehouse members of respondent Board, acting between and among themselves, and through and by means of respondent Board (as well as its predecessor)—and the respondent Board acting through them—for a number of years past, and particularly since about 1949, have by agreements and understandings between and among themselves, as well as various means and methods, including the reckless disregard of the rights of potential new entrants in particular, constituted a combination designed to carry out and maintain, and a combination which actually did carry out and maintain, in commerce between the several States of the United States and in the District of Columbia, and with foreign countries, an unreasonable hindrance, restriction and suppression of the establishment and operation of market facilities and market opportunities in competition in the purchase and sale of flue-cured tobacco on the Henderson market.

There is, to be sure, no proof of conspiracy apart from action of the Board in its by-laws and its enforcement policies, as well as the usual unanimous consent by its members as permitted by the by-laws, and also the obvious collaboration of members and Board under the cloak of the North Carolina statute governing

tobacco markets (to which may be added the collaboration of Board members with the predecessor Board, particularly from 1947 to 1949). The proof of unlawful conduct is sufficient nevertheless, particularly under Section 5 of the Federal Trade Commission Act, as distinguished from the Sherman Antitrust Act as such.

The acts and practices of respondent Board and its members are set forth in more detail in the Findings following this one.

(The above Finding is largely an elaboration and rephrasing of the material set forth in Par. Eight of the complaint.)

Creation of Restrictive By-Laws
(Complaint, Paragraph Nine (1), (2), and (3))

43. Respondent Board and its members have created and adopted by-laws—particularly by a provision in its "unit" system allowing new entrants no more than one unit of time for warehouse space exceeding one unit, more particularly by the repeal of the "two-thirds" allocation rule thus permitting established warehouse firms to increase their time drastically by adding non-selling warehouses and thereby decrease the time of new entrants, and also by deficient definitions as to suitable, available, and necessary warehouses—for the purpose or with the intent or effect of

(1) Restricting, preventing or foreclosing firms, persons and corporations from engaging in the tobacco auction warehouse business on the Henderson tobacco market, particularly as set forth in (2) and (3) hereof.

(2) Discouraging or preventing firms, persons and corporations—particularly potential new entrants—from erecting, building or operating new tobacco auction warehouses on the Henderson tobacco market.

(3) Discouraging or preventing firms, persons and corporations—particularly established firms with limited capital resources—from expanding their present tobacco auction warehouse facilities thereon (although this is a subordinate consideration in this case except in respect to new entrants after being admitted to the market).

(The above is a rephrasing of Par. Nine (1), (2), and (3) of the complaint.)

The defects in the by-laws may be more fully referred to as follows:

First: There is the by-law provision in respect to the adopted unit system (with its so-called average square footage of space

for a warehouse) whereby a new entrant warehouse, irrespective of size, can on being admitted to the market receive only the one unit of time, no more. See by-laws, Article Four, Section 1–B (CX 1, pp. 6–7). (Although the provision's limitation of a one unit maximum applies to established warehouses also, if they expand, they have expanded mightily, simply by bringing in warehouses not to be used for selling tobacco.)

Second: There is the repeal of the two-thirds allocation rule, which had been in the by-laws, and which largely restricted time allocation to warehouses actually selling tobacco (CX 1, p. 5). The repeal enabled added warehouses selling no tobacco at all to receive allocations of time, with the end result of permitting established firms to enlarge their time by legerdemain, at the expense of new entrants, who would bring in selling warehouses, *i.e.,* warehouses, presumably new, which would actually sell tobacco in return for allocations of time. This repeal of the two-thirds rule is the outstanding overt act in the unlawful collaboration found in this case.

Third: There is the definition in the by-laws specifying as the requirement for allocation of time to a warehouse only that it be "suitable" for the sale of tobacco, and containing only an incomplete definition of the word. Moreover, there is no expressed requirement at all that the warehouse be "available." Finally, there is no provision or control requiring the warehouse be "necessary" to the market, nothing whatever to replace the repealed two-thirds rule, which virtually made it impossible for warehouses to be allotted allocations of time unless they actually sold tobacco.

The Actual Allocation of Time to Warehouses Not Suitable (or Available)
(Complaint, Par. Nine (4))

44. Respondent Board and its members have included or considered to be included as a basis for allocation of selling time, certain warehouse facilities which are unsuitable and/or unavailable for use in connection with the sale of tobacco at auction in the Henderson market—contrary to the provision in the by-laws that warehouses must be "suitable," and contrary to any proper standard that they be "available"—for the purpose or with the intent or effect of bringing about the adverse effects on the tobacco auction warehouse business, on new entrants, and also on established firms, as described in Finding 43 (1), (2), and (3).

(Detailed substantiation for the above Finding will be found in

the discussion below under the appropriate captions as to Suitability and Availability.)

The Actual Allocation of Time to Unnecessary Warehouses

45. More importantly, respondent Board and its members have included or considered to be included as a basis for the allocation of selling time, warehouse facilities for use in connection with the sale of tobacco in the Henderson market which were completely unnecessary (whether suitable and available or not)—for the purpose or with the intent or effect of bringing about the adverse effects in the tobacco auction warehouse business, on new entrants in particular, as described in Finding 43, *supra*.

This has brought about a situation where there are three times as many warehouses and three times as much warehouse space in the Henderson market as required to sell the tobacco actually sold, and whereby the unit of time available to a new entrant is worth one-third of the unit available prior to repeal of the two-thirds allocation rule, which had prevented such expansion designed to obtain unrealistic time allocations to the established firms.

(See Findings 27 ff., *supra*, and discussion below entitled Repeal of the Two-Thirds Rule.)

(The subject of unnecessary space completely permeates this case, and is inextricably intertwined with the unit system, signaled out in the complaint, as it was actually employed and implemented in the Henderson market. This issue underlies and underscores all other issues herein. It is the subject of voluminous proof offered and stipulated by parties on both sides. It was the sole subject of the oral argument herein.)

Effects on Competition
(Complaint, Paragraph Ten)

46. The aforesaid agreements, understandings and planned common course of action, together with the acts and practices of respondents, and each of them, as hereinbefore alleged, have each and all operated to prevent a substantial volume of tobacco from being sold or purchased by persons, firms and corporations who sought to compete, or who were already engaged, in the market operations of the Henderson tobacco market, and thereby unduly and unreasonably hindered, restricted, suppressed and prevented competition in the sale and purchase of tobacco at auction on the Henderson tobacco market. Among the specific effects in this respect are the following:

a. Discouraging and preventing by Board by-laws new entrants, in particular, from bringing warehouses into the market, by (1) permitting the established firms to add an inordinate number of unnecessary warehouses, thus giving the new entrant a bogus unit (through repeal of the two-thirds rule), (2) not defining suitable and available warehouses properly, further contributing to the debasement of the new entrant's unit, and (3) not giving new entrants any credit beyond the one illusory unit of time even for space in excess of a unit.

b. Depriving new entrants in particular from receiving a fair share of tobacco selling time by counting against them, contrary to the by-laws, or proper standards, unsuitable or unavailable warehouses, or both, even assuming that they are necessary warehouses—thus entrenching the character of the debased unit offered them.

c. Limiting the choices of growers in the Henderson market area in selecting warehouses to sell their tobacco.

d. In general, exercising unreasonably the control vested in the Board and its members by North Carolina statute, including bringing about adverse competitive effects on established firms, as well as new entrants (including the two groups admitted to the market).

(Findings 43, 44, and 45 and discussion below under appropriate captions.)

UNIT SYSTEM

(*New Entrants Limited to Single Time Unit, Etc.*)

The discussion under this caption is largely limited to the by-law provision which is part of the unit system, that new entrant warehouses or added warehouses are not entitled, irrespective of size, to selling time allocation in excess of one unit each. The question of unnecessary warehouses is treated under the caption Repeal of the Two-Thirds Rule, *i.e.*, immediately after the present Unit System discussion. The discussion as to suitable and available space follows thereafter under appropriate captions.

The present discussion, although it concentrates on the unit limitation, as above stated, goes somewhat in depth by describing the origin, in the Henderson market, of the unit system in general, and its actual operation among warehousemen, old and new.

In doing so, the present discussion follows fairly closely the order of presentation in complaint counsel's discussion in their

proposed findings, etc. (pp. 29–59), except where complaint counsel occasionally stray, as is natural, into the questions of unnecessary warehouses, or unsuitable and unavailable warehouses.

By following the order of complaint counsel's presentation, and noting their page numbers, it has been possible to avoid repeating some of the less important record citations given by complaint counsel. It has also been found unnecessary to repeat salient record citations already contained in the examiner's formal Findings of Fact, *supra*.

Complaint counsel have proposed a finding (pp. 29–30) which the examiner has largely adopted in substance by finding herein that the special limitation (in the general unit system provided for in the by-laws) whereby a new or added warehouse irrespective of size is entitled to no more than one unit of time, was inserted for the purpose or effect of preventing or discouraging the entry and erection of new tobacco warehouses brought in by new entrants.

The by-laws promulgated by respondent Board in 1949, were adopted by unanimous consent, or without dissent. However, contrary to proposals of complaint counsel, the examiner does not name as parties to the cease and desist order issued herein either of the two new entrants or groups admitted to this market, to wit, the Liberty (Robertson) or Ellington respondents. The immediate discussion shows why, particularly in respect to the restriction to one unit, it would be inappropriate to name them as parties to the order. The discussion also comments, and expounds somewhat differently from complaint counsel, on the issue of conspiracy as to these and other respondents.

As stated by complaint counsel, in 1946 and for several years prior thereto, selling time was allotted to the Henderson warehouses by unanimous agreement on the basis of the then existing floor space on the market (pp. 30–31). (See Finding of Fact 23.)

In 1947, however, respondent Robertson entered the Henderson tobacco auction market with his Liberty Warehouse. Its floor space was in excess of 104,000 square feet, the largest preexisting warehouse being 75,000 square feet. Under the floor space plan this would entitle him to 26.53 percent of total available selling time, since the total of all space, including his own, was 392,000 square feet (p. 31). (See Finding of Fact 24.)

Complaint counsel point out that respondent Fred S. Royster testified that this "caused concern among the established operators on the market"; that they considered it "unreasonable" for such a "newcomer" to come onto the market on a fully competitive

basis (R. 881). In the examiner's opinion such concern was quite natural, and standing by itself is no support to the charge of conspiracy.

However, as complaint counsel point out, it is undisputed that upon Liberty's entry into the market new resolutions were adopted which discarded the existing floor space system and adopted a "performance system" (not to be retained for too long). More importantly, the resolution set up the unit system with its incidental allocation of selling time to new entrants, or new space, limited to one unit. It is this limitation which the examiner finds illegal and an unreasonable restraint on trade, principally under the *Asheville* case, since it provides no allowance whatever to a new entrant warehouse for floor space beyond the fixed unit. Moreover, respondents seem to concede the illegality of this system.

Under the unit limitation, only 56,000 square feet, the average space unit (392,000 divided by the seven warehouses, including Liberty) of any new-entrant warehouse could receive selling time, *i.e.*, one time unit. Thus, the Liberty Warehouse of respondent Robertson was allotted only 14 percent of selling time, even though it contained 26.53 percent of total selling space. The remainder of the time was divided among the established warehouses in accordance with their sales during the 1946 season (p. 32 A), *i.e.*, under the "performance system" referred to above.

Respondent Robertson filed suit in the United States District Court, but was unsuccessful. Pending appeal, however, there was a settlement in the form of a written agreement (CX 7), dated August 18, 1949, whereby Robertson, or Liberty Warehouse, was allotted 16 percent of the total selling time, instead of the original 14 percent. The net effect of the agreement was to freeze the allocation of selling time among all warehousemen, including Robertson or Liberty, at least among themselves, to the percentages contained in the agreement (p. 33). (See Finding of Fact 25.)

Following this compromise the then existing Henderson Tobacco Board of Trade was abolished and the present respondent Board, taking a slightly different name, incorporated as its successor. Respondent Robertson was not an incorporator; the incorporators were the same individuals and members of the predecessor Board then operating on the Henderson market (p. 33). (See Finding of Fact 13.)

Respondent Board then promulgated its by-laws, which were adopted without dissent (CX 51, R. 370, 1. 24). The Robertson

(Liberty) compromise agreement is incorporated by reference in the by-laws (Article Four, Sec. 1–D). The limitation to one unit of time is clearly stated (Article Four, Sec. 1–B), as part of the unit system.

As stated by complaint counsel (p. 34), there were three salient provisions in the new by-laws (apart from the two-thirds allocation rule):

(1) They provided for the allotment of selling time to the existing warehouses on the market on the basis of unanimous agreement.

(2) They adopted the unit system for the allocation of selling time upon the entry of a new warehouse or expansion of an existing warehouse, with no additional allowance for space in excess of a unit (the same proviso established by the predecessor Board in 1947 upon Robertson's entry).

(3) They provided for the remainder of the total allotted time, remaining after allocation to a new entry, to be allocated to the existing warehouses in accordance with the agreement of August 18, 1949, above referred to. No provision was made for continuing the short-lived performance system.

Complaint counsel correctly concluded (p. 35) that the restrictive nature of respondent Board's new-entrant proviso, *i.e.*, refusing to give any credit to the size and capacity of a new entrant in excess of 56,000 square feet, the average of all warehouses, is thus clearly demonstrated by the unfairness imposed upon respondent Robertson when he entered the market in 1947, as well as the hindrance which it later imposed upon respondent Ellington when he entered the market in 1953. However, this act of the respondent Board, and its then members, hardly lends support, in the examiner's opinion, to complaint counsel's request that a cease and desist order should be issued herein against the Liberty (Robinson) respondents—or against the Ellington respondents.

Complaint counsel also argue (pp. 36–38) that it is no defense, to the restriction of a new entrant to one unit, that there is a danger of overbuilding, even by pure speculators. The argument is unnecessary since it is settled by *Asheville* that some allowance of time must be accorded for space in excess of the unit. Moreover, in stressing by repetition (pp. 38, 39) a court-used phrase of "equality of opportunity" they appear to be actually thinking more of later events when the repeal of the two-thirds rule debauched the value of the unit to new entrants as against the old warehousemen who added non-selling warehouses.

Complaint counsel continue (p. 39) to dwell on the injustice accorded to the Liberty Warehouse, whereby instead of being treated as a fourth firm with one-fourth of selling time, it was treated as a seventh warehouse with only one-seventh of the time, and even by the settlement agreement received only 16 percent of selling time, although it contained 20 percent of total floor space.

Complaint counsel also cite a further alleged discrimination against Robertson's Liberty Warehouse by a limitation incorporated into the by-laws providing that "no single warehouse building shall be divided for the purpose of being counted as two or more warehouses" (Article Four, Section 1–C, Constitution and By-Laws, CX 1, p. 7). The examiner agrees and finds that this provision, although generally worded, was definitely a deliberately added protection to the established firms—although apparently part of the settlement and compromise with the Board —against any attempt on the part of respondent Robertson to claim excess space on Liberty by dividing it into two units. This seems to be rather clearly demonstrated by the testimony of respondent Turner (R. 386), and a statement at a Board meeting of respondent Fred S. Royster (after Robertson did divide up the Liberty Warehouse (CX 51, p. 4) in the hope of obtaining more time through an "added" warehouse). Consequently, as noted in respondent's own documentary evidence of record (RX 7, p. 2, footnote 8), the warehouse's rear and separated portion containing 48,000 square feet "has never been allotted selling time even though it was requested of the Board of Trade." The examiner agrees with complaint counsel's conclusion (p. 41) that the net effect of such action by the respondent Board was to deprive Liberty Warehouse of a substantial amount of selling time which would have permitted it to sell 423 extra baskets. Complaint counsel arrive at the computation by presenting a very detailed table (p. 42).

