

Other Acquisitions

5. Respondent made three other acquisitions in the State of Wyoming. Only one of these involved a corporation. Complaint counsel concede that the record fails to establish that any of the three companies was engaged in commerce. The only corporation in the group was Worland Creamery Company, which respondent acquired in May 1959 for a consideration of \$37,000. Worland had sustained a loss on its operations in each of the two years prior to its acquisition (CX 358-N, R). The other two companies acquired were: Meredith Dairy, which respondent acquired in December 1951 for a consideration of \$8,500 (CX 69-A), and Yellowstone Dairy, which respondent acquired in May 1954 for \$65,000 (CX 110-A).¹³¹

Z-1. *Rose Lawn Dairies of Arkansas, Inc.*

The Acquisition

1. Rose Lawn Dairy operated as both a corporation and a partnership. The principal location of the business was in Muskogee, Oklahoma, and was operated by a partnership. There were two Rose Lawn distribution branches. One was in McAlester, Oklahoma, which the partnership operated. The other was in Fort Smith, Arkansas, which was operated as an Arkansas corporation, whose stock was wholly owned by the partnership. The partnership had originally manufactured its own ice cream and processed its own milk, which were distributed both from Muskogee and the two branch locations. However, in 1952 it ceased manufacturing ice cream because of financial difficulties and began purchasing its ice cream requirements from Swift & Co. In 1954, the continuation of its financial difficulties caused the company to cease processing milk, and it became a distributor of fluid milk purchased from respondent's plant at Tulsa, Oklahoma. In January 1955, when Rose Lawn was unable to repay respondent for milk and dairy products purchased from it, respondent took over the McAlester and Fort Smith branches, in partial repayment of the debt. Respondent did not acquire the principal business of the partnership at Muskogee. After operating the branches for a year, respondent offered to resell them to Rose Lawn, but the latter declined the offer (CX 21: CX 117).

2. Rose Lawn Dairies of Arkansas, Inc., had net sales in the seven-month period from April 1, 1954 to October 31, 1954, of \$227,477, on which it sustained a loss of \$30,026 (CX 21-G). The record does not disclose any breakdown of the operations of the partnership, as be-

¹³¹ See p. 567, *supra.* for a discussion of Yellowstone Dairy's market position in a portion of the area served by the Utah Division of Creameries of America.

tween the Muskogee and McAlester operations. In the 10 months up to October 31, 1954, the partnership had net sales of \$1,156,564, on which it sustained a loss of \$14,000 (CX 117-I). The record contains no data as to the gallonage sold by the Fort Smith branch operated by the corporation. The gallonage sales of the McAlester branch operated by the partnership were approximately 750 gallons of milk per day (CX 117-E).

Market Conditions

3. The branch operated by the corporation at Fort Smith distributed fluid milk and related products in the city of Fort Smith and adjacent territory (CX 21-D). These products were received from respondent's plant in Tulsa, Oklahoma. Respondent concedes in its answer that the Rose Lawn corporation was engaged in commerce. The branch at McAlester distributed fluid milk and related products in the counties of Pittsburg, Latimer and part of Pushmataha in the State of Oklahoma (CX 117-E). Respondent did not distribute any milk products in the areas in which its distributor sold. There were seven other dairy companies distributing dairy products in the area served by the Fort Smith branch (CX 21-D), and four in the area served by the McAlester branch (CX 117-E).

4. Complaint counsel have proposed no specific area, as being the relevant geographic market with respect to either the Fort Smith branch or the McAlester branch. In the absence of more definitive evidence than appears in the record, no finding can be made as to the relevant geographic market areas. The record contains no market share data with respect to the area in which the Fort Smith branch, operated by the corporation, sold. There is evidence that the market share of the Rose Lawn operation conducted by the partnership in McAlester was in the order of magnitude of 11 to 13% (CX 451).

Z-2. *Dahl-Cro-Ma, Ltd.*

The Acquisition

1. As heretofore mentioned (p. 569, *supra*), in December 1954 respondent acquired Dahl-Cro-Ma, Ltd., a Hawaiian corporation. The acquisition was actually made by Dairymen's Association, Ltd. (the name under which respondent's subsidiary, Creameries of America, operated in Hawaii). Under an agreement entered into December 27, 1954, Dairymen's acquired the business and assets of Dahl-Cro-Ma, including its trade name "Blue Bonnet." The transfer took place February 1, 1955, and the consideration paid was approximately \$100,000 (CX 24 A-E). Dahl-Cro-Ma was engaged in the manufacture and sale of ice cream and other frozen desserts. In the fiscal

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year ending June 30, 1954, Dahl-Cro-Ma's ice cream sales amounted to \$119,064, consisting of approximately 60,000 gallons (CX 24-Z 1). Its gross profit on ice cream sales was \$39,144, and its net profit on all sales, including frozen foods, was \$2,472 (CX 24-Y).

