

of carpet or rug currently in inventory or production. Upon request, respondents will forward to the Commission for testing a sample of any such carpet or rug.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

IN THE MATTER OF

UNITED FRUIT COMPANY, ET AL.*

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE CLAYTON ACT, SECS. 2(a), 2(f), AND 7

*Docket 8795. Complaint, July 28, 1969—Decision, Jan. 12, 1973.***

Order requiring the largest banana jobber in the United States, located in Long Beach, California, to sell its major competitor in the Los Angeles area which it acquired in 1968; to stop knowingly inducing discriminatory prices; and to not make any acquisition of any banana firm for the next ten years without prior Federal Trade Commission approval.

Order requiring the largest importer of bananas in the Los Angeles market, and its subsidiary, to stop discriminating in price among purchasers of their bananas.

*During the course of this proceeding, United Fruit Company through merger became an unincorporated division of United Brands Company, and United Fruit Sales Corporation changed its name to Chiquita Brands, Inc.

**Respondent Harbor Banana Distributors, Inc., filed a separate petition for review on March 20, 1973 in the Court of Appeals for the Fifth Circuit. On March 22, 1973, respondents United Brands Company and Chiquita Brands, Inc. also filed a petition for review in the same court.

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COMPLAINT

The Federal Trade Commission, pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. Section 45) and the Clayton Act, as amended (15 U.S.C. Sections 13, 18 and 21), by virtue of the authority vested in it by said Acts, having reason to believe that United Fruit Company, United Fruit Sales Corporation, and Harbor Banana Distributors, Inc., all corporations, hereinafter more particularly described and referred to as respondents, and hereby made respondents, have violated and are now violating the provisions of Section 2 of the Clayton Act, as amended, as hereinafter more particularly described, and having reason to believe that the respondents United Fruit Company, United Fruit Sales Corporation, and Harbor Banana Distributors, Inc., have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act as hereinafter more particularly described, and having reason to believe that the respondent Harbor Banana Distributors, Inc., has violated the provision of Section 7 of the Clayton Act, as amended, as hereinafter more particularly described, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its charges in respect thereto as follows:

PARAGRAPH 1. Respondent United Fruit Company, is a corporation organized, existing and doing business under the laws of the State of New Jersey, with its principal business office located at Prudential Center, Boston, Massachusetts. Respondent United Fruit Company is now, and for many years past has been engaged in the business of growing, causing to be grown, acquiring, processing, shipping, distributing and selling a variety of tropical agricultural food products including bananas. United Fruit Company operates many branch offices, installations and port facilities throughout the world and the United States. In 1966 its sales of all products and services were approximately \$440 million, and its sales of bananas in that year were approximately \$287 million. United is the dominant importer and distributor of bananas in the United States and the Los Angeles, California area. In 1966 United imported and distributed more than fifty percent of all bananas sold in the United States and more than sixty-five percent of all bananas sold in the Los Angeles, California area.

Some of the bananas sold and distributed by respondent United are sold for use, consumption and resale within the United States.

PAR. 2. Respondent United Fruit Sales Corporation, is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal business office located at Prudential Center, Boston, Massachusetts. Respondent United Fruit Sales Corporation, is now and, at all times referred to herein, has been a wholly-owned subsidiary of respondent United Fruit Company, and serves as the sales agent in the United States of United Fruit Company. Respondent United Fruit Company and respondent United Fruit Sales Corporation, are hereinafter jointly referred to as "United."

PAR. 3. Respondent United, in the course and conduct of its business, ships, and for many years past has shipped, bananas from foreign nations to purchasers located in many States of the United States. At all times referred to herein respondent has maintained a substantial course of trade in bananas in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 4. Respondent Harbor Banana Distributors, Inc., was incorporated under the laws of the State of California on December 18, 1964, and exists and conducts its business under the laws of said state with its principal business office located at 1420 Panorama Drive, Long Beach, California.

Upon its incorporation, respondent Harbor Banana Distributors, Inc., succeeded in interest, privity, control and purpose the business of a joint venture organized under the laws of the State of California on May 26, 1964 by Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc., California corporations. Said joint venture operated under the fictitious firm name "Harbor Banana Distributors, Inc.," and succeeded in interest, privity, control and purpose the businesses of the said Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc.

Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc., during the times referred to herein and for many years past were operated, controlled and substantially owned by Norf James Jebbia and Dominic Jebbia, individuals, and other individuals who are members of their mutual family, all of which individuals are sometimes hereinafter referred to as the "Jebbia Family." In addition to, and sometimes in connection with, Long Beach Banana Distributors, Inc., and San Diego Banana Distributors, Inc., the Jebbia Family for many years past operated

their business, as hereinafter described, under a variety of firms and trading names including San Fernando Valley Distributors, Inc., Colton Banana Distributors, West Coast Banana Distributors, and Union Banana Distributors.

Respondent Harbor Banana Distributors, Inc., and the individuals and firms described above as its predecessors are jointly referred to herein as "Harbor." Harbor is now and for many years past has been engaged in the business of purchasing bananas from importers, processing bananas and selling and distributing bananas to retailers and wholesalers in the Los Angeles, California area. Respondent Harbor had sales of approximately \$5.5 million in 1967.

The bananas purchased, processed, sold and distributed by respondent Harbor are sold for use, consumption, and resale within the United States.

At all times referred to herein respondent Harbor has competed with other corporations and with individuals and firms in the sale and distribution of bananas.

PAR. 5. Respondent Harbor, in the course and conduct of its business of purchasing and selling bananas, has purchased bananas from importers from foreign nations, causing bananas to be shipped from foreign nations to its place of business in the State of California and causes and has caused bananas to be shipped from the State of California to purchasers located in various other States of the United States. At all times referred to herein, respondent Harbor has maintained a substantial course of trade in bananas in commerce as "commerce" is defined in the Federal Trade Commission Act and the Clayton Act.

COUNT I

Alleging violation of Section 2(a) of the Clayton Act, as amended, by respondent United.

PAR. 6. The allegations of Paragraphs One through Five, are alleged in Count I the same as if fully written herein.

PAR. 7. In the course and conduct of its business in commerce, respondent United now discriminates and since July 1965 has discriminated, in price in the sale of bananas of like grade and quality in the Los Angeles, California area by selling bananas to respondent Harbor upon terms and conditions significantly more favorable than the terms and conditions respondent United sells

bananas of like grade and quality to other purchasers competing with the favored purchaser, Harbor.

For example, respondent United now maintains and for many years past has maintained a terminal facility at Wilmington, California located at the waterfront on San Pedro Bay. During the times referred to herein, respondent United has sent two ships each week loaded with bananas to its terminal facility at Wilmington, California where respondent United unloads bananas from its ships into trucks and railroad cars for its various purchasers, which purchasers then transport said bananas to their respective processing warehouses, at their own expense.

Beginning in July 1965 and once each week since that date, respondent United has sent its ship loaded with bananas directly to the processing warehouse of the favored purchaser, respondent Harbor, at Long Beach, California, located at the waterfront on San Pedro Bay, where respondent United unloads the bananas sold to respondent Harbor directly into Harbor's processing warehouse.

Since July 1965 respondent United has maintained and does maintain a tract of land and necessary equipment and facilities at Long Beach, California for the sole purpose of unloading bananas from its ships into respondent Harbor's processing warehouse and has employed such land, equipment and facilities for this purpose.

Many of the purchasers of bananas from respondent United who receive their bananas from said respondent at its Wilmington, California terminal compete with the favored purchaser, respondent Harbor, in the distribution and resale of bananas in the Los Angeles area. None of the nonfavored competing purchasers receive the delivery and warehouse loading service and favorable terms and conditions of sale afforded to respondent Harbor, with the result that they incur substantially higher transportation expenses than the favored purchaser, respondent Harbor, in connection with the purchase of bananas from respondent United.

Said difference in delivery and loading service has resulted in a substantial discrimination in the ultimate or net price for products sold to its favored and nonfavored purchasers by respondent United.

PAR. 8. The effect of respondent United's discrimination in net price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which its

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avored purchaser is engaged, or to injure destroy or prevent competition between the favored and nonfavored purchasers or with customers of either of them.

PAR. 9. The aforesaid acts and practices of respondent United constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

Alleging violation of Section 2(f) of the Clayton Act, as amended, by respondent Harbor.

PAR. 10. The allegations of Paragraphs One through Nine are alleged in Count II the same as if fully written herein.

PAR. 11. Prior to the beginning of the discriminatorily favorable delivery and loading service, terms and conditions of sale, and net prices afforded to respondent Harbor as alleged in Count I above, respondent Harbor, in the course and conduct of its business in commerce, induced respondent United to agree to afford it such discriminatory considerations, when respondent Harbor knew or should have known that such discriminatory benefits would not be granted to all of the other purchasers from respondent United competing in the distribution and resale of bananas with respondent Harbor.