However, the examiner points out again, as with other facts connected with respondent Robertson and Liberty Warehouse, that the discrimination against him or Liberty is hardly any support for complaint counsel's contention that a cease and desist order should, because of this, issue against the Liberty respondents. Moreover, neither this proof nor any other proof so far considered is proof of conspiracy or unlawful combination extraneous to the unlawfulness of the respondent Board's action generally—of course through its members named as respondents

here—except, perhaps, from the point of view that members acted unanimously and in obvious collaboration.

Complaint counsel point out (p. 43) that despite this additional restriction placed on Robertson's Liberty Warehouse, nevertheless the largest of the original warehouses, *i.e.*, High Price, having 75,000 square feet, received full credit for its entire space regardless of any unit limitation as applied to newcomers or new space. (See Turner, R. 554.)

Complaint counsel go on (p. 44) to repeat the unfairness of all this to Robertson and his Liberty Warehouse, depriving Liberty of a potential 423 baskets of tobacco, preventing recoupment by partitioning the warehouse, and continuing the procedures despite market changes as time went on.

Complaint counsel devote several pages (pp. 45–51) to an alleged violation by the Board of the 1949 agreement (CX 7), incorporated by reference in the by-laws, that the "division of selling time" specified therein "shall be continued from year to year to tobacco selling seasons," following the 1949 season, unless and until the "discontinuance (without replacement) of the operation of any one of the [existing] warehouses," or the "addition of one or more other warehouses to the Henderson market." It was agreed that on the happening of either of these two events the "agreement as to the division of selling time shall terminate and be of no further effect."

This seems to raise a question, however, not as to time allocations to new entrants, but as to the division of time among the established firms after a new entrant is admitted and given an allocation of time. (Of course, it does relate to a new entrant like Liberty—or, later, Ellington—who is admitted to the market and then shares with the established firms on what may well be an inequitable basis.)

Moreover, the submission by complaint counsel of an extensive tabulation, commencing 1951, of the many warehouses added to the Henderson market, indicates that, in pressing the alleged 1951 agreement violation, they are getting far afield of the immediate question of allowing time for an added warehouse in excess of a unit, and perhaps directly into the field of unnecessary space, dealt with, here, under Repeal of the Two-Thirds Rule, *infra*.

Complaint counsel also use a large number of pages (pp. 52–59) as to the effect of Board procedures on Ellington as a new entrant. In the examiner's opinion, the presentation is an argument for not including the Ellington respondents in any

cease and desist order. Furthermore, it hardly contains anything of substance indicating proof of conspiracy extraneous to the unlawful by-laws of the Board as such perpetrated by its members acting through it. It does, of course, emphasize facts which sustain the general charge of the unlawful conduct of respondent Board and its members generally in connection with the unit system's provision that a new entrant warehouse irrespective of size may receive only one unit of time. However, complaint counsel again depart from this narrow issue, and get into the question of warehouses being added by established firms to secure allocations of time but not used by them to sell tobacco, and actually used to store tobacco or for non-tobacco purposes, a subject dealt with here separately.

Complaint counsel set forth (p. 52) a table showing that the Ellington position in respect to selling time has remained stagnant through the years commencing with entry in 1953—with only two significant increases, one of 27 baskets and the other of 35 baskets. The table in discussion is prefaced with the remark (p. 51) that in view of the discriminations practiced by the original firms, it is "no surprise" to find that Ellington experienced little growth over the years. This may be true, but in the examiner's opinion, the small increase in growth is attributable more to the modification and repeal of the two-thirds rule with the resultant enormous increase in unnecessary warehouses.

Complaint counsel also contend (p. 53) that respondent Turner, an officer and president of respondent Board, used his mathematical calculations as to what Ellington would be entitled to under the precise formula embraced by the by-laws so as to be able to offer Ellington just a little more and thus obtain his adherence to unanimous consent. In other words, respondent Turner would depict the *lesser* number of baskets which Ellington would receive "under the by-laws" if Ellington did not go along with the so-called unanimous agreement for the year. In the examiner's opinion, this seems to be borne out by the record (see Ellington, R. 1461–62). But it is only indirectly related to the provision in the by-laws that a new entrant or new space could receive a maximum of only one unit of time. It does supply some excuse to Ellington for joining in unanimous agreement and perhaps, therefore, further ground for not naming Ellington in any cease and desist order.

Complaint counsel claim additional wrongs were perpetrated against Ellington—none of them closely connected, however, with the limitation of a new entrant warehouse to one unit. They point

out, for instance (p. 54), how, when Coopers Warehouse was eliminated from the market in 1960, no part of its selling time was passed on to Ellington, although the selling time was divided among all the other firms. They also point out (pp. 54, 55) how Ellington, already squeezed as a new entrant hardly added to his time at all by adding another warehouse, Planters, since his potential total time was reduced by all the many added warehouses brought in by the old-timers, and the actual time awarded him could not "make expenses" (see Robertson, R. 1107, Royster, R. 934).

REPEAL OF TWO-THIRDS RULE

(Measuring Time Allocation)

Originally, Article Three, Section 5, of respondent Board's by-laws contained the following provision (CX 1, p. 5):

> Any concern operating more than one warehouse, may transfer sales from one warehouse to another as they see fit; however, at least two-thirds of sales allotted to any warehouse for that particular season must be sold in that particular warehouse unless the warehousemen agree unanimously to alter this provision.

Obviously, and the hearing examiner so finds, this provision—the two-thirds sales rules—was a protection of the integrity of the system of allotting time according to the amount of square feet in the floor of a warehouse. Time, of course, is the very life blood of the tobacco warehouse industry. This provision recognized that it was to be allocated, except by unanimous agreement, on the basis of "live" space, at least to the extent of two-thirds. In other words, only space actually used for selling tobacco (at least to the extent of two-thirds) could qualify for the allocation of time. Any contrary procedure, or contrary in spirit, could, of course, easily lead to abuse and to the debasement, by a kind of inflation of the time allocation system based on the amount of floor space. Without such a control, a warehouse firm, in order to gain more time or undeservedly retain existing time, might be subject to temptations of an undesirable nature considering the tobacco market as a whole, including, particularly, new entrants. Such a firm might demand time on the basis of warehouses—perhaps brought in for the very purpose of enlarging its time—not only unsuitable or even unavailable, but actually unnecessary to the market, considering the amount of tobacco to be sold, more or less fixed by a number of factors, and considering the space already existing for the sale of such tobacco.

The ⅔ sales rule was therefore a special protection, if possibly only by happenstance, to a newcomer like Robertson of Liberty who, although allowed for a new warehouse only a unit credit at maximum, might well think that he could depend on its being a unit commanding an allocation of time based largely on actual selling space, and not on non-selling space used for tobacco storage, or for storing pickles, and possibly even for manufacturing. Without the ⅔ sales rule warehouses might be brought in by the established firms for non-selling purposes—after admitting new entrants like Liberty and Ellington—in order to enlarge the total balance left over after assigning even limited time to any such new entrants. Such non-selling warehouses could thus be used not only to enlarge the time percentages of the particular old-timers bringing them in, but to whittle down the percentages of the new entrants admitted as newcomers.

It may also be interpolated here that, apart from being a guarantee against loading the market with unnecessary warehouses, the ⅔ sales rule was obviously a built-in control against admitting or retaining unsuitable or unavailable warehouses.

Be that as it may, the examiner construes the ⅔ rule as the respondent Board's own measure of propriety for controlling the expansion of space, and its own standard and method of allocating time based largely—to the extent of two-thirds—on space used to sell tobacco, *i.e.*, necessary space.

The fact is that so long as the ⅔ sales rule remained in effect—even after being modified, as was to happen in 1953—it seems to have served as a deterrent to bringing in additional warehouses used prior thereto as storage warehouses, for instance, and then claiming and receiving allocations of time on them. (See Turner, R. 392–97.) Golden Belt Warehouse (later named Royster-Hight No. 1) had been built in 1951 and from its inception used as a storage warehouse by the Taylor Company, a tobacco leaf processing firm, under a five-year lease. It was never given an allocation of time until 1955, as will be expounded below in chronological order, when the ⅔ rule was completely repealed.

There were also five other warehouses around of the storage variety—built in 1951, 1952, and 1954 (one)—but never given an allocation of time until the 1955 repeal of the ⅔ rule, as will also be expounded below in chronological order.

Modification of the ⅔ sales rule was effectuated in 1953. It was a serious change, although not completely crippling, in actual operation, to the sound allocation of time.

Curiously, but perhaps understandably in a market unfriend-

ly to newcomers, this modification was not effectuated until the second newcomer came into the Henderson picture, namely Ellington with a new entrant application for membership submitted in 1953.

Immediately after the application by Ellington, two established warehouses applied for additional selling time on the basis of two additional warehouses, built for selling tobacco (Turner, R. 398), which they placed on the market. The additional warehouses were Henderson No. 2 (Moore), with 39,000 square feet, and Liberty No. 2 (Robertson), with 50,000 square feet.

At a meeting of respondent Board on May 23, 1953, a motion was unanimously adopted modifying the ⅔ sales rule, so that instead of applying the ⅔ mandate, a payment of $1,500 could be made to respondent Board for the privilege of transferring selling time from one warehouse to another, or the rent received for the non-selling warehouse during the tobacco selling months, whichever was greater (CX 27, pp. 3,4). The motion was made by respondent W. J. Alston, Jr., and seconded by respondent Fred S. Royster. The money was to be spent for advertising, and any of the fund not so expended during the season was to be disbursed to member firms proportionately.

The examiner finds that this payment requirement into a fund for the benefit of all warehouses was an express demonstration, however indirect, by respondent Board itself of the general trust character of the allocation of time based on amount of space, and was a reaffirmation, however partial and limited, of the principle of the limitation on the use of non-selling space contained in the original ⅔ sales rule.

On the basis of this modification of the ⅔ rule, nevertheless, not only would Big Henderson No. 2 and Liberty No. 2, referred to above, sell no tobacco in the 1953 season, although receiving an allocation of time, but the same was true of Coopers Warehouse, which had also been built to sell tobacco.

As appears by the Board minutes of August 3, 1953, respondent Turner stated that his firm would not operate Coopers, that is would not sell tobacco in it, and respondent Robertson stated that his firm would not operate Liberty No. 2. Respondent Moore had previously advised that his firm would not operate Big Henderson No. 2. Each of the three firms paid $1,500 to the "advertising fund" for that year for receiving an allocation of time based on non-selling space (CX 28, pp. 1,2; R. 393,4, 1063,4).

In 1954, the same modification of the ⅔ sales rule was continued, apparently by unanimous vote, although the minutes

stated merely that the motion was "carried" at a Board meeting (CX 31).

In 1954, Planters Warehouse—also built to sell tobacco and so used (R. 398, 401)—was added to the three non-selling warehouses referred to above. Pursuant to the continuation into 1954 of the 1953 modification of the ⅔ rule, Carolina Warehouse (then Fred Royster, etc.) paid $1,500 for the privilege of not having to conduct sales in said Planters Warehouse (Royster, R. 892, 918, 919).

Thus, for the 1954 season, out of a total 12 warehouses, only eight, including Ellington Warehouse and Liberty No. 1 (Robertson), actually sold tobacco; and four warehouses, including Liberty No. 2 (Robertson), did not sell tobacco.

This, in the examiner's opinion, was an ominous situation, if not yet a disastrous one. As a result of the modification of the ⅔ sales rule and watering down of the built-in control therein set up by the Board itself, selling time was now being allocated to four warehouses not selling tobacco at all, as against eight which were selling tobacco. Moreover, two of the warehouses added by the firms on the market were new structures, foreshadowing a possible building war.

One of the obvious results of this addition of warehouses receiving time but not selling tobacco, was to put the "squeeze" on Ellington, whose newcomer's unit, limited as it was in nature, was worth less than anticipated. This adverse effect was not too obvious on old-newcomer Robertson (Liberty), who finally, despite all prior obstacles by the old-timers, got some additional time by bringing in a brand-new warehouse, Liberty No. 2.

The added warehouses of the established firms also served as a threat to all would-be newcomers that not only would they be confined to one unit irrespective of the size of the warehouse, but that the space entitlement could be diminished by increased non-selling warehouses added by established warehousemen. Of course, it was never contemplated by the established firms that new entrants would be allowed to come in with non-selling warehouses brought in merely for the purpose of obtaining additional units of time each.

The only possible stabilizing factor (apart from the $1,500 required payment) about the modification of the ⅔ rule as it worked out, was that the non-selling tobacco warehouses which received time thereunder were at least not in origin merely tobacco storage warehouses.

The ominous situation brought about by modification of the

⅔ sales rule came to a heady climax in 1955, when the question became one of allocating time to a storage warehouse, namely, Golden Belt Warehouse (later called Royster-Hight No. 1), heretofore referred to. It happened that Carolina Warehouse (Fred Royster) was having trouble continuing its lease on Planters Warehouse, which 1953 newcomer Ellington, trying to improve his precarious position, was to eventually obtain, on lease. Carolina Warehouse, in order to solve its problem, on respondent F. S. Royster's proposal, obtained consent, without a dissenting vote, at a Board meeting held on April 5, 1955, to substitute Golden Belt Warehouse for Planters Warehouse (CX 36, pp. 1,2).

Ordinarily, it would seem not too difficult for Carolina to obtain permission by paying $1,500 on unanimous consent, to be allowed time on an additional warehouse. It had no difficulty in obtaining such permission, by paying $1,500, to be allowed time on Planters Warehouse without selling tobacco therein, as we have seen.

But, of course, factually there was a great difference between Golden Belt and Planters. Golden Belt was definitely a storage warehouse and no tobacco sales had ever been held in it. As already pointed out, from the time it had been built in 1951 it had been exclusively used for a tobacco storage warehouse by the J. P. Taylor Company under a five-year lease.

To further modify the ⅔ sales rule by suspending it, even on unanimous consent, in respect to such a storage warehouse would completely and unalterably challenge the very sanctity and virility of the ⅔ rule as a regulator and control of the fundamental operating validity of the allocation of time based on warehouse space in a market selling tobacco. Such further modification, operating in favor of adding storage warehouses or warehouses not selling tobacco, would seem to open the door wider to unbridled expansion, even by a building war, on the part of established warehouses.

It would mean that a tobacco storage warehouse, or any kind of warehouse, could be brought into the market and counted for selling time although not used to sell tobacco, provided only that it could be shown to be suitable for tobacco selling under the relevant provision of the by-laws, and perhaps also available, and provided, of course, a sufficient vote was obtained.

This potential danger of further modification, or complete emasculation, of the ⅔ sales rule is not, to be sure, spelled out in the relevant minutes of the Board warehouse meeting of April 5, 1955. As is true of all other minutes of the Board, they are

fairly cryptic and not too revealing. There are, however, laconic references (CX 36, p. 2) such as that respondent Moore stated he "might add to his house," C. J. Flemming stated that "warehousemen should stop building," and respondent Turner stated that his "firm would be unable to take any more cuts" (an allusion, no doubt, to time cuts his firm had sustained by the adding of warehouses by others, and possibly to his belief that retaliation was justified).

The minutes, it is true, directly speak of the question as being whether or not existing firms should close some of their warehouses and each sell through one warehouse (CX 32, p. 2), *i.e.*, as a superior and more efficient sales method. Whatever merit to the argument of efficiency, the examiner cannot help but infer, considering the tie-in with the allocation of time, that it was a somewhat thin disguise and cover, even if not fully understood by all, for the real driving purpose to permit those who could afford to add warehouses to accumulate more time thereby at the expense of competition, actual and potential.

Whatever the question as understood by the parties, the result, in the examiner's opinion, is much the same for the purpose of determining whether or not any action taken at this and subsequent meetings, or any lack of action, was a step in unlawful conduct in unreasonable restraint of trade.