Market Conditions

2. Dahl-Cro-Ma's plant was located at Hilo on the Island of Hawaii, and its area of distribution was limited to that island (CX 24-X). So far as appears from the record, it did not distribute on the Island of Oahu, on which Honolulu is located. As heretofore mentioned, Dairymen's had a processing plant at Hilo and distributed frozen products on the Island of Hawaii in competition with Dahl-Cro-Ma (CX 16-Z 9). Although there were a number of other ice cream companies on the Island of Oahu (CX 24-Z), Dahl-Cro-Ma's only competitor on the Island of Hawaii was respondent's subsidiary, Dairymen's (CX 16-Z 9).

3. Complaint counsel contend that the "Island State of Hawaii" is the geographic market relevant to the Creameries of America acquisition (Reply Findings, p. 13). However, they propose no specific area as being the appropriate market area with respect to the Dahl-Cro-Ma acquisition. It is the conclusion and finding of the examiner that the Island of Hawaii is an appropriate market area in which to consider the impact of the Dahl-Cro-Ma acquisition. Dairymen's annual frozen products sales on Hawaii were approximately 100,000 to 120,000 gallons (CX 16-Z 9). Dahl-Cro-Ma's sales were approximately 50,000 to 60,000 gallons annually (CX 16-Z 9; CX 24-Z 1). On this basis, Dairymen's accounted for approximately two-thirds of the frozen products sold on Hawaii and Dahl-Cro-Ma accounted for approximately one-third. Following the acquisition, Dahl-Cro-Ma's operations were consolidated with Dairymen's Hilo plant (R. 1341). Dairymen's is at present the only company distributing ice cream at wholesale on the Island of Hawaii (CX 412).

Z-3. Other Acquisitions

1. The complaint as amended charges respondent with having acquired 175 dairy companies, of which 77 are alleged to have been corporations engaged in commerce. Complaint counsel have conceded, in their proposed findings, that the record establishes engagement in interstate commerce by only 37 of these companies.¹³² Appropriate

¹³² The 37 companies actually involve 29 different groups of companies, since some of the acquisitions involved multiple corporations which were commonly controlled. Thus, the Tro-Fe Dairy acquisition involved two corporations, an Alabama corporation and a Tennessee corporation; the Dairyland acquisition involved its affiliate company, Valdair; and the Dothan Ice Cream acquisition involved seven affiliated corporations, plus a partnership.

findings have been hereinabove made with respect to each of the corporations which complaint counsel contend were engaged in interstate commerce.¹³³ In order to provide a fuller picture of market conditions in the areas where respondent made acquisitions of corporations claimed to be in commerce, the examiner has briefly discussed the facts relating to respondent's acquisition of 83 other companies (corporate and non-corporate) in these areas. The 55 remaining companies which have not been hereinabove discussed or mentioned are either corporations with respect to which complaint counsel concede the record fails to establish engagement in commerce, or are non-corporate businesses which, in most instances, were also not in commerce. For the most part, these were small companies which were acquired for a consideration of \$25,000 or less.

2. The companies with respect to which findings have not been previously made were located in the States of Colorado, Nebraska, Kansas, Oklahoma, Wisconsin, Michigan, Tennessee, Kentucky, Maryland, South Dakota and Oregon. Only nine of these companies had annual sales of \$250,000 or over. These companies and their approximate sales were: Superior Dairy of Pueblo, Colorado (\$250,000); Sutter Dairy, Inc., of Grand Island, Nebraska (\$450,000); Weibel Dairy, Inc. of Enid, Oklahoma (\$413,000); Eckles Ice Cream & Dairy Co., Inc. of Baltimore, Maryland (\$446,000);¹³⁴ Princeton Creamery, Inc. of Princeton, Kentucky (\$735,000); Kentucky Ice Cream Co. Inc. of Richmond, Kentucky (\$840,000); Model Farms Dairy of Louisville, Kentucky (\$2,950,000); Daniel's Dairy & Ice Cream Co. of Paintsville, Kentucky (\$518,000); and Medo-Land Creamery Co. of Eugene, Oregon (\$4,200,000). Complaint counsel have conceded that the record fails to establish that those of the above-named companies which were corporations were engaged in commerce.