From the commencement of the discriminatory delivery and loading service, terms and conditions of sale, and net prices as alleged in Count I above to the present, respondent Harbor in the course and conduct of its business in commerce, has induced, induced and received, and received such discriminatory considerations when it knew or should have known that such discriminatory considerations were not granted to all of the other purchasers of bananas of like grade and quality from United competing in the distribution and resale of such bananas with respondent Harbor.

PAR. 12. The aforesaid acts and practices of respondent Harbor constitute violations of subsection (f) of Section 2 of the Clayton Act, as amended.

COUNT III

Alleging violations of Section 5 of the Federal Trade Commission Act by respondents, Harbor and United.

PAR. 13. The allegations of Paragraphs One through Five and

Paragraphs Seven, Eleven and Eighteen through Twenty-Two are alleged in Count III the same as if fully written herein.

PAR. 14. In the course and conduct of its business in commerce, respondent Harbor has attempted and is attempting to monopolize the sale and distribution of bananas in the Los Angeles area by various acts and practices, including but not limited to the following:

A. Selling or offering to sell bananas at unreasonably low prices approaching or below the cost of purchasing, handling, processing and distribution.

B. Acquiring and developing the physical facilities and capacity to support a monopoly in the sales and distribution of bananas in said market. For example, in July 1965, respondent Harbor completed the construction of and began operating a banana processing warehouse on the waterfront of San Pedro Bay at Long Beach, California. Said warehouse is especially and uniquely designed and equipped for the handling and processing of bananas. Said processing warehouse has the capacity to handle, process and store, in anticipation of sale, enough bananas to satisfy the entire needs of the Los Angeles market area presently and in the foreseeable future, and exceeds the total capacity of Harbor's own prior capacity and all its competitors combined.

C. Inducing, inducing and receiving, and receiving the discriminatory terms and conditions of sale as alleged in Count II herein.

D. Acquiring the business and assets of its largest competitor as alleged in Count IV hereinafter.

PAR. 15. Each of the acts and practices of respondent Harbor alleged in this count separately and in combination with each, any, or all of the other acts and practices alleged in this count have had and do have the effect of hindering, lessening, restricting and eliminating competition with respondent Harbor in the sale of bananas; have had and do have the tendency to create a monopoly in respondent Harbor; have been conducted, engaged in, and adopted, for the purpose of creating monopoly in respondent Harbor; are all to the prejudice of the public and to competitors of respondent Harbor; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

PAR. 16. In the course and conduct of its business in commerce, respondent United, by discriminating in the terms and conditions

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of sale as alleged hereinbefore, has knowingly and materially aided and abetted, and is knowingly and materially aiding and abetting respondent Harbor in the acts and practices alleged in this count, and in Harbor's attempt to monopolize the sale and distribution of bananas in the Los Angeles area.

United's aiding and abetting of respondent Harbor together with any or all of the acts and practices of respondent Harbor as hereinbefore alleged have had and do have the effect of hindering, lessening, restricting and eliminating competition with respondent Harbor in the sale of bananas; have had and do have the tendency to create a monopoly in respondent Harbor; and are all to the prejudice of the public and to competitors of respondent Harbor. Said aiding and abetting by respondent United constitutes unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

COUNT IV

Alleging violations of Section 7 of the Clayton Act, as amended, by respondent Harbor in respect to the acquisition of the assets of Charles C. McCann Company, Inc., and Tradewinds Produce, Inc.

PAR. 17. The allegations of Paragraphs Four, Five, and Fourteen are alleged in Count IV the same as if fully written herein.

PAR. 18. The Charles C. McCann Company, Inc., was organized in 1957 and at all times pertinent hereto was a corporation, organized and existing under the laws of the State of California. Tradewinds Produce, Inc., was organized in 1962 and at all times pertinent hereto was a corporation, organized and existing under the laws of of the State of California, and traded under the name "W. W. Crenshaw Company." During the period of their mutual existence, the Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., shared common ownership, management, and facilities and had the same principal business offices at 780 Warehouse Street, Los Angeles, California. Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., were operated as a single business enterprise engaged in the wholesale distribution of bananas. They were collectively known in the trade as, and are sometimes referred to herein as, "McCann-Crenshaw."