The fact is that at least one warehouse member, respondent W. J. Alston, Jr.—actually a rather mild-mannered person, as was evident at the hearing—is reported by the minutes (CX 36, p. 2) as stating, as to "closed," that is, non-selling houses:

> * * * that in his opinion this was possibly detrimental to the market.

The minutes state that respondent Turner said, on the contrary, that it was beneficial, because of the extra expense to warehouses and buyers resulting from sales in all 12 warehouses. Respondent Fred S. Royster, who with his experience and acumen could not have failed to realize all the implications, also stated, according to the minutes (*id.*), that it accorded with general practice on all multiple sales markets.

However, Mr. Alston still did not give his consent even at an April 9, 1955, meeting (CX 37, p. 1), and at the April 23, 1955, meeting the minutes show that (CX 38, p. 2) a statement was read signed by him that the 1955 sales should be conducted strictly "in accordance with the by-laws." This made final the position of Mr. Alston (and his father).

The minutes then go on to state that respondent Fred S. Royster stated that this was the only Board operating on unanimous rule and "that he felt we should leave the unanimous rule." He also stated that "Stabilization Corporation would need a great deal of space for green storage as well as re-dried storage," thus pointing to a profitable use for non-selling space—space which at the same time might be utilized to obtain an allocation of selling time.

Respondent Robertson stated, however, that he "hated to leave the unanimous rule" (*id.*)—thus expressing, it would seem, well-founded fears as to the possible effect on newcomers at being left at the mercy of a majority of the Board members—in other words, the established firms—with no protection whatever from a two-thirds sales rule or any other control subject to change only by unanimous vote of the members.

The record shows that after this meeting was over there was informal discussion among the members, and it is not difficult to infer that some "deals" were made.

In any event, the minutes show (CX 39) that there was a meeting of the Board of Directors later in the evening of the same day and that the Board of Directors totally rescinded and repealed the two-thirds rule contained in the by-laws. This made unnecessary the obtaining of any unanimous consent from the members to continue the 1953 and 1954 modification of the rule for the year 1955 or for any other year.

In the examiner's opinion, it makes little difference what motive, or group of motivations, controlled this action—accommodation to the Fred Royster interests; economy for the warehouse industry by conducting sales only from selected warehouses; the gnawing desire to add further discouragement to new entrants and sew up things for the firms already in the market by giving them an extra edge in obtaining time. The indisputable fact is that respondent Board acted at the behest of its members in reckless disregard for newcomers already hemmed in by an inelastic single unit provision, and in reckless disregard of the ultimate interest of all warehousemen and the existence of healthy competition.

The motion to rescind or repeal the ⅔ sales rule was made by respondent Fred Royster and seconded, it is interesting to note, by respondent F. H. Ellington, the 1953 newcomer. It was carried by a vote of 5 to 1, Alston voting against and respondent Moore not voting (CX 39, p. 1). Those voting for it were respondent Robertson, the 1947–49 newcomer (despite his prior fear of giving up unanimous rule), respondent F. H. Ellington, the

1953 newcomer, respondents Fred Royster and Turner, and also J. N. Smith.

Four of the five of those voting to eliminate the amendment had immediate personal gains (Turner, R. 408,9): Respondent Fred Royster obtained his immediate objective of having Golden Belt (Royster-Hight No. 1) draw selling time without holding sales on the premises, and of also collecting rent from it as a storage warehouse—an arrangement he was also to work out in respect to Royster-Hight No. 2 and No. 3. Respondent Turner did not have to pay the Board for keeping Coopers Warehouse "closed" during the year 1955. Respondent Robertson did not have to pay for keeping Liberty No. 2 closed for 1955. Respondent Ellington could bring in Planters (having obtained the lease he desired on the premises) and without having to hold sales in this warehouse.

Thus, for personal gain, apart from any other reason—which, of course, is no offense of itself—these four respondents, clearly trustees under sanction of North Carolina statute, were willing to act, as they did, in reckless disregard of the interest of the Henderson tobacco market in possessing a sound time allocation system such as the built-in safeguard provided for by the ⅔ sales rule, and in reckless disregard of the rights of new entrants.

Moreover, they acted with the clear acquiescence of all the respondent warehouse members—except Alston and only possibly except Moore, so far as the record shows—all of them also trustees or fiduciaries by reason of the extraordinary power granted by the North Carolina statute, all of them standing to gain personally and all of them acting in reckless disregard of a sound time allocation system and the rights of new entrants.

The said directors and the said members of respondent Board were willing to so act in reckless disregard of potential new entrants, already baffled by an inflexible and unreasonable single unit provision, who would now find even their circumscribed single time unit geared to an uncontrollable and ever-expanding base composed in large measure of presumably unnecessary warehouse space. The examiner construes this reckless disregard exhibited by respondent Board and its members—at least so far as concerns new entrants and vitality of competition generally—as equivalent to and as actually constituting, under all the facts and circumstances herein, unlawful combination and collaboration to stifle new competition on the market and to impair the vitality of all competition on the market.

In view of this finding as to the effect on new competition, it may, to be sure, seem strange to find the two newcomers in the

market, to wit, respondents Robertson and Ellington, both voting in the affirmative for the repeal of the ⅔ sales rule. However, it cannot be overlooked that there were some extenuating circumstances in respect to both. Robertson certainly took a beating from the very beginning when his huge Liberty Warehouse was held to a single unit maximum, which he was unable to increase even by actually dividing the structure into two warehouses. Ellington's single time unit for his warehouse was immediately diluted in value by the addition of non-selling warehouses which received time, so that Ellington, in bringing in Planters, was simply trying to supplement the meager time he had.

At the risk of repetition, it must be stated and found that the vice and recklessness of the repeal of the two-thirds sales rule by the board of directors—aided and abetted by the warehouse members generally, numbering not too many more than the directors in this closely-knit organization—was not the mere nullification of the rule as such but the breakdown of the entire morale of the Henderson market and a decisive blow to sound competitive conditions. This recklessness obviously resulted in encouraging frantic additions to their holdings by the established warehouses, so as to compensate for cuts in time immediately resulting not only from admitting the two newcomers but also from allowing additional warehouses by some established firms (which warehouses also reduced the time of the newcomers).

The repeal of the ⅔ sales rule heralded, and in large measure propelled, an expansion comprising not only a building war, but, even more, an uninhibited invasion into the market for the sole purpose of obtaining selling time by already-built warehouses actually catering to the tobacco storage business. Once the repeal of the ⅔ rule started things really going, the inevitable chain-reaction took place. The tobacco storage business, at least by change of ownership or lease of the warehouses concerned, became part of the tobacco selling market—not to sell tobacco, but to receive allocations of selling time.

Thus, not only Golden Belt Warehouse (Royster-Hight No. 1), the immediate beneficiary of the repeal, was allotted selling time, but, by July 30, 1956, nine other warehouses were admitted to the market as auxiliaries to established warehouses, making ten in all as new recipients of time (CX 52). Five of these were already-built warehouses, making six including Golden Belt. The other four were new warehouses.

The following is a list of the warehouses, indicating which were new, and the year in which each existing warehouse was built. (It

will be noted that two of the new ones belonged to Liberty (Robertson), already something of an established firm.)

Name of Warehouse:	*When built*
Robertson's Warehouse	New
Robertson & Southerland	New
New Dixie	New
Dixie No. 2	New
Golden Belt[1] (Royster-Hight No. 1) (See footnote re Planters)	1951
Alston No. 2	1951
Alston No. 3	1952
Dixie No. 1	1952
Royster-Hight No. 2	1952
Royster-Hight No. 3	1954

[1] Substituted for Planters, which Ellington took over.

All of these houses received an allocation of time although they were not used for selling tobacco and were generally used to store tobacco. None of these warehouses had ever received an allocation of selling time previously.

With the recognition of the ten additional warehouses, the total floor space on the Henderson market increased from 616,800 square feet (11.52 units) to 1,052,800 square feet (19.31 units), as is shown by the proof herein (see RX 7). This is an amazing increase, particularly considering the adequacy of Henderson space for all sales from 1949 on to the present time, as conceded in the Board stipulation, apparently without disagreement by other respondents, as found herein (Finding of Fact 39, *supra*).

Ironically, as already indicated, Ellington[4]—due to this vast increase of space—gained very little by adding Planters Warehouse, consisting of 28,000 square feet, to his Ellington Warehouse. His gain was only 27 baskets over the 333 (CX 83) to which Ellington Warehouse by itself would be entitled. This was because he was allotted only 360 baskets (CX 84), instead of the 500 baskets for which Ellington Warehouse and Planters had previously carried time allotment. Of course, Ellington did obtain some money gain by reason of the rentals he derived from Planters Warehouse.

Respondent Robertson, of course, or his Liberty group, did quite well, by bringing in the Robertson Warehouse and the Robertson and Southerland Warehouse—both, to be sure, newly

[4] "Ellington" is used interchangeably in this decision to refer to the Ellington Warehouse or an Ellington principal of the firm.

constructed. Moreover, not only did Robertson (Liberty) obtain additional time but also additional rentals, *i.e.*, from J. P. Taylor Company for tobacco storage, amounting to about $7,000 a year (R. 1090).

The 22 warehouses which were allocated time in 1956 decreased to 21 in 1961 due to the elimination of Coopers, which was razed by reason of snow damage; and the seven warehouses actually selling tobacco decreased to six warehouses. Those not selling tobacco remained at 15, as they do now.

Thus, due to the modification and ultimate repeal of the ⅔ sales rule, over two-thirds of the warehouses for which time was allocated do not sell tobacco at all, and *less than one-third of them do sell tobacco.*

Moreover, hardly more than one-third of the actual selling space (belonging to the six warehouses) accounts for the selling time allocated, with almost two-thirds accounted for by nonselling space. Thus, in 1965, out of 944,800 square feet considered by respondent Board in allocating time, only 333,800 [5] square feet (six warehouses) represented space on which tobacco was sold. (See Finding of Fact 34, *supra*, as stipulated.)

The following tabulation shows how only one warehouse in each of the six groups of 21 warehouses, operating today, is used to sell tobacco.

Warehouse uses—1965

Liberty warehouse firm (Robertson):	
1. Liberty No. 1	Operated as sales warehouse.
2. Liberty No. 2	Green tobacco storage.
3. Robertson's	Green and redried storage.
4. Robertson's & Southerland	Green storage.
5. Dixie No. 2	Redried storage.
Carolina warehouse firm (Royster-Hight connection):	
1. Carolina	Operated as sales warehouse.
2. Golden Belt (Royster-Hight No. 1)	Redried storage.
3. Royster-Hight No. 2	Do.
4. Royster-Hight No. 3	Do.
Farmers warehouse firm (Alston):	
1. Farmers	Operated as sales warehouse.
2. Alston's No. 1	Sheet Association and Parts Pool (J.P.Taylor) and green tobacco storage.
3. Alston's No. 2	Redried tobacco storage.
4. Alston's No. 3	Do.

[5] This, in the examiner's opinion, is a remarkable reversal of the two-thirds rule—actually standing the rule on its head, although the fractional resemblance is, of course, purely coincidental.

High Price warehouse firm (Turner):
1. High Price ..... Operated as sales warehouse.
2. Dixie No. 1 ..... Redried tobacco storage.
3. New Dixie ..... Do.

Big Henderson warehouse firm (Moore):
1. Banner ..... Operated as sales warehouse.
2. Big Henderson No. 1.... Fram Aire Corporation.
3. Big Henderson No. 2.... Do.

Ellington warehouse firm (Ellington):
1. Ellington's ..... Operated as sales warehouse.
2. Planters ..... Wholesale grocery.

(See Finding of Fact 33, *supra*, as stipulated by respondents.)

Thus most of the 15 warehouses not selling tobacco in 1965 were engaged in storing redried tobacco—*i.e.*, tobacco already processed by the Taylor Company and contained in kegs (see oral argument transcript)—a few were engaged in storing green tobacco pending processing, and a few were in completely nontobacco pursuits. The situation may be tabulated as follows:

Use of nonselling warehouses, 1965

	Storing redried tobacco	Storing green tobacco	Nontobacco purposes
Liberty group (Robertson)	[1] 1	2	
	1	[1] 1	
Carolina group (Royster-Hight)	3		
Farmers (Alston)	2	[1] 1	[1] 1
High Price (Turner)	2		
Big Henderson (Moore)			2
Ellington			1

[1] Partly.

It is conceded in this case that a new entrant coming in now would have to build 226 square feet of floor space in order to receive one basket of tobacco. (See Finding of Fact 36, *supra*, as stipulated by all parties.) Obviously, considering present day building costs and limitations on warehouse income, this is an intolerable hindrance to new entrants.

Two experienced North Carolina tobacco marketeers, Mr. Clark from the Wilson market (R. 1003), and Mr. Day from the Asheville market (R. 1242,3), testified that they would not consider entering a market under these conditions. A warehouseman's income derives from three sources—a weighing charge, an auction

fee, and a commission based on the price that the tobacco brings. All three charges are fixed by state law (Turner, R. 461; CX 131, pp. 1,2 through CX 150, pp. 1–2). Cost of warehouse construction, according to testimony, may well be over $1.50 per square foot, and at least that according to Fred Royster (R. 856). Respondent Ellington testified that a newcomer could not come in the market in face of present costs, considering fixed commissions and fees (R. 1326–27). Robertson testified he could not come into the market today under these circumstances (R. 1232–33). Moreover, of course, as already fully demonstrated, a new entrant is always faced with the possibility that operators will add warehouses, thus reducing the meager time for allocation of baskets a newcomer can now anticipate, *i.e.*, one basket for 226 square feet of construction.

Threat of the addition of further warehouses, even without building new ones, is very real. This is because there are other warehouses around, but not, or not yet, admitted to the market. Examples are Hight's Warehouse, Big Four No. 1, and Big Four No. 2. Board minutes of April 17, 1956 (CX 50, p. 2), show these three houses included by name in a tentative list of "all houses" together with respondent Turner's proposed basket allocation for each. See also a tabulation for the years 1949–65 (RX 7, p. 1), referring to two Big Four warehouses built in 1953 and 1954, and to Hight's Warehouse built in 1956, and stating: "No selling time has *yet* been requested or allotted to these houses" (our emphasis).

Obviously, as the examiner sees it, this situation of uncontrolled space used for allocating time, resulting from repeal of the ⅔ sales rule, is thus further demonstrated to be a far worse obstacle to a newcomer than the Board's rigid and fixed single unit provision itself, as well as a block to vital and true competition among the established warehouses.

The only answer respondent Turner could offer to a question propounded to him (R. 412) as to "the bringing into the market of warehouses which were unnecessary," or which were unsuitable or unavailable, was: "It could be done, but it has to be approved by the Board of Trade and those involved" (R. 412).

But this approval "by the Board of Trade and those involved" is no protection of any substance to the newcomer or potential newcomer. It simply means that the established firms, as against the newcomers, can do about anything they want to do. Nor, for that matter, is it much protection to a minority of firms already members of the Board as against a majority, particularly on a

matter which originally required unanimous consent, *i.e.*, to waive the ⅔ rule controlling time allocation.

That the influx of additional floor space in 1955 and 1956 was wholly unnecessary for the sale of tobacco on the market is self-evident. Actually, Henderson had more than enough floor space for selling tobacco even in 1949. The salient justification for admitting new entrants is, in the examiner's opinion, to ensure that a market will not become stagnant by refusing to receive new blood and to accord with the antitrust laws and basic concepts of fair business methods serving the ends of free competition. It is conceded, on the Board stipulation, as already found herein (Finding of Fact 39):

> There was then (1949) and there is now more floor space on the Henderson Market than is needed for the sale of 4,400 baskets (maximum number) that can be sold on the market on a 5½ hour day.