III. OTHER ALLEGED ILLEGAL PRACTICES

A. Customer Assistance

1. While this proceeding is aimed principally at respondent's acquisition of other dairy companies, the complaint, in Paragraph

¹³³ These have been grouped under 27 separate headings. Each of the acquisitions of multiple, commonly controlled corporations has been grouped together. In addition, the acquisition of two small Ohio companies claimed to be in commerce, viz, Gray & White and Linton & Linton, has been discussed under the heading "Other Ohio Acquisitions".

¹³⁴ The Eckles acquisition involved the acquisition by respondent of 32.4% of Eckles' preferred stock and 40% of its common stock. The company continued to operate as a separate entity in Baltimore. There is no indication in the record that, by this stock acquisition, respondent acquired control of Eckles.

Eight, alleges that respondent has engaged in a number of business practices, most of which involve various types of assistance to customers, or discrimination in favor of certain customers. These include, the loaning of money or equipment to customers, the performance of special services, and the granting of rebates or discriminatory prices. Most of these practices were the subject of a number of proceedings brought against nine of the principal manufacturers of frozen desserts, including respondent in this proceeding (Docket Nos. 6172-6179, and 6425). After extensive hearings, the complaints were ultimately dismissed on the ground that the record in such cases did not "support a finding that these practices have produced the requisite degree of competitive injury to support an order to cease and desist" (Order Dismissing Complaint, Docket No. 6174, May 23, 1962) [60 F.T.C. 1274, 1620]. Complaints have also been issued against some of the same companies, charging them with the granting of discriminatory prices, allegedly in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Such a proceeding is now pending against respondent (Docket No. 7599).

2. At a pre-hearing conference held in this proceeding on January 17, 1957, counsel supporting the complaint agreed that they would not seek an order requiring respondent to cease and desist from engaging in any of the acts and practices set forth in Paragraph Eight of the complaint (see Pre-trial Order, February 8, 1957). The purpose in alleging such practices in the complaint herein was not to secure a re-trial of the earlier cases, but to provide a basis for offering evidence to show the economic power possessed by respondent vis-a-vis its smaller competitors, so as to provide a background for determining the competitive impact of the challenged acquisitions (R. 6, 18).

3. Complaint counsel have submitted a number of proposed findings with respect to some, but not all, of the allegations in Paragraph Eight. The examiner does not consider it necessary to make extensive findings with respect to these allegations. It is sufficient to note that the record does establish that respondent has made loans to some of its wholesale customers and that it has expended substantial sums in furnishing equipment to such customers. However, there is nothing in the record to show that respondent's practices in this regard are any different from those of dairy companies generally, or that their expenditures for such purposes are greater than that of other dairy companies, in proportion to the amount of

business done by them. The record also establishes that respondent has granted rebates or volume discounts to wholesale customers. However, there is nothing in the record to establish that respondent's practices differ from that of the other dairy companies or that their practices may result in substantial injury to competition.

B. "Market Leverage"

4. Although not charged in the complaint as an illegal practice, counsel supporting the complaint contend that respondent has deliberately sold milk or ice cream in certain areas at unreasonably low prices, while making abnormally high profits in other areas. Complaint counsel assert that respondent has used its economic power or "market leverage" to "act individually in specific market areas so as to give it a competitive advantage over a local single-product company or a local multi-product company" (Findings, p. 19). In support of this contention complaint counsel cite a number of instances in which various of respondent's plants operated at a loss in either the milk or ice cream product line.

5. Respondent does not deny that its profit and loss statements, which are in evidence, purport to show that it sustained losses in certain of its plants. It contends that some of these losses were mere bookkeeping losses, as where a branch plant which did not manufacture ice cream was charged a price above the cost of the manufacturing plant. In such instances, if the records of both plants are combined they show an overall profit. In other instances where the records disclose a loss on one product and a profit on another, respondent contends that this resulted from the arbitrary assignment of indirect expenses to a particular product, and that if such expenses were ratably divided, the records would reveal a profit on all products. Respondent concedes that in some instances its plants did in fact operate at a loss, but contends that this was not due to any deliberate policy on its part. Certain of such plants, which were not considered to be efficient plants, were later closed.

6. The examiner considers it unnecessary to make extensive findings with respect to the contention that respondent used its economic power or market leverage unfairly. It is sufficient to note that the record is lacking in substantial evidence to support a finding that respondent deliberately incurred losses in one area or in one product and/or obtained abnormally high profits in other areas or with respect to other products. However, while the charge that respondent engaged in what complaint counsel refer to as "predatory" pricing