PAR. 19. During 1966 and for at least several years prior thereto, McCann-Crenshaw was a growing and increasingly profit-

able business with substantial sales and profits. For example, in 1966, McCann-Crenshaw had sales of about \$3.5 million with net profits exceeding \$90 thousand. Prior to its acquisition by respondent Harbor, McCann-Crenshaw competed with respondent Harbor in the purchase, sale, and distribution of bananas in the Los Angeles, California area.

PAR. 20. The wholesale distribution of bananas in the Los Angeles, California area is a substantial business with sales of about \$13.5 million in 1967. Concentration is high and is increasing. In 1967 the two leading wholesale banana distributors in the market accounted for about sixty-five percent of wholesale banana sales. Respondent Harbor ranked first with about forty percent and McCann-Crenshaw was second with about twenty-five percent of such sales. Following the combination of the businesses of respondent Harbor and McCann-Crenshaw, the two-firm concentration in that market increased to about 77 percent.

PAR. 21. In February 1968, respondent Harbor acquired the assets of McCann-Crenshaw as a going business, by execution of the terms of a sales agreement dated February 2, 1968, wherein the Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., collectively agreed to sell their tangible personal property and interest in leases to respondent Harbor.

PAR. 22. At the time of said acquisition and at all times relevant hereto, Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., separately and jointly have purchased bananas from importers from foreign nations, causing said bananas to be shipped from foreign nations to the State of California and have caused said bananas to be shipped from the State of California to various other States in the United States. At all times referred to herein Charles C. McCann Company, Inc., and Tradewinds Produce, Inc., have maintained a substantial course of trade in bananas in commerce as "commerce" is defined in the Clayton Act.

PAR. 23. The effect of the acquisition of the McCann-Crenshaw business and assets by respondent Harbor as herein alleged, may be substantially to lessen competition or tend to create a monopoly in the wholesale distribution of bananas in the Los Angeles, California area, in violation of Section 7 of the Clayton Act (15 U.S.C. Section 18) as amended.

Mr. Ivan W. Smith and Mr. David M. Malone supporting the complaint.

Mr. Harry L. Shniderman, Mr. Michael J. Henke, and Mr. Rodney E. Gould, Covington & Burling, Washington, D.C., Mr. Henry C. Thumann, Mr. George A. Manfredi, O'Melveny & Myers, Los Angeles, California, for respondents United Fruit Company and United Fruit Sales Corp., Mr. Eberhard P. Deutsch, Mr. Bernard Marcus, and Mr. Joseph H. Lawson, Deutsch, Kerrigan & Stiles, New Orleans, Louisiana, for respondent Harbor Banana Distributors, Inc.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

NOVEMBER 18, 1971

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I

PRELIMINARY STATEMENT

This proceeding was commenced on August 1, 1969, by the service of the complaint of the Federal Trade Commission on respondents. Respondents are: United Fruit Company, the largest importer of bananas into the United States and its subsidiary, United Fruit Sales Corporation by whom its selling activity was conducted (both described as United) and; Harbor Banana Distributors, Inc. (Harbor) the largest banana jobber in the United States that carries on its operations in the Los Angeles-Long Beach, California area.¹

A. The Pleadings

The complaint contains four counts and certain descriptive matter concerning the business (reiterated in each count). The

¹ During the course of this proceeding United Fruit Company through merger became an unincorporated division of United Brands Company, and United Fruit Sales Corporation changed its name to Chiquita Brands, Inc.

first count charges that United discriminated in net price in favor of Harbor in violation of Section 2(a)² of the Clayton Act, as amended, Count II that Harbor induced the discrimination in violation of Section 2(f)³ of the Clayton Act, as amended; Count III that Harbor had attempted to monopolize the sale and distribution of bananas in the Los Angeles area, aided and abetted by United in violation of Section 5⁴ of the Federal Trade Commission Act; and, Count IV that Harbor had purchased the assets of competitors, Charles C. McCann Company (McCann) and Tradewinds Produce, Inc. (Tradewinds) in violation of amended Section 7 of the Clayton Act.⁵

On August 14, 1969, respondent Harbor moved for a more definite statement. The motion was denied August 21, 1969, and a prehearing conference was scheduled for 3 days after the date fixed in the complaint for the initial hearing.