Moreover, there seems to be a unanimity of opinion that 50 square feet at the most are needed in warehouse construction to display and sell one basket of tobacco. Turner stated in his testimony 30 to 45 square feet (R. 462–64). Fred Royster stated 45 square feet (R. 851,2). Clark, of the Wilson market, stated 35 to 50 square feet (R. 1013–14).

We have already seen that a new entrant upon the Henderson market in 1965 would have to build 226 square feet, actually 226.09, of warehouse space for every basket he desired to sell (Finding of Fact 36, *supra*, based on stipulation). Moreover, a new warehouse with 56,000 square feet of space, or one unit, would receive an allocation of only 247.69 baskets (*id.*). Contrariwise, if only the space of the six tobacco selling warehouses were counted for time allocation, a warehouse with 18,790 square feet, hardly more than one-third of the 56,000 square feet, could obtain the same number of baskets, *i.e.*, 247.69 (*id.*).

Accordingly, the examiner is firm in his opinion that the allowance of selling time for warehouses unnecessary for the sale of tobacco at auction is, as contended by complaint counsel in their proposed findings (p. 95), the broader issue in this case—even broader and more important than the restriction of a new warehouse to one unit of time irrespective of the size of the warehouse.

One defense offered for allotting time on warehouses not used to sell tobacco is that such warehouses are available in case a tobacco selling warehouse is destroyed by fire or condemned by the state for other uses. It is the examiner's opinion that, considering the completely disproportionate amount of non-selling space now used

in allocating time, this defense is simply "the tail wagging the dog."

Something of the same can be said for the defense that tobacco storage space is deserving of allocation of time because it is allegedly a boon to the Henderson market in attracting purchases of tobacco from J. P. Taylor and Company. It is contended that this company buys more tobacco in the Henderson market than in adjoining markets because it has a redrying plant in Henderson needing storage space for both green and redried tobacco.

However, in the examiner's opinion, this is primarily a tobacco storage problem, not a tobacco selling problem, and certainly not an allocation of selling time problem. Connecting it with selling time results in chaos to the market, a far cry from helping the market. Moreover, in Henderson, tobacco storage warehouses fully served their purpose without ever being admitted to the market.

Even Fred Royster, when asked if there is "a real connection between selling time and building storage warehouses" answered that "there is no connection" (R. 1557)—the implied emphasis perhaps being on "building" them.

Mr. Royster also agreed that not all storage warehouses in general have any value to the market, *i.e.*, to justify an allocation of time to them.

Thus he had no hesitancy in agreeing that warehouses having nothing directly to do with tobacco at all are of no value to the market (R. 951), *i.e.*, to justify allocation of time. The examiner believes that such non-tobacco warehouses definitely might well be deprived of any allocation of time.

But Mr. Royster did testify that warehouses storing tobacco—not only green tobacco but even redried tobacco—have sufficient value to the market to justify allocation of time.

As for warehouses storing green tobacco, the examiner sees at least some plausibility in the contention that they are of value to the market, so that perhaps, therefore, they may properly qualify for time, although not necessarily at the same rate as tobacco-selling warehouses. There are, of course, relatively few of these green storage warehouses on the Henderson market, compared to redried tobacco warehouses.

However, as to warehouses storing redried tobacco, the examiner is unable to conclude that they have value to the market justifying time allocation under any plausible theory, and believes that even if they might have any value justifying time allocation it might well be set at some minimum rate. Mr. Royster has so much ownership interest in redried tobacco warehouses in the

Henderson area (R. 912) that he cannot be considered a disinterested expert witness on their value to the market.

(It may be interpolated that the examiner has been making no absolute rulings at this point as to a classification and grading of non-selling warehouses for the purposes of receiving varying allocations of time. Nor is he holding that a warehouse may not qualify for time allocation simply because it is engaged in questionable activities outside the tobacco season. What has been said in this connection may well be considered, however, by the Board and its members in submitting a plan of compliance under the order issued herein.)

Even if the defense as a whole, for allotting time to warehouses not used to sell tobacco, were supported by some economic justification, it must fail. As complaint counsel correctly argue, the practice of allocating time to non-selling warehouses, as indulged in by respondent Board, reduces competition among the warehousemen from its proper basis of services offered the public to competition in financial resources, and, of course, at the same time effectively prostrates new entrants.

The ludicrous and fantastic nature of allocating time to non-selling warehouses is illustrated by Dixie No. 2, a storage warehouse owned by respondent Turner in partnership with Mr. Wilkerson and Mr. Huff (see CX 184). When, on the repeal of the ⅔ sales rule, this warehouse received an allotment of 92 baskets, each of the latter two gentlemen found themselves with an allowance of 30 baskets but with no warehouse of his own to sell it in. The result has been that each of them now offers his allotment to the highest bidder. (See Ellington, R. 1458,9.) Thus the present system permits selling time to run with the man, as well as with a warehouse not to be used to sell tobacco. This could be considered quite funny were it not for the very real injury perpetrated on new entrants by the system which makes it possible.

This injury to the new entrant, or potential new entrant, is that at the very best he receives for his real selling warehouse not a real unit of time, but, if only to repeat what has already been stated in the formal Findings, a bogus or illusory unit of time. He receives a unit that will allow him to sell only one-third the number of baskets he might be able to sell were the two-thirds sales rule fully in effect, or, putting it the other way around, a unit for which he must have three times as much warehouse space, with three times the investment, as he would require under a bona fide system.

Promotion of Unsuitability, Etc.

The repeal of the ⅔ sales rule and its built-in control opened wide the door not only to adding unnecessary warehouses to the Henderson market, but to adding unsuitable or unavailable warehouses, necessary or not.

Obviously, the ⅔ rule, requiring two-thirds of sales allowed to any warehouse be sold in that particular warehouse, meant in effect that the particular warehouse would be suitable and available. Otherwise, the tobacco would not or could not be sold there. This is almost axiomatic.

Respondent Turner agreed to this, namely, that under a provision requiring actual sales in the warehouse drawing time allocation, it is inherently necessary to keep the warehouse "suitable and available" during the tobacco season. As Mr. Turner put it: "If you sell tobacco in it, of course you have to" (R. 412). And he agreed that the repeal of such a provision in the by-laws opens the door to bringing in not only unnecessary but unsuitable or unavailable warehouses—subject only to approval by the Board "and those involved" (R. 412).

Respondent Fred Royster himself admitted (R. 858) that the suitability and availability problem stems from having surplus or unnecessary space. The transcript reads in this connection:

> Q. * * * Based upon your experience and your knowledge in this industry, Mr. Royster, wouldn't it be your testimony that your problems of unsuitability and unavailability actually stem from the fact of having surplus space or having space which is not really necessary for the sale and display of tobacco?
>
> A. Yes, I'd agree with that.

In other words, the repeal of the ⅔ sales rule admittedly opened the door not only to unnecessary space but to unsuitable and unavailable space. If an unnecessary warehouse can be counted for time, even though not suited for selling tobacco, what compelling motivation or inducement is there for really having a suitable and available warehouse, or keeping it so? The answer must be very little, since the chance that any one warehouse will be suddenly required for selling tobacco, say, in case of fire in another warehouse or condemnation by the state authority, is small indeed, particularly when there are so many warehouses in a "surplus" market to choose from.

Moreover, the repeal of the ⅔ sales rule, although not changing or modifying the definition of a warehouse, did reveal the weakness of the definition. The by-laws contain what the examiner regards as a rather inadequate definition of suitability and contain nothing

whatever on availability. So long as time was essentially allotted only in warehouses actually selling tobacco, this was perhaps not too important. But once the ⅔ sales rule was repealed and non-selling warehouses could receive time, it became very important.

The repeal of the ⅔ rule thus called for a strengthening of the definition of suitability and the insertion of a definition of availability. Since this was not done, it called for construing strictly the definition as written, which also was not done.

In the examiner's opinion, this potential for fostering unsuitable and unavailable warehouses is itself indicative—even without proof that it resulted in actually bringing unsuitable or unavailable houses into the market—of the heinousness, in terms of standards of fair trade practice, of removing the control of the ⅔ sales rule and leaving, in effect, no control except the majority vote of established warehousemen, or their Board directors, obviously interested in retaining or enlarging their own percentages of time, particularly as against potential new entrants as well as the only two admitted to the market.

Actually, there is proof in this case that a number of warehouses did receive allocations of time although, even under the wording of the by-laws, strictly construed, they were not "suitable." And there is proof that a few warehouses received allocations of time although they were not actually available during the period in which they received such allocations.

Although the questions of suitability and availability are of subordinate importance in this case, certainly as compared with the question of unnecessary warehouses, they are discussed in the next two succeeding portions of the present decision. The following tabulation, by way of anticipation, summarizes the findings therein. It lists the unsuitable warehouses, evaluated by a strict definition. It includes the unavailable warehouses which happen also to be unsuitable. (There were also other unavailable warehouses.)

Unsuitable Warehouses (Some Also Unavailable [1]):
- Robertson & Southerland
- Dixie No. 2
- Royster-Hight No. 2
- Royster-Hight No. 3
- Alston No. 2 [1]
- Alston No. 3 [1]
- Dixie No. 1
- New Dixie [1]
- Big Henderson No. 2 [1]

[1] Also unavailable, except that Alston No. 2 and No. 3 have apparently been available since 1964 lease expiration.

This concludes the discussion on the repeal of the two-thirds sales rule, actually a discussion of unnecessary warehouses and consequences flowing therefrom.

SUITABILITY

Article Three, Section 5 of the by-laws reads in part as follows:

> A tobacco warehouse shall be a building suitable for selling tobacco with proper lighting, scales, trucks and other necessary fixtures and shall be easily accessible, both to farmers and to buyers, for removing tobacco. Any concern operating more than one warehouse may transfer sales from one warehouse to another as they see fit [; however, at least two-thirds of sales allotted to any warehouse for that particular season must be sold in that particular warehouse unless the warehousemen agree unanimously to alter this provision].

The bracketed portion of the above quotation is, of course, the two-thirds sales rule repealed in 1955. But there is no contention in this case that the repeal as such in any way affected the definition of what is a suitable warehouse. As far as the by-laws are concerned, the definition is the same now as it was before the repeal. Any construction to the contrary would mean that the Board, and its members, in repealing the ⅔ rule also decided to relax the definition of suitability.

The examiner stresses this since, in his opinion, the quoted provision containing the bracketed portion comprehending the ⅔ sales rule, which contemplates warehouses actually engaged in selling tobacco, makes it clear that the "suitable" definition—as adopted in the by-laws together with the ⅔ rule—rightfully means actually suitable, and not merely potentially suitable. It means suitable today, not merely suitable next week or next month.

The conceded proof in this case is that quite a few of the warehouses receiving time allocations have not been suitable in this strict, immediate sense, as above referred to by the examiner, in a number of salient categories relevant to suitability. Respondent Board's defense is that the objectional defects could have been, or can be, remedied within a reasonable time.

However, only if "suitable" is construed strictly can it operate as a control against the addition of unnecessary warehouses, brought in merely to obtain allocations of time, and against the overwhelming surplus of warehouse space which has developed in the Henderson market since the repeal, and prior modification, of the ⅔ sales rule.

Accordingly, as is consistent with a strict construction of the word "suitable" as used in the by-laws, and is supported by the

consideration that the same strict construction should be made as a matter of sound business practice in this "surplus" market entirely apart from the by-laws, the hearing examiner rejects the Board defense.

The relevant facts or factors necessary for discussion on this question of suitable warehouses is as follows:

Complaint counsel, on the question of suitable warehouses, have submitted an ingenious and helpful tabulation of all the Henderson warehouses. See their proposed findings, etc. (pp. 113–15). The tabulation has headings or categories, among others, as follows:

Loading ramps or similar facilities;
Rest rooms;
Skylights;
Scales;
Paying office.

Board counsel, for their part, have submitted a careful and detailed discussion of the warehouses in connection with the question of suitability (and also availability).

Although the submissions of each side were filed together, each covers these five categories, in connection with the question of suitability, as listed above, to wit, loading facilities, rest rooms, skylights, scales, and paying office. Board counsel also state as to most of the warehouses discussed that they were actually built for the purpose of selling tobacco, but the examiner does not regard this as particularly relevant on the question of whether or not the warehouses have been immediately suitable rather than only potentially so.

Moreover, as clearly appears from complaint counsel's tabulation and corroborated by the Board's discussion, as well as the record, every warehouse actually engaged in selling tobacco does, as a matter of fact, qualify as suitable in each of these five categories: loading facilities, rest rooms, skylights, scales, and paying office. (Incidentally, the warehouse actually selling tobacco is the first listed in each group by complaint counsel's tabulation, and the first dealt with in each group by Board counsel's discussion.)

Accordingly, the examiner feels justified in finding or concluding that a warehouse to be "suitable" should be adequately qualified in at least all these five respects, to wit; loading facilities, rest rooms, skylights, scales, and paying office. (Of course, these five categories adopted here for evaluation purposes are not intended to exclude as irrelevant other factors such as parking facilities, etc.)

We shall now review the warehouses with alleged deficiencies

of substance listed in the complaint counsel's tabulation, and discuss them in the order in which they are defended in the Board's proposed findings, etc. (p. 46 ff.).

Liberty Group

Robertson & Southerland—This warehouse is admittedly deficient in skylights, *i.e.*, needs a few more skylights (Robertson R. 992, 1. 19–25; R. 993, 1. 1–8). It was testified, to be sure, that additional skylights when needed can be installed in half a day (Turner, R. 432, 1. 10–13). Even if skylights can be installed as rapidly as this, the examiner finds that the Robertson & Southerland Warehouse is not a suitable warehouse in the strict sense adhered to by the examiner for the purpose of defining the term as used in the by-laws, particularly in the present "surplus" market.

Dixie No. 2—This warehouse admittedly contains no scales and has no paying office; it also has only one door (Turner, R. 432, 1. 14–21; R. 536, 1. 2–8). Although it has no scales, it was built as a tobacco auction warehouse and is equipped with a hole for scales (Moore, R. 640, 1. 9–16). Although the testimony is that the entire situation can be remedied within two days to one week (Turner, R. 536, 1. 9–16), the examiner is inclined to find that, particularly because of the lack of a selling office, the Dixie No. 2 Warehouse should be deemed not suitable for receiving an allocation of selling time while in this deficient condition.

Carolina Warehouse Group (Royster-Hight, Etc.)

Royster-Hight No. 2—This warehouse admittedly does not contain a paying office or any scales (Hight, R. 763, 1. 1–3, 18–19). Moreover, it seems that the skylights are partly sealed off.—Mr. Hight testified, somewhat equivocally, that he did not know whether some of the skylights were sealed off (R. 763, 1. 15–17).—The examiner holds that Royster-Hight No. 2 does not qualify as suitable for the allocation of time while it is in this deficient condition.

Royster-Hight No. 3—This warehouse concededly does not contain rest rooms, scales, a paying office, or a loading ramp (Hight, R. 766, 1. 1–25).—The examiner finds that Royster-Hight No. 3 is not to be regarded as suitable for obtaining allocation of time while in this deficient condition.

Farmers Warehouse (Alston)

Alston No. 2—This warehouse concededly lacks sufficient sky-

lights, and concededly has no rest rooms, scales, or paying office (R. 479). It was testified that additional skylights and the acquisition of scales would take a "couple of days' work" (Alston, R. 607, l. 8–15). As to rest rooms and a paying office, it was testified that the facilities in Alston No. 1 could and would be utilized (R. 607, l. 8–15); but the same was testified as to the equally deficient Alston No. 3. Accordingly, the examiner finds that Alston No. 2 is not to be regarded as a suitable warehouse for the allocation of time while it is (or has been) in this deficient condition.

Alston No. 3—This warehouse also concededly lacks sufficient skylights and has no rest rooms, scales, or paying office (R. 482,3), a situation already partly alluded to in discussing Alston No. 2. In regard to rest rooms and paying office, it was testified, as with Alston No. 2, that the facilities in Alston No. 1 could be used (Alston, R. 607, l. 8–15). The examiner finds that Alston No. 3 is not to be regarded as suitable for the allocation of time while in this deficient condition.

High Price Warehouse Group (Turner)

Dixie No. 1—This warehouse concededly lacks scales, loading ramps and a paying office (Turner, R. 424, l. 22–23; R. 425, l. 15–25). Even if, as testified (Turner, R. 536, l. 9–16), this could be rectified in a week, the examiner holds that it should not qualify for allocation of time while in this deficient condition—applying, of course, as with all these warehouses, a strict definition, as heretofore indicated.

New Dixie—This warehouse concededly lacks rest rooms, a paying office, and scales (Turner, R. 435, l. 20–21; R. 436, l. 6–9). The examiner holds that New Dixie is not to be regarded as a suitable warehouse for the purpose of receiving allocation of time while in this deficient condition.

Big Henderson Group (Moore)

Big Henderson No. 2—This warehouse is claimed to be unsuitable only in one of the categories directly considered herein—namely because a few skylights may be covered (R. 647) by the manufacturing company occupying it, although they apparently could be uncovered in half a day (see Turner, R. 432, l. 10–13), which does not by itself seem to be too substantial a defect. However, the use of the warehouse by the manufacturing company occupying it includes machinery bolted to the floor, so that it seems correct to hold that it is unsuitable considering the skylights together with the bolted machinery.

The machinery bolted to the floor would be expensive and difficult to remove (Moore, R. 695, l. 2), even if this would be at the company's expense as lessee. Moreover, respondent Moore stated that if he should be pressed for the use of one of his warehouses to sell tobacco it was "more likely" (R. 695, l. 14) that he would propose Big Henderson No. 1, which is used by the same manufacturing company but for storage purposes (R. 695, l. 9).

Accordingly, Big Henderson No. 2 is found by the examiner, as above indicated, not to be suitable for the allocation of time while in this deficient condition, even though the main deficiency is only indirectly related to one of the live categories here under direct consideration.

AVAILABILITY

There are a few warehouses which are claimed by complaint counsel to be in the unavailable class. These will be discussed now.

Big Henderson No. 2 (Moore)—This warehouse would seem to be in the unavailable class. It is leased to Fram-Aire, or Fram, a manufacturing concern, which, as already indicated, also leases Big Henderson No. 1, apparently using the latter for storage (Moore, R. 694, l. 14). Machinery is bolted to the floor of Henderson No. 2 under a "permanent arrangement" (Moore, R. 694, l. 23). The machinery could be "unbolted" (*id.*, l. 24), but Mr. Moore—asked if it would not be an "expensive and difficult operation to move it out"—testified that "it would take some money" (R. 695, l. 2). As to possible recapture, the lease (see CX 151) provides that 50 percent of the space will be made available to Moore during the tobacco season on 30 days' notice (CX 151, p. 5). Moore did testify that Fram's moving expense would be its own (R. 695, l. 4), but he apparently does not, in any event, contemplate exercising the 50 percent recapture right. He testified that it is "more likely" (R. 695, l. 14) that if he was forced to give up a warehouse rented out by him, he would exercise his similar 50 percent recapture right to Big Henderson No. 1, used by Fram for storage, since "it would be a little less trouble" (R. 695, l. 9).

Accordingly, as above indicated, Big Henderson No. 2 is found to be unavailable for receiving an allocation of time (and has been so in the past).

New Dixie (Turner)—This warehouse also appears to be in the unavailable class. Its five-year leases, one in 1956 and one in 1961, to the Taylor Company for storing of tobacco have had no recapture clauses at all (CX 169, R. 558; CX 170)—thus making the warehouse quite clearly unavailable.

The 1966 lease (CX 171) of this warehouse has a recapture clause, on 90 days' notice, which is quite long, and the recapture applies to only 50 percent of the space (CX 171, p. 1). Moreover, the Taylor Company would have to be paid all expenses of moving the tobacco to "any other location" (CX 171, p. 2), which even respondent Turner interpreted as meaning anywhere (Turner, R. 1558). Even if a recapture clause applicable to only 50 percent of the space is enough to make the warehouse available, as stated by Mr. Turner (R. 433, 1543), the examiner believes that the moving expense provision in the lease makes the warehouse unavailable, certainly by any strict definition of availability.

As to the recapture clause applicable only to 50 percent of the space—a provision in a number of the leases in this market—the examiner has reservations as to whether or not this makes the warehouse available. In the last analysis, it is not a warehouse which is purportedly made available, but only half a warehouse.

Coopers Warehouse (Turner)—This warehouse is, of course, already out of existence. However, it operated on successive leases to the Taylor Company without any recapture clauses at all (CX 172, covering the period 1954–55; CX 173, covering the period 1955–58; and CX 174, covering the period 1958–61). See also the transcript (Turner, R. 558–60).—It is thus found that Coopers Warehouse, while it was in existence, was not an available warehouse during the years in which it was receiving allocations of time.

Planters Warehouse (Ellington)—This warehouse was leased out by Ellington from 1956 to 1965 on a year-to-year basis without any recapture provision (CX 152). It is now used for storing pickles (R. 1286,7; 1419). The record is silent as to any recapture rights. Thus, it is found that Planters Warehouse was unavailable from 1956 to 1965 while receiving allocations of time, but, on the present record, seems to be available since that time.

Alston No. 2 and No. 3—These warehouses operated on three-year leases to the Taylor Company, for the period 1961–64—the leases containing no recapture clauses (CX 165, CX 168). Since 1964, however, Taylor has been in possession of the warehouses without new leases or, so far as the record shows, without exercising the option to renew contained in existing leases (Alston, R. 477, 1. 16–20; R. 599, 1. 21–23). The examiner finds that the warehouses were thus unavailable in the past although they now appear subject to recapture and thus available.

CONCLUSIONS OF LAW

Respondent Board and its warehouse members have violated Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition, particularly in respect to new entrants, but also in respect to the vitality of the competition generally in the Henderson market. They have unreasonably exercised the power to regulate the Henderson tobacco market conferred by North Carolina statutes, and they have acted in unlawful collaboration. The ultimate violations and unlawful acts of said respondent Board and its members, over all of which the Federal Trade Commission has jurisdiction, are as follows:

I

Unit Limitation

1. The Board and its members have brought about a provision in the Board's by-laws to the effect that a new entrant warehouse, or added warehouse, irrespective of its size, shall be entitled to a *maximum of only one unit of selling time.* So far as concerns a new entrant, this means a restriction upon the allocation of time to *tobacco-selling* warehouses, presumably new warehouses.

2. The time unit, even apart from the limitation contained in this provision, has become completely unrealistic for new entrants, due to the repeal in 1955 of the two-thirds sales rule permitting established warehouses to obtain allocations of time even by adding *non-selling* warehouses, and thus resulting in a tremendous amount of unnecessary warehouse space. See II of these Conclusions. As to unsuitable or unavailable warehouses and their effect, see III hereof.

3. Moreover, the said time unit has similarly become unrealistic because it is based on an average warehouse space unit of 56,000 square feet as established in 1949 before the avalanche of unnecessary warehouses brought about by the repeal of the two-thirds sales rule. See II of these Conclusions.

II

Unnecessary Warehouses

1. The Board and its members first modified and then in 1955 repealed the provision in the by-laws constituting the two-thirds sales rule, which cites the allocation of time to warehouses actually selling tobacco. They thus permitted the established warehousemen to bring into the market a large number of *unnecessary* ware-

houses solely to obtain allocations of time (and collect rents on the side).

2. The Board and its members thus also encouraged the existence and addition of unsuitable and unavailable warehouses—whether necessary or not—which received allocations of time despite their unsuitability or unavailability. See paragraph 5 of this Conclusion II.

3. As a result of bringing in unnecessary warehouses, including those also unsuitable or unavailable, there is now on the Henderson market three times as much warehouse space as is necessary for the sale of tobacco.

4. All of this was, and is, to the prejudice of new entrants, and their participation in the market. This is because their time allocation, already limited to a maximum of one unit, turns out to be a bogus or illusory unit with only one-third of its original time value based on warehouses actually selling tobacco.

In a similar way, it is also to the prejudice of new entrants for a further reason. The reason is that the unit of time extended to new entrants is based on an average of 56,000 square feet fixed in 1949 on the basis, largely, of actual selling space as compelled by the original two-thirds sales rule. The 56,000 square feet figure is unrealistic, and has been for some years, in the present market composed mostly of non-selling warehouse space.

5. The repeal of the two-thirds sales rule by the Board and its members encouraged the entry and existence of nonsuitable and unavailable warehouses—judged by strict standards—since there can be little motivation for keeping unnecessary warehouses in a suitable and available condition. This encouragement of unsuitable and unavailable warehouses by the Board and its members is chargeable to them as an offense even if the result did not actually come about. However, the result did actually come about, as set forth in III of these Conclusions.

6. Moreover, by repealing the two-thirds sales rule, the Board and its members exposed the weakness of their by-law definition of eligible warehouses. The said definition covers "suitable" in only a limited way and does not even mention "available." The definition was satisfactory only so long as the two-thirds sales rule remained unrepealed so as in effect to prohibit non-selling warehouses from receiving allocations of time. To be useful at all, the definition of "suitable" and of "available" must, both in letter and in spirit, be construed strictly.

7. Under a strict construction there have been a very large number of unsuitable and unavailable warehouses on this market and

the Board and its members must be held responsible for them. See III of these Conclusions.

III

Unsuitable and Unavailable Warehouses

1. The Board and its members—by (a) not applying a strict construction of its by-laws and of standards of suitability and availability implied by the original two-thirds sales rule contemplating only tobacco-selling warehouses, and by (b) not amending the by-laws, particularly after repeal of the two-thirds rule, so as to make a satisfactory definition—have, as a matter of fact, permitted allocations of time to be made to a substantial number of unsuitable and unavailable warehouses. They have done so either contrary to the by-laws or contrary to proper standards of suitability and availability, particularly in a tobacco market containing such a large amount of unnecessary warehouse space.

2. Contrariwise, it may be noted that the warehouses found herein not to be suitable or available are not, particularly in respect to suitability, in the deplorable or unuseable condition which has existed in the Wallace tobacco market.

3. Permitting unsuitable and unavailable warehouses to receive allocations of time has been particularly to the detriment of new entrants. This is because the maximum of a single unit accorded new entrants for their tobacco-selling warehouses is whittled down in value by unsuitable or unavailable warehouses for which allocations of time are received by the established warehousemen, particularly those warehouses added for non-selling purposes by the established warehousemen as a result of the repeal of the two-thirds sales rule.

4. Thus the encouragement of and the emergence of unsuitable and unavailable warehouse space by the repeal of the two-thirds sales rule, as referred to in II of these Conclusions, has actually resulted in the addition and existence of such unsuitable and unavailable warehouses.

5. The dereliction of the Board and its members in respect to unsuitable and unavailable warehouses is, however, definitely subordinate to, and largely part of, their unlawful conduct in respect to bringing into the market unnecessary warehouses, resulting from the repeal of the two-thirds sales rules. See II of these Conclusions.

INDIVIDUAL LIABILITY

The order to cease and desist issued herein is essentially di-

rected against respondent Board. It is also, although only in general terms, directed against any member, officer or agent, even if not such at this time, and against any successor or assign.

The present officers are actually named as such, but not in their individual capacities, as proposed by complaint counsel. This follows the holding of this Commission *In the Matter of Wilson Tobacco Board of Trade, Inc.*, 53 F.T.C. 141, 190 (1956). The Board president, who is respondent Turner, and the vice-president, who is respondent Alston, are named individually in any event, *i.e.*, as members of the Board who operate warehouses.

The present warehouse members (except those in the two newcomer groups) are also actually named. They are named individually since they operate as individuals or as members of partnerships.

The Robertson (Liberty) and Ellington newcomer respondents are not actually named. It seems incongruous to the examiner to single out newcomers, who have been the victims of violations herein, by naming them as parties to the order. It would be, particularly as to Ellington, rubbing sore wounds. Moreover, to do so might, perhaps, unnecessarily expose them to legal suits, however thin, based on a theory of "individual liability."

It is true that both sets of newcomer respondents did engage in some, but not all, of the illegal conduct found herein. But they were entrapped by an animus against new entrants that preceded their entry on the market, and also continued thereafter. They were simply trying to survive, as best they could, a system presenting them with an illusory time unit, which even kept diminishing in value. In any event, the public interest does not seem to require that they be named in the order. The public interest is, however, protected by the general reference to members of the Board contained in the order.

Respondent Fred S. Royster is not named in the order. He is not a member of respondent Board and has not been since the end of 1956. His name does not appear in the minutes for years after 1956 (CX 65–CX 80), despite its previous presence prior thereto. The testimony of all witnesses corroborated his nonmembership. (Hight, R. 810,11; 832,3; 777,779,782. F. S. Royster, R. 859,867,1532,1549. F. H. Ellington, R. 1331. Moore, R. 669–670. Robertson, R. 1081,2,1085.)

The examiner does not deem it necessary or appropriate to name a person or firm not a member of the Board as a party against which an order is directed.

Accordingly, respondent Royster-Hight Corporation is not

named as a party against which the order is directed. It too is not a member of the respondent Board. (Nor, of course, is Fred Royster named as such a party, *i.e.*, as an officer, and individually, of said corporation. Nor are W. G. Royster and J. S. Royster named as officers, and individually, of said corporation.) The contrary proposals of complaint counsel are rejected.

It would seem to be an act of dubious necessity actually to name Fred Royster or Royster-Hight Corporation in the order when they are known not to be members of the Board. There has been no sufficient proof actually to put them in the shoes of the Carolina Warehouse partners holding membership in the Board. The proof that the claimed consideration for assigning allocation of time to Carolina Warehouse was only one dollar is inconclusive on this, and in any event was not sufficiently explored.

Moreover, Fred S. Royster is named in the complaint individually only insofar as he is so named, with others, in connection with Royster-Hight Corporation, to wit, "individually and as officers and directors of said corporation." As to naming in an order a corporation officer individually, see *Flotill Products, Inc.* v. *Federal Trade Commission,* 358 F. 2d 224, 233 (1966).

The examiner formed a rather good opinion of Mr. Fred Royster and, although there is no doubt but that he is a sufficient believer in free enterprise to have an eye for his own interest, the examiner doubts that he would do anything unwarranted to frustrate the present cease and desist order. Indeed, he was a forthright critic of the vice of unnecessary warehouses as now rampant on the Henderson market. Moreover, the examiner finds no public interest in adding to factional friction in this market by naming a man of Mr. Royster's caliber as a party against whom the cease and desist order is directed—any more than naming newcomer parties like the Liberty and Ellington respondents.

In any event, the public interest is protected by the general provision in the order making it applicable generally to agents and other intermediaries.

The examiner has considered omitting respondent Alston as a named party against whom the order should issue. There is the outstanding fact that he voted against repeal of the two-thirds sales rule. But he is a member of the Board, is not a newcomer, and has a substantial share of non-selling space.

LEGAL DISCUSSION

Brief and specific reference will be made in this discussion to the *Asheville* case, *i.e.*, in connection with the single unit limita-

tion; and to the *Wallace Tobacco Board* case, in connection with the unsuitable warehouse problem.

This discussion will be devoted mostly to a summary and analysis of the opinion of the United States Court of Appeals for the Fourth Circuit in the *Danville* case, filed January 25, 1967, largely in connection with its applicability to the question of unnecessary warehouses. Discussion is centered on the *Danville* case not because it is by any means regarded as squarely in point in respect to this question, but because it is the latest statement of law governing tobacco warehouse markets and comes from a high and respected court which has decided *Danville* and other tobacco warehouse cases and has appellate jurisdiction from a Commission order issued against the respondents herein.

The examiner is not disposed to assemble or restate the various case citations usually relied on to support lenient rules of evidence in conspiracy or unlawful combination of cases, the applicability of Section 5 of the Federal Trade Commission Act to Sherman Act violations, and the sufficiency, nevertheless, of proof of a Section 5 violation without the proof required for a Sherman Act violation.

I

Single Unit Limitation

Discussion of this point, involving the principle of law that some time allowance must be accorded to a new entrant or added warehouse for space in excess of the average space unit, will be confined to a full citation of the *Asheville* case, to wit: *Asheville Tobacco Board of Trade, Inc.* v. *Federal Trade Commission,* 263 F. 2d 502, 508, 509 (C.A. 4, 1959); *reheard* 294 F. 2d 619 (C.A. 4, 1961).

II

Unnecessary Warehouses
(Repeal of Two-thirds Rule)

Although the question of unnecessary warehouses does not appear to be the dominant one in the latest *Danville* case, above referred to, it is undoubtedly included within the scope of the opinion, so that a case analysis and discussion of the opinion is well warranted, in order to determine just what the holding is, as well as what the case is primarily about. The case may be cited as follows: *The Danville Tobacco Association, et al.* v. *Bryant-Buckner Associates, Inc.* (C.A. 4; January 25, 1967).

In that case the question was the reasonableness of a provision in the Danville plan that a new entrant warehouse should be entitled only to 75% of one unit of time for an average unit of space (there 87,500 square feet). The new entrant can, it may be added, receive proportionately in excess of this for space in his warehouse exceeding the defined space unit—since provision is made for "fractional" parts (p. 6 of typewritten decision)—so that the *Asheville* rule is satisfied. The alleged unfairness apparently is that the new entrant receives only 75% time credit for the presumably new warehouse he brings into the market for the sale of tobacco, as against 100% time credit for the existing warehouses of established firms, including those not used for selling tobacco. (This, of course, is less favorable than the 100% credit a Henderson new entrant receives under comparable conditions.)

However, under the plan, added warehouses by established warehousemen receive only 50% credit for the first unit added, and only 25% for further added units. Thus, as this examiner sees it, even though the new entrant receives only 75% time credit, his time cannot be whittled down in value, by added warehouses *thereafter* brought in by established firms, as drastically as the new entrant's 100% credit in the Henderson market. Secondly, if the new entrant in the Danville market comes in with a warehouse of more than one space unit, then presumably, as this examiner sees it, the additional space is entitled also to 75% time credit, as contrasted with the 50% or even 25% credit to added warehouses by an established firm.

The two considerations just alluded to are not set forth here in order to express a preference for the provision in the Danville plan, giving a new entrant only 75% credit, but merely to set forth counter-provisions in the Danville plan applicable to established firms and tending to mitigate the effect of the limited 75% credit for new entrants.

Whether the present examiner comprehends fully and accurately the 75% time credit for new entrants under the Danville plan, the fact is that this provision, and nothing else, was the real issue in the case.

As the opinion states (p. 3 of typewritten opinion):

> The knot of this controversy is the validity of the constriction placed upon the share allotable to a new warehouseman in the total daily selling time of the market.

Incidentally, it is well to note that the Federal Trade Commission was not a party to the suit. The action was commenced by

the Danville Association to obtain declaratory judgment on the legality, under the antitrust laws, of a plan for time allocation on its tobacco market. All the warehouse members were named respondents. Bryant-Buckner Associates, a 1962 newcomer, referred to by the Court as B–B, was the sole appellant from the ruling of the District Court approving the plan (Opinion, pp. 3–4).

It may also be noted, as the opinion points out (p. 4), that the plan contains an 8% gain or loss performance (experience) provision—a kind of provision which may possibly be of benefit to new entrants.

The opinion goes on to quote what it refers to as the "now pertinent parts" of the Danville plan (pp. 4–6).

It quotes a definition of eligible warehouses as being "suitable in every respect" for selling tobacco "in an efficient manner" and "which is available therefor," and which complies with the "Association Rules and Regulations relating to the construction and maintenance of tobacco sales warehouses" (pp. 4–5). (The definition thus emphasizes true suitability.)

The quoted definition states (p. 5) that a warehouse is available if "determined, on the day when the allocation of selling time is made, * * * that the warehouse is available for that season." (There is an exception for warehouses under existing noncancellable leases.)

It is this examiner's opinion that the definition in the Danville plan, particularly by including a specific reference to "available" together with fixing determination on the day allocation of time is made, is superior to lack of definition in the Henderson by-laws.

The opinion also quotes the provision in the plan as to the 8% performance or experience system referred to above.

Then follows a quotation (pp. 5–7) of the provisions as to new entrant warehouses and as to added warehouses by established firms. The quotation sets forth in detail the limitation of a new entrant warehouse to a 75% credit for time (which we have referred to above), with limitations of 50%, down to 25%, on warehouses added by established firms but not applying to their existing warehouses.

The opinion also notes (p. 2) that the Federal Trade Commission had been invited by the District Court (at the suggestion of the Court of Appeals when this case was earlier before [6] it) to submit a plan in answer to the report which had been submitted to the District Court by its special master (here the respondent

[6] 333 F. 2d 202 (4 Cir. 1964).

Fred S. Royster), which the District Court had in effect adopted.[7]

The opinion states (p. 7), as if to emphasize that the real issue before the Court was the limitation of a new entrant to a 75% credit, the following:

> However, it [the Commission] thought the restriction of a new member to less selling time per space-unit than that allowed the older warehouses was inimical to the antitrust statutes, as constituting an unlawful restraint upon an outsider.

The opinion also summarizes, in one paragraph (pp. 7–8), the Commission's plan, as putting a new entrant warehouse on complete equality with older warehouses, each to get one time unit, or 100%, for the first space unit, 75% for the second space unit, 50% for the third unit, and 25% for the fourth unit—existing warehouses in the market not excluded in applying this formula.

The rest of the opinion, which perhaps may be regarded as the opinion proper, is stated in three parts—I, II, and III. (There is a cryptic part IV of no interest here.)

Part I is by far the longest portion (pp. 8–12), and deals with the 75% restriction on new entrants, not with the Commission's plan as such (p. 8).

Incidentally, this portion of part I challenges the right of B–B to attack the 75% provision. It points out that B–B was actually never subjected to the 75% provision, since B–B had come in under an interim plan, and that it actually "was accorded much more." It also points out that B–B "has been made eligible for the 8% gain or loss provision," not contained in the interim plan. Thus, "B–B has not thus so far been injured" and its apprehensions are "premature and presently academic" (p. 9).

However, "to avoid any chance of incompleteness" and also "for comparison" of the plan with the Commission plan (pp. 9–10), the matter is discussed on the merits by the opinion, particularly the 75% limitation on new entrants.

The opinion then outlines (p. 10) the development after World War Second of "the possibility of wasteful erection of additional warehouses," creating "a problem in distributing selling time." It further states that the "evidence demonstrates that the confinement of a latecomer to less-than-average selling units is necessary in order to maintain the integrity of the market." It states that a tobacco board or association is "in some respects almost a State agency." It states: "Healthy discouragement of surplus building,

[7] The report of the special master, and his further report answering the Commission's plan, are found in 250 F. Supp. 357 (1966).

it has been found, may be achieved to a degree by fairly withholding full participation in the market from a stranger until he proves he is not gambling" (p. 11). It also refers to the 8% gain-or-loss performance or experience system as a provision "not disfavored by the Commission if the initial allocation is not unreasonable" (p. 12).

Then come parts II and III (each very short) of the opinion, which are of more direct applicability to the problems and possible solutions with which the examiner has wrestled in the present case, than is part I.

Part II deals with the District Court's "refusal to replace the Danville system with the Commission's" (p. 12). The opinion points out that the Commission's plan would immediately give B–B an increase of 251 while decreasing by 251 the share of the oldest Danville warehouse—a drastic change indeed, if accomplished at one stroke.

It also states that the "Commission's plan does not discourage superfluous buildings," and that "there is no absolute legal right in a new entrant to have a prevailing system remodeled or discarded for a new model" (p. 13). The opinion concedes that the "plan advanced by the Commission seems logical and acceptable enough for a market just opening," but it states that caution should be used in uprooting an established system. It particularly cautions against "recasting it in another form, especially one which goes beyond the limits of this controversy"—which seems to be another way of saying that the Commission plan went beyond the actual controversy existing in the *Danville* case. The opinion states that a "wrenching reformation" was thought by the District Court to be "particularly and unwarrantably disruptive at Danville," the emphasis obviously being on Danville. It states that the warehouses in Danville have made adjustments, during the years, in the distribution of selling time to absorb demand as it arose. "To inaugurate another system would mean the dissolution of reconcilements which have been found necessary and practicable from year-to-year" (p. 13). "A general rearrangement could also penalize warehousemen who had not contributed to overbuilding." "These conclusions of the District Judge cannot be cast aside lightly, for there is wisdom in them" (p. 13).

The comment on this by the present hearing examiner is that the statements in the opinion, although they may reflect the Danville situation, hardly reflect the Henderson situation. For one thing, the present situation arises out of the repeal of the two-thirds sales rule supported by practically everyone of the Board's

warehouse members. That this distinguishes Danville from Henderson seems to be brought out by the final paragraph in part II, reading in part as follows:

> In this consideration, it must be remembered that the Danville warehouse situation of today is the eventuation of an historical progression. It was not conceived deliberately or at one time; nor was it structured to exclude newcomers. It "just grew" into its present shape and state.

This is just the opposite of the Henderson situation. It is contrary to the very detailed findings and conclusions made in the present case based on voluminous testimony and other proof not only of overt acts of the Henderson Board and its members, but of the very condition of each of the warehouses involved. It seems quite apparent that this type of evidence in depth was not in the *Danville* case, involving a declaratory judgment on a plan.

Part III, according to the opinion, is devoted to the charge that "in assigning selling time figured on floorage, the computer counted space in the older warehouse which was not used for the sale of tobacco" (p. 14). This is a question which we have referred to in the present case as the allocation of time to non-selling warehouses. The opinion concedes, by quoting the figures, that the amount of warehouse space in the Danville market greatly exceeds the amount actually needed to sell the tobacco—a situation existing, of course, in the Henderson market.

The opinion points out that some of the space "is needed to some extent for storage pending sale or resale," although "some of the area is let out for purposes foreign to tobacco sales." This also conforms to Henderson practice.

The opinion also states, however, something which does not accord with the facts in the Henderson case, to wit: "Nevertheless, as the regulations of the Association already quoted will confirm, no floorage credit is given to any part of a warehouse which is not in truth readied or readiable for the sale of tobacco during the season" (p. 14). In our case, as has been made very clear, the by-laws do not even have a provision in regard to availability of warehouses.

The opinion, incidentally, goes out of its way to say that "B–B can hardly be heard to complain on the score of superfluous space, for it stands in pari delicto in the vice" (p. 15)—having a warehouse of more than 168,000 square feet, which could well be taken care of in 40,000 square feet, and having been granted selling time on a floorage of 268,000 square feet (p. 15). The examiner cites this because it seems to limit, possibly, the applicability of the

Danville opinion to the very status of B–B, the appellant, thus not comprehending the total facts in the Danville market as well.

The opinion also states that the present Danville regulations agree with the Commission's standards of a "suitable" and "available" warehouse. The examiner here doubts that the court would say the same about the present by-laws of the Henderson Board. Moreover, very significantly, the opinion (p. 15) goes on to state that the plan submitted to the District Judge was presumably accepted by him:

> * * * upon the condition that the appropriation of warehouse space will be *rigidly supervised and enforced* by the Association. (Our emphasis.)

The findings in the present case are that the by-laws were not rigidly supervised and enforced in the Henderson market, and that, actually, in any event, there have been quite a number of unsuitable or unavailable warehouses. Moreover, the examiner has felt supported by the quoted statement in the *Danville* opinion in his holding that any definition in the Henderson by-laws should be strictly construed and so enforced.

Finally, the opinion states at its conclusion, as follows:

> In conclusion we observe, nevertheless, that the permanent plan is certainly not the ideal, nor do we hold it up as a criterion of reasonableness in all circumstances. We do not have the competence as we pointed out on the first appeal, to construct plans. Our duty, as here, is simply to examine an existing plan and ascertain whether the legal infirmities imputed to it in truth exist.

Accordingly, the Danville plan, although approved by the Court of Appeals, can certainly not be regarded as a "criterion of reasonableness in all circumstances." The court has not excluded the possibility that the Commission may come up with a different plan than it offered in that case, perhaps as an ideal blueprint. Thus a different or specially tailored plan might be acceptable in view of the *actual facts* in the Henderson market, including the outstanding fact that the present space surplus, and even the unsuitable warehouses, were brought upon it by the affirmative act of repealing the two-thirds sales rule.

It is therefore in accordance with his understanding of the instant *Danville* decision that this examiner has deemed it appropriate and fitting to shape a cease and desist order which does, it is true, attempt to bring about a different system of allocating time than has existed since the repeal, and earlier modification of the two-thirds sales rule, but attempts to bring about the change

largely in a graduated period of five years, with an immediate prohibition, however, on the addition of warehouses by the old firms.

III

Suitable and Available Warehouses

Reference is here made to the latter part of the discussion under II, *supra*, of the opinion in the *Danville* case, where the problem of suitable and available warehouses is dealt with in some measure, and where a strict rule and strict enforcement is apparently favored.

Reference is also made to the *Wallace Tobacco Board* case, sometimes, as already stated herein, referred to as the chicken coop case, by reason of the obvious unsuitability of some of its warehouses—in contrast to the less obvious unsuitability of warehouses in the Henderson market. This case may be cited as: *In the Matter of Wallace Tobacco Board of Trade, Inc.*, 62 F.T.C. 733 (1963).

MANDATES IN THE ORDER

General provisions are inserted in the order to cease and desist issued herein, which are much in the form proposed by complaint counsel. They are designed to apply to the violations in a general way and as sanctioned in past orders of the Commission in tobacco market cases. They will not be discussed further here.

The present discussion will cover the rather specific directions contained in the order herein, but not proposed by complaint counsel in the specific form followed.

I

Unit Limitation

First, there is, of course, the specific direction against not allowing a new entrant warehouse, or an added warehouse, irrespective of its size, in excess of a single time unit. This provision accords, of course, with the *Asheville* case, and is regarded by Board counsel as a proper provision in the by-laws under the ruling in that case, although not regarded by said counsel as required to be inserted in a cease and desist order.

However, as already indicated in a previous portion of this decision, it is a very late hour for the Board and its members to—far

from actually amending the by-laws—be still stating that they are willing to do so. Nevertheless, the good faith of Board counsel, who originally made the offer in the Board answer, is respected and beyond question. Accordingly, the direction in the order is worded much as proposed by Board counsel, even though, of course, said counsel did not agree to the insertion of the provision in the order. The provision applies proportionately to a fractional space unit, as was intended by Board counsel, who so stated at oral argument. —Incidentally, the percentages contained in the order are made permissive.

II

Unnecessary Space

The problem of unnecessary space, largely resulting from the repeal of the ⅔ sales rule is met in the cease and desist order herein as follows:

1. The Board and its members shall, except with the approval of the Commission, cease and desist for a period of five years from adding to the Henderson market any further warehouses brought in by any persons or firms except new entrants and except the Liberty or Ellington newcomer respondents.

The hearing examiner proposed the general five-year prohibition at the oral argument herein (without mentioning, however, the exceptions in favor of newcomers) and recollects no concrete and substantial objections. It is the examiner's belief, and at least his hope, that most of the Board members—catapulted, perhaps somewhat unwittingly, into the unnecessary-space nightmare—will breathe a sigh of relief at this respite. The proposal, in context, hardly involves an overnight reformation of the market, but one graduated over a period of years. Accordingly, the examiner believes that it is outside the scope of certain language, heretofore quoted, of the Court of Appeals for the Fourth Circuit in the recent *Danville* case. It applies only to the bringing of warehouses into the market. It does not apply to mere reshuffling of warehouses among the Board members—due to assignments, reorganizations, new leases, death, and the like—which formed the basis of objections at the oral argument.

The provision for Commission approval to obtain a special exception is not inserted for the purpose of surplanting the Board in its legitimate function of regulating the market. It is inserted merely to provide an escape clause for unusual situations which

may arise from time to time, or perhaps, however unlikely that may be, a reversal of the present percentage of unnecessary warehouse space.

The general exceptions, if only for new entrants and the two newcomer groups, means that *there is no general ban on the addition of warehouses.*

The exception as to new entrants, that is, potential new entrants, is, of course, required if this market is to be open to new entrants at all as required by principles of antitrust law—subject, of course, to required approval of the Board or its members.

The exception as to the Liberty and Ellington respondent groups is justified by the shabby treatment Liberty and Ellington received as newcomers on the market in the past. They too, of course, are subject to the required approval of the Board or its members.

The exception is perhaps less indicated as to the Liberty (Robertson) respondents, who are already old-newcomers, than the Ellington newcomers, who obviously are less adjusted than Liberty in respect to total allocation of time. However, it is to be anticipated that the Board, which the examiner believes is desirous of beneficial change, will try, aided no doubt by its able counsel, to work this out between the two groups, so that Ellington, if there is any addition, will be favored before Liberty, or receive a preference.

2. However, even more importantly, the order provides that the Board and its members shall cease and desist from allowing a new entrant only an illusory time unit instead of a bona fide time unit reflecting the actual tobacco-selling warehouse space; this may be accomplished by according to a new entrant a supplemental time allowance of a compensatory nature.

Liberty and Ellington groups, as newcomers already in the market, are also given the benefit of this provision but only to a limited degree, and only in respect to their first warehouse, the one actually used to sell tobacco.

Compliance with this compensatory and supplemental allowance, however, is not to be at once, but is to take place in graduated stages over a period of five years. Thus only by the last of these five years would a new entrant warehouse be receiving an allocation of time truly reflecting a share of warehouse space used only for the purpose of selling tobacco. However, since this direction for supplemental time—designed to attain equal time according to the percentage of actual warehouse space—is spaced gradually over a period of five years, it complies, in the examiner's opinion,

with any language of the Court of Appeals for the Fourth Circuit directed against the sudden uprooting of past arrangements in the tobacco market, as expressed in the latest *Danville* case.

It seems only fitting that Liberty and Ellington should participate in the benefits of this provision, if only to a limited degree. It will be noted, however, that the provision is so worded that these two newcomer groups receive no time compensation for past years.

3. It is also provided in the order issued herein that the Board and its members refrain from basing their time unit on an average space unit of 56,000 square feet, established in 1949, but use, instead, an up-to-date average warehouse space figure.

4. It is further provided in the order herein that the Board and its members shall cease and desist from operating under by-laws which do not contain an adequate definition of unnecessary warehouses or which do not contain an adequate definition of unsuitable warehouses and unavailable warehouses, linked as they are to the problem of unnecessary warehouses.—It is also indicated that consideration be given to grading non-selling warehouses according to their use during the tobacco season (with, possibly, highest credit to green tobacco storage, perhaps no credit at all to redried tobacco storage, and very likely no credit whatever to non-tobacco warehouses).

The order does not state precisely what the definition or definitions should be or what grading of warehouses there should be. This is the responsibility of the Board and its members, vested in them by North Carolina statute empowering them to regulate the Henderson market. The Board and its members should, however, submit proposed definitions and any warehouse grading plans as part of overall compliance procedure in connection with the present order.

III

Suitability and Availability Enforcement

The order herein directs the Board and its members to cease and desist from permitting unsuitable or unavailable warehouses to receive allocations of time. Compliance may be effectuated by strict construction of the present by-laws and by proper standards applicable to a market such as this with a large surplus of unnecessary warehouses, as accords with good practice; as well as by amended by-laws, and by strict enforcement. Again, the order does not spell out actually what the Board should do, since it is

the Board's function to formulate its own procedures, in this connection. However, it is again anticipated that respondent Board and its members will submit proposed procedures of their own as part of compliance procedure under the order.

ORDER

It is ordered, That respondent Henderson Tobacco Market Board of Trade, Inc., a corporation, its officers, directors, and members, its agents or instrumentalities, and all other persons described herein, shall cease and desist, directly or indirectly, from the acts and conduct described in this order.

The various respondents and other persons or entities so ordered to cease and desist are named or described as follows:

Board, and Others in General

Henderson Tobacco Market Board of Trade, Inc., and any successor thereto or any assign.

All members of said Board, all members of its board of directors, and all officers—whether in the past, present, or future, if now or hereafter connected with the activities of said Board or its conduct of the Henderson market.

Similarly, all agents and intermediaries of said Board—past, present, or future, if now or hereafter connected with its activities or its conduct of the market.

Said Board and said members, officers, directors, agents or intermediaries, whether acting directly or indirectly, or through any corporate or other device.

Officers of the Board

Charles Brooks Turner, president, W. J. Alston, Jr., vice president, William H. Hoyle, secretary-treasurer, as officers of said corporate Board.

Warehouse Members of the Board

W. J. Alston, Jr., an individual trading and doing business under the name and style of Farmers Warehouse.

A. H. Moore, and C. E. Jeffcoat, individuals trading and doing business under the name and style of Moore's Big Banner Tobacco Warehouse.

M. L. Hight, B. W. Young, and J. S. Royster, individuals and

copartners trading and doing business under the name and style of Carolina Tobacco Warehouse, a partnership.

C. B. Turner, R. E. Tanner, S. P. Flemming, and R. E. Flemming, individuals trading and doing business under the name and style of High Price Tobacco Warehouse.

It is ordered, That each and all of the aforenamed or aforedescribed respondents, persons, or entities shall cease and desist from the following described conduct and activities, to wit, they shall cease and desist from:

(a) Engaging in or committing any of the acts and practices specifically described below:

(b) Participating in any collaboration, to engage in or commit any of the said acts and practices, in reckless disregard of the rights of new entrants to enter the Henderson market, the rights of newcomers once admitted to the market, and the rights of warehousemen competitors generally;

(c) Participating, continuing, cooperating in, carrying out, or instigating any planned course of action to commit said below-described acts or practices;

(d) Participating, etc., similarly, in any course of dealing, understanding, plan, combination or conspiracy to engage in or commit any of said below-described acts and practices; or

(e) Collaborating in reckless disregard of new entrants, newcomers and others, as referred to in (b), or engaging in any planned common course of action, dealing, understanding, combination or conspiracy, etc., as described in (b) and (c)—whether or not the collaboration, common course of dealing, or the like, is between or among two or more of those named or described above as against whom this order is directed, or between one of them and any other person or entity.

The acts and practices from which the aforementioned and aforedescribed persons or entities shall cease and desist—whether acting directly, by collaboration, planned course of action, or otherwise, as referred to in (a), (b), (c), (d), and also (e), are as follows:

I

Single Unit Limitation

Having or continuing in the by-laws of respondent Board, or in any regulations controlling the Henderson tobacco market, any

provision whereby a new entrant warehouse, in particular, even though its size is in excess of the average size of all warehouses, does not receive reasonable consideration in selling time for the size in excess of the average size of all warehouses: *Provided,* That it shall be deemed to be a reasonable consideration if there is consideration in the amount of 50% for the first unit of such excess space, and 25% for any additional units, the allowed percentages to apply to fractional units of excess space.

II

Unnecessary Space

1. Permitting, without approval of the Federal Trade Commission, the addition to the Henderson tobacco market of any warehouses, or warehouse space comparable in size to a warehouse, for a period of five years, except by the two newcomer Liberty (Robertson) and Ellington respondent warehouse groups, and except by new entrants who bring in warehouses for the sale of tobacco;

2. Continuing to allot to new entrants, or to the two newcomer Liberty and Ellington respondent groups in respect to the first warehouse of each, actually selling tobacco, only the existing time allowance (computed largely on the basis of non-selling warehouses already on the market) and not supplementing the same by an adequate supplemental time allowance compensating for the dilution in value of the present time allowance by reason of the non-selling warehouses: *Provided,* That compliance herewith shall be deemed adequate if the supplemental time allowance is instituted in graduated annual steps designed to reach a fully compensatory allowance within five years;

3. Continuing to allot selling time on the basis of an average space unit of 56,000 square feet (computed in 1949), instead of allotting selling time on an average space unit based on a realistic and up-to-date method of computation; or

4. Operating under by-laws or similar regulations which (in aggravation of the unnecessary warehouse problem, etc.) do not contain an adequate definition of "suitable" warehouses or any reference to "available" warehouses and not amending or wording the same to contain adequate definitions particularly designed to mitigate the problem of unnecessary warehouses, and, desirably, amending and wording same to grade warehouses as to entitlement to time depending on whether they are used for

green tobacco storage, redried tobacco storage, or non-tobacco purposes.

III

Suitability and Availability

Permitting unsuitable warehouses or unavailable warehouses to receive allocations of time, and doing so (a) by failing to construe strictly the Board's present by-laws, or any appropriate standards particularly applicable in respect to a market comprised mostly of non-selling or unnecessary warehouses, (b) by failing to amend the by-laws so as to mention and define "available" in reference to warehouses and adequately define both "suitable" and "available" in this connection, or to bring about the promulgation of regulations accomplishing this, and (c) by failing to enforce strictly appropriate standards of suitability and availability, particularly in respect to a market loaded down with non-selling or unnecessary warehouses.

IV

In General

1. Allocating or causing to be allocated any selling time to tobacco auction warehouses operating on the Henderson tobacco market on the basis of any system, plan, method, policy, or practice for the purpose or with the effect of preventing or foreclosing, or of unnecessarily restricting or limiting, qualified persons, firms or corporations from engaging in the tobacco business on the Henderson tobacco market as warehouse operators;

2. Allocating or causing to be allocated any selling time pursuant to any system or method of allocating selling time which discriminates against newcomers, *i.e.*, new entrants already admitted to the market;

3. Engaging in any act or practice or entering into any arrangement, agreement or understanding with the purpose or effect of preventing or foreclosing, or of unreasonably limiting or restricting, the entrance of new tobacco warehouses on the Henderson tobacco market;

4. Engaging in any act or practice or entering into any arrangement, agreement or understanding with any respondent named herein or with any other person, firm or corporation with the purpose or effect of preventing or foreclosing, or of unreasonably limiting or restricting, competition between or among

the tobacco warehouses engaged in doing business on the Henderson market; or

5. Engaging in any act or practice, the purpose or effect of which is to effectuate any understanding, agreement or combination prohibited herein, or placing in effect or carrying out any act, practice, policy or method, prohibited by any provision or any part of this order, through respondent Board or any other instrumentality, agent, agency, medium, or representative.

It is further ordered, That the complaint is dismissed as against the below-named respondents insofar as they are named in the complaint as listed below:

George T. Robertson, and Samuel E. Southerland, individuals trading and doing business under the name and style of Liberty Warehouse, and Robertson & Southerland.

F. H. Ellington, Gilbert F. Ellington, and John Ellington, individuals trading and doing business under the name and style of Ellington Warehouse.

Royster-Hight Corporation, a corporation, and Fred S. Royster, W. G. Royster, J. S. Royster, and M. L. Hight, individually and as officers and directors of said corporation.

M. L. Hight, an individual trading and doing business under the name and style of Hight Warehouse.

William H. Hoyle, individually.

APPENDIX

EXHIBIT A

Chronological Summary
Re Space Allocation
(Contained in Board Stipulation Only)

Following is a chronological summary regarding the allocation of selling to warehouses on the Henderson tobacco market for the years 1949 through 1966.

1949

There were seven warehouses:

1. Liberty No. 1—16%
2. Farmers—13.34%
3. Banner—14.32%
4. Planters—7.14%

5. Carolina—17.62%
6. Coopers—10.74%
7. High Price—20.84%
TOTAL—100% (CX 7, pp. 1, 2, 3.)

Percentages of producers' sales during the 1948 season:
Liberty—12.07%
Farmers and Planters—20.92%
Banner—16.92%
Carolina and Coopers—29.95%
High Price—20.14%
TOTAL—100% (CX 3, p. 2.)

On August 18, 1949, the seven warehouses entered into a written agreement for division of the selling time for 1949 on a percentage basis, to continue from year to year until either (1) the discontinuance without replacement of any warehouse or (2) the addition of one or more other warehouses.

1950

The 1949 agreement applied by its terms (CX 7).

1951

Two new warehouses came on the market (RX 7, p. 1):
8. Alston No. 1.
9. Big Henderson No. 1.

These were allotted time under Article Four, Section 1 B of the By-Laws. The time remaining was allotted to the other warehouses in accordance with the 1949 agreement under Article Four, Section 1 D of the By-Laws (RX 7, p. 1).

1952

The minutes are silent as to the selling time, but the 1951 allotment was continued without objection.

1953

Three new warehouses came on the market:
10. Big Henderson No. 2 (CX 26, p. 2).
11. Ellington's (CX 26, p. 1).
12. Liberty No. 2 (CX 27, pp. 1 and 2).

Selling time was allotted to these three new warehouses under the By-Laws, Article Four, Section 1 B, and the remaining time was allocated under the 1949 agreement under the By-Laws, Article Four, Section 1 D, as in 1951 (CX 27, p. 2).

1954

There were no additions or withdrawals. By vote at a meeting of the warehousemen, the previous year's allocation was continued (CX 31).

1955

There was no change in the market except the warehousemen unanimously agreed to allow substitution of the Golden Belt Warehouse, which had been built in 1951, but never allowed any selling time, to be substituted for the Planters Warehouse, to operate with Carolina with 45 more piles per day. Also in 1955, 4,000 square feet were added to Big Henderson #1 for which no time adjustment was made until 1956 (RX 7, p. 2). Thus, with the exception of allowing the Golden Belt to be substituted for Planters as indicated, the 1954 allotment was continued at a meeting of the Board of Directors (CX 41) by a vote of 5 to 0.

1956

In 1956, four new warehouses and five previously built, but never allotted any selling time, were admitted to the market, they being as follows:

13. Robertson (new).
14. Robertson and Southerland (new).
15. New Dixie (new).
16. Dixie No. 2 (new).
17. Dixie No. 1 (built in 1952, but never allotted selling time prior to 1956).
18. Alston No. 2 (built in 1951, but never allotted selling time prior to 1956).
19. Alston No. 3 (built in 1952, but never allotted selling time prior to 1956).
20. Royster-Hight No. 2 (built in 1952, but never allotted selling time prior to 1956).
21. Royster-Hight No. 3 (built in 1954, but never allotted selling time prior to 1956).

The addition of Planters by the Ellington firm raised the number of warehouses on the market in 1956 to a total of 22.

[The balance of the chronological material for 1956 as contained in the Board stipulation, par. 38, is omitted here as being too lengthy and more of a narrative than a chronology, although it refers to such pertinent events as:

April 17, 1956—Meeting of Warehousemen.

April 24, 1956—Meeting of Board of Directors.

July 30, 1956—Meeting of Board of Directors.

October 23, 1956—Meeting of Board of Directors.

The chronological summary is now continued here, from this point, without further deletion.]

1957

Market operated on unanimous written agreement based on five-hour selling time for six firms (CX 54).

1958

Market operated on unanimous agreement evidenced by vote at a warehouse meeting, on a five and one-half hour basis for six firms (CX 60, p. 2).

1959

Minutes of warehousemen state that it was unanimously agreed that each house have the same number of piles as last year (CX 63).

1960

Continuation of 1959 allocation was voted, without objection (CX 68, p. 1).

1961

Board of Directors met April 4, 1961, Mr. Ellington present. It recessed until July 20, 1961, when Mr. Ellington was not present. At this meeting, selling time was allotted to six warehouse firms by unanimous vote (Ellington not being present at the recessed meeting, but was present at the original meeting) (CX 70, p. 2).

The percentages of the original warehouses in the 1949 agreement were adjusted in 1961 by the destruction of Coopers Warehouse after 1960 season and by the admission of additional warehouses (CX 89).

1962

There were no changes in warehouse space and at a meeting of the Board of Directors on April 10, 1962, recessed from April 3, 1962, a motion that the market operate on the same basis as in 1961 as to selling time was put and carried, after Ellington resigned from the Board. After Ellington was reinstated as a Director, he requested permission to have his vote recorded against the motion (CX 74, p. 2).

1963

Selling time allotted to six warehouse firms on a five and one-half hour basis at the annual meeting of the Board of Directors (CX 76, p. 4).

1964

Selling time allotted at Board of Directors meeting (CX 77, p. 3) on motion "put up and carried without dissenting vote."

1965

Board of Directors meeting allotted selling time "in the same manner as last year * * * carried without a negative vote" (CX 78, p. 2). F. H. Ellington was present.

1966

At the annual meeting of the Board of Trade, motion that the market operate the same as last year with respect to piles per warehouse firm was put and "carried without a negative vote," Ellington was present (CX 80, p. 2).

OPINION OF THE COMMISSION

JULY 15, 1967

This matter is before the Commission upon the joint brief with agreed-upon order in lieu of appeal briefs and oral argument filed April 26, 1967, by complaint counsel and appealing respondents. The nonappealing respondents have filed answers thereto. Complaint counsel, in addition, has filed a reply and has indicated that appealing respondents will not file a reply.

The hearing examiner filed his initial decision on March 17, 1967. He found and concluded that the charges in the complaint alleging a violation of Section 5 of the Federal Trade Commission Act in connection with the sale of tobacco through the Henderson market were sustained and he entered an order to cease and desist prohibiting such practices. Among other things he found that respondents, acting between and among themselves, engaged in a combination to carry out and maintain, and did carry out and maintain, in commerce, an unreasonable hindrance, restriction and suppression of the establishment and operation of market facilities and market opportunities in competition in the purchase and sale of flue-cured tobacco on the Henderson market. More specifically, he found that the adoption of by-laws which favored established warehouses and penalized new entrants to

the market had the intent and effect of restricting and preventing persons and corporations from engaging in business on the Henderson tobacco market.

The respondent board members in this matter were categorized into three separate groups by the examiner. These are (a) the established or old-time warehousemen, (b) the first newcomers, *i.e.*, the Liberty Warehouse group, which owns and controls five warehouses and which entered the Henderson market as a newcomer in 1947, and (c) the late newcomers, *i.e.*, the Ellington Warehouse group, which owns and controls two warehouses and which entered the Henderson market in 1953.

Respondents other than the Liberty Warehouse group and the Ellington Warehouse group, which would include the Henderson Tobacco Board of Trade, Inc., and the older established members thereof, on March 30, 1967, gave notice of their intention to appeal from the hearing examiner's initial decision. In such notice these respondents stated they would limit their appeal to the type of order entered by the hearing examiner, which they deemed to lack specificity. Complaint counsel likewise on March 30, 1967, filed a notice of intention to appeal from the initial decision and stated that they would limit their appeal to the propriety of the order entered by the hearing examiner, which they believed to be inadequate. The other respondents who were treated differently from the appealing respondents in the hearing examiner's order did not appeal from the initial decision.

Subsequently, the respondents (other than the Liberty and Ellington groups) and complaint counsel, through conferences and meetings, were able to agree upon a new form of order as a substitute for the order to cease and desist contained in the initial decision. They filed with the Commission, on April 26, 1967, a joint brief with agreed-upon order in lieu of appeal briefs and oral argument. In this joint brief the appealing respondents and complaint counsel state that the hearing examiner's findings and conclusions are deemed to be reliable, probative and substantial and that these, to which no exceptions have been taken, should be adopted as those of the Commission. We concur as to that.

The parties contest only the form of the order, which they, in effect, claim is unclear in its prohibitions and which they assert would not be effective in certain respects. A major objection is made to the examiner's method of dealing with unnecessary space. The examiner ordered the board and its members, for a period of five years, not to add any warehouses, unless approved, but he excepted from such order the Liberty and Ellington groups, and

other newcomers. The appealing parties claim that this exception would permit the newcomer groups to add nonselling space and that this would further enhance the danger of overbuilding in this market. The parties also disagree with the hearing examiner's elimination of excess space from selling time computations in graduated stages over a period of five years. They assert that the order should provide for the immediate exclusion of excess floor space and claim that this would not have a disruptive effect on the market.

The appealing parties have proposed a new form of order, which they contend would deal with the problems referred to and which would effectively prohibit the unfair practices found to exist. This new form of order is nearly the same as the proposed order attached to the complaint. It contains nine prohibitions directed to the unfair practices found to exist, including those which have resulted in the unfair allocations of time as between the established firms and the newcomers. The parties suggest that the proposed order would eliminate surplus space from future allocations of selling time and that such would be eliminated on an equal basis.

The Ellington group, in their answer, state that they have no objection to the entering of the order contained in the joint brief. However, they point out that F. H. Ellington and John Ellington were dismissed from the complaint as individuals by the hearing examiner and were bound only insofar as they are members of the Henderson Tobacco Market Board of Trade. They, in effect, request the same treatment in the final order to be issued by the Commission.

The Liberty group, in their answer, state that they have no objections to the prohibiting praragraphs in the proposed order contained in the joint brief. However, they object to some of the language of the preamble, which they assert results in the naming of George T. Robertson and Samuel E. Southerland as individuals, parties as to which the examiner had dismissed the complaint. The Liberty group also challenge a statement in the joint brief, which proposes, as an illustration, a method for future allocations of selling time on the Henderson market. In the illustration it is suggested a firm, whether established or a new entrant, would be given full credit for its first unit and that all other units on the market would be reduced by 50 percent for the second unit and 75 percent for the third and subsequent units. They argue that such allocation as to the second, third and subsequent units would be most detrimental to them in that they

claim they were forced to construct tobacco sales warehouses because of the prevailing allocation of time rules in the market at the time and that to now suggest that said warehouses should be allotted only 50 percent of a unit and 25 percent would, they submit, be unfair. They propose that the second unit should receive at least 75 percent and the third unit 50 percent. Finally, the Liberty group urge that the hearing examiner's prohibition of the addition to the Henderson tobacco market of any warehouses by the appealing respondents during the next five years be retained in the order. They claim that the construction of additional warehouses by the appealing respondents is a likely development and that this would put them in the same position they found themselves over the years in the Henderson market.

The Commission is satisfied that the proposed order in the joint brief is adequate and, in view of the general accord of the parties on the proposal, including the Liberty and Ellington groups (although with reservations, mentioned), we are of the opinion that the public interest would best be served by the issuance of this agreed-upon order. However, some revisions which we believe are minor will be necessary. It is clear that the parties did not intend that George T. Robertson, Samuel E. Southerland, F. H. Ellington and John Ellington were to be included in the order as individuals. On the other hand, we believe such persons should be retained in the order in their capacities as members of the board and as representatives of the membership so that the Commission's order will be fully effective as to the entire board. The order will be appropriately modified to make this distinction clear.

The next point made by the Liberty group is their objection to the proposed formula, offered as an illustration by the appealing parties for the future allocation of warehouse selling time.[1] This proposal is not a part of the order; it is only an illustration of the manner in which compliance with the order, which is general in its terms, could be effected, and it may not be finally adopted. As we understand the proposal, however, each of the six firms now in the market would be allocated selling time on the basis of a first unit of 56,000 square feet of suitable and available warehouse space "actually used" for the sale of tobacco

[1] The paragraphs of the proposed order dealing most directly with activity relating to the allocation of selling time are paragraphs 1–4. These paragraphs are all phrased in general injunctive terms and none provide for, or require, the use of a specific method of allocation. Paragraph 2, for instance, prohibits designated activity in the allocation of selling time "which takes into account or includes as a basis for such allocation, warehouse space which is not only unsuitable and unavailable, but not actually used for the sale of tobacco at auction."

at auction, and they would also receive additional but decreasing allocations of time for the second, third and subsequent units, if any. New entrants would be allocated selling time on the same conditions and without discrimination.

If this method of allocation were to be adopted, it is our understanding that the newcomers, such as the Liberty group, who built extra warehouse space to qualify for selling time under the old rules, would be able to count such space toward selling time pursuant to the formula.[2] Under such a procedure, the Liberty group would be on an equal footing with the other firms even if the less liberal formula of 50 percent for the second unit and 25 percent for other additional units is used. Nevertheless, we will not make the final decision on that question here. We believe that in the circumstances it is preferable to adopt the form of order proposed by the parties, which contains general prescriptions, rather than to issue an order with specific requirements on such matters as the allocation of selling time. For one thing, we do not have sufficient current market data to determine at this time the appropriateness of one method or formula over another. Moreover, it is the responsibility of the board and its members, under North Carolina law, to adopt proper regulations, which regulations, of course, must also comply with the laws administered by the Commission. It seems to us that the matter of selling time allocation is more in the nature of a detail of compliance. Our final determination on this, therefore, will be made upon the submission of compliance reports. In this connection, we observe that, under paragraph 3 of the order, the regulations have to be such as to "afford equitable and nondiscriminatory treatment to all warehouse members on the Henderson market whether said members are established operators or new entrants."

On the provision in the hearing examiner's order, banning the older, established warehouses from building new warehouses for five years while exercising no restraint upon newcomers, which the Liberty group has asked be retained, we believe this might work unjustly and tend to encourage overbuilding of warehouses by newcomers. It is the Commission's conclusion that the restriction on all firms as contained in paragraph 2 of the proposed order will operate more effectively and justly.

Accordingly, the appeals consolidated in the joint brief are

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[2] In this connection, the phrase "not actually used" found in paragraph 2 of the proposed order would not, as we interpret it, eliminate any warehouse solely for the reason of non-use unless there has first been an opportunity to use such warehouse for the selling of tobacco at auction.

granted to the extent indicated herein and they are otherwise denied. The order in the initial decision will be modified to conform to the views expressed in this opinion. The findings and conclusions contained in the initial decision, excepting those which are inconsistent with the Commission's views expressed as to the form of order, and the order as modified will be adopted as those of the Commission. An appropriate order will be entered.

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of counsel supporting the complaint and certain respondents, which appeals were consolidated and filed as a "Joint Brief with Agreed Upon Order In Lieu Of Appeal Briefs and Oral Argument," upon the answers of the non-appealing respondents and the complaint counsel's reply; and

The Commission, for the reasons appearing in the accompanying opinion, having granted in part and denied in part the appeals as consolidated in the joint brief, and having determined that the initial decision should be modified in accordance with the views of the Commission expressed in the opinion and that the initial decision as so modified should be adopted as the decision of the Commission:

It is ordered, That the following order be substituted for the order to cease and desist contained in the initial decision:

ORDER

It is ordered, That respondents Henderson Tobacco Market Board of Trade, Inc., a corporation, its successors or assigns, and all of its officers, including its present officers, Charles Brooks Turner, president, W. J. Alston, Jr., vice president, William H. Hoyle, secretary-treasurer, directors and members, agents or instrumentalities; W. J. Alston, Jr., trading under the name and style of Farmer's Warehouse, individually and as a member of said board; A. H. Moore and C. E. Jeffcoat, trading under the name and style of Moore's Big Banner Tobacco Warehouse, individually and as members of said board; M. L. Hight, B. W. Young, and J. S. Royster, copartners trading under the name and style of Carolina Tobacco Warehouse, individually and as members of said board; C. B. Turner, R. E. Tanner, S. P. Flemming, and R. E. Flemming, trading under the name and style of High Price Tobacco Warehouse, individually and as members of said board; George T. Robertson and Samuel E. Southerland, trading under the name and style of Liberty Warehouse and Robertson &

Southerland, as members of said board; F. H. Ellington and John Ellington, trading under the name and style of Ellington Warehouse, as members of said board; and all of the above-named persons as representatives of all of the warehouse members of said board and as officers and directors, directly or through any corporate or other device, in connection with procuring, purchasing, offering to purchase or selling or offering for sale, leaf tobacco, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, participating, continuing, cooperating in, or carrying out, or directing or instigating any planned common course of action, course of dealing, understanding, plan, combination, or conspiracy between or among any two or more of said respondents, or between any one or more of said respondents and another or other parties hereto, to do or perform any of the following acts and practices:

1. Allocate or cause to be allocated selling time to new entrant warehouses on the Henderson market on any basis or in any manner which refuses to give any credit to the size and capacity of a new entrant in excess of the average size and capacity of all the warehouses operating on the market;

2. Allocate or cause to be allocated any selling time pursuant to any system or method of allocating selling time which takes into account or includes as a basis for such allocation, warehouse space which is not only unsuitable and unavailable, but not actually used for the sale of tobacco at auction;

3. Allocate or cause to be allocated any selling time pursuant to any system, plan, method, policy or practice which fails to accord equitable and nondiscriminatory treatment to all warehouse members on the Henderson market whether said members are established operators or new entrants;

4. Allocate or cause to be allocated any selling time to warehouses operating on the Henderson market on the basis of any system, plan, method, policy or practice with the purpose or effect of restricting, hindering, limiting, preventing or foreclosing any person, firm or corporation from engaging in the tobacco business on the Henderson market either as a warehouse owner or operator, buyer, speculator, broker or rehandler of tobacco;

5. Adopting, using, adhering to or maintaining or attempting to adopt, use, adhere to or maintain any plan, system,

method, policy or practice that restricts, hinders, limits, prevents or forecloses any person, firm or corporation from engaging in the tobacco business on the Henderson market either as a warehouse owner or operator, buyer, speculator, broker or rehandler of tobacco;

6. Engaging in any act or practice or entering into any arrangement, agreement or understanding with the purpose or effect of restricting, hindering, limiting, preventing, or foreclosing the entrance of any person, firm or corporation from engaging in the tobacco business on the Henderson market or any other person, firm or corporation already doing business on the Henderson market, from competing therein;

7. Engaging in any act or practice or entering into any arrangement, agreement or understanding with any respondent named herein or with any other person, firm or corporation with the purpose or effect of restricting, hindering, limiting, preventing or foreclosing competition between or among the warehouse members engaged in doing business on the Henderson market;

8. Engaging in any act or practice, the purpose or effect of which is to effectuate any understanding, agreement or combination prohibited herein; or

9. Placing in effect or carrying out any act, practice, policy or method, prohibited by any provision or part of this order, through respondent board or any other instrumentality, agent, agency, medium or representative.

It is further ordered, That the complaint be, and it hereby is, dismissed as to George T. Robertson, Samuel E. Southerland, F. H. Ellington, and John Ellington in their individual capacities.

It is further ordered, That the complaint be, and it hereby is, dismissed as to Royster-Hight Corporation, a corporation, Fred S. Royster, W. G. Royster, and Gilbert F. Ellington.

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

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, submitting a plan, subject to Commission approval, for allocating selling time in compliance with paragraph 2 of the Commission's order and otherwise setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.