² Section 2(a) as amended, reads in pertinent part as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * * And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." (15 U.S.C.A., sec. 13, as amended)

³ Section 2(f) of the Clayton Act, as amended, reads as follows:

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." (15 U.S.C.A., sec. 13, as amended)

⁴ Section 5(a)(1), as amended, of the Federal Trade Commission Act reads as follows:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." (15 U.S.C.A. sec. 45)

⁵ Section 7 of the Clayton Act, as amended, reads in pertinent part as follows:

"That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise may be substantially to lessen competition, or to tend to create a monopoly." (15 U.S.C.A. sec. 18)

Respondents filed their answers September 2, 1969. Each respondent (United being treated as one) admitted its corporate status and admitted some of the allegations regarding its activity, but generally there was denial of knowledge of the activity of the other respondent.

Respondent United took the position in its answer that it was under no obligation to answer regarding Counts II and IV. It stated that it had maintained a tract of land and necessary equipment at Long Beach and had discharged bananas there once each week during the period July 1965 to March 4, 1969. It also stated that it had maintained a terminal facility at Wilmington, California, and had sent two ships there each week loaded with bananas.

As an affirmative defense to Counts I and III, United alleged that the counts failed to state a cause of action and that United's action in discharging at Long Beach was taken in good faith to meet an equally low price or equal the services of a competitor.⁶

Respondent Harbor first separately stated its affirmative defenses to Counts II, III and IV.

Its position was that the deliveries to Long Beach were non-discriminatory; ceased prior to the issuance of the complaint; could have been made to others; were made to a disadvantageously located processing warehouse; and were made in good faith to meet competition.

Harbor's position as to Count III was that: (1) it was not engaged in interstate commerce; (2) no sales were made at unreasonably low prices; (3) it acquired no property unlawfully and its warehouse capacity did not exceed its needs; (4) it had not received or induced discriminatory terms; and (5) it had not unlawfully acquired any business.

Harbor's third defense relating to Count IV was that: (1) it acquired only the physical assets of a seller, no longer a competitive factor, that was unable to dispose of them elsewhere; (2) the seller retained other assets and its right to compete; and (3) the acquisition had no anticompetitive or monopolistic effect.

⁶ This defense and Harbor's similar defense were made pursuant to Section 2(b) of the Clayton Act, as amended, which reads in pertinent part as follows:

"* * * Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." (15 U.S.C.A. 13(b))

Harbor's fourth defense was a paragraph by paragraph answer to each paragraph of the complaint.⁷ Except for admissions regarding its corporate status⁸ and that of United's, the unloading of bananas into its processing warehouse, the purchase of certain assets of Charles C. McCann Company and Tradewinds Produce, Inc., and their competition prior to 1966, the answer generally denied the remaining allegations of the complaint. We pass now to the prehearing procedures.

B. Prehearing Procedures

Closed prehearing conferences were held in Washington, D.C., on September 19, 1969, December 2, 1969, March 4, 1970 and February 8, 1971 (Ph. Tr. 1-457) in an effort to simplify the proof and to insure complete discovery. The effort was partially successful in that most documents had been agreed to as genuine and the mathematical accuracy of most charts was conceded. Names of witnesses were also disclosed. A considerable period of time was expended in the preparation and exchange of charts and tabulations. This was due, in part, to differences of opinion concerning the geographic market and the competition to be included. And, despite the length of the hearings, considerable time was conserved by the prehearing procedures and by later agreements made during trial, for which counsel for all parties are commended. There were a number of other procedural matters disposed of during prehearings.

During the course of the prehearing procedures, counsel for Harbor reached an agreement with counsel supporting the complaint to submit to the Commission a proposed consent decree.

⁷ The following abbreviations will sometimes be used:

Tr.—Transcript page	RUPF—Respondent United's Proposed Findings
Ph. Tr.—Prehearing transcript page	RHPF—Respondent Harbor's Proposed Findings
CX—Commission's Exhibit	CPF—Complaint Counsel's Proposed Findings
RHX—Respondent Harbor Exhibits	
URX—Respondent United Exhibits	
RU—Respondent United	
RH—Respondent Harbor	
C.—Complaint	
A.—Answer	

(It should be noted, parenthetically, that exhibit numbers do not run consecutively throughout because among other matters charts were separately numbered during prehearing and it was necessary to set up a special series of hundreds for them. In addition, complaint counsel keyed their exhibits to sections of their proof.)

⁸ In its answer respondent Harbor admitted that it was a successor to the Jebbia interests (hereinafter described as Jebbias and Jebbia family). In its findings it takes a different position (RHPF p. 150, *et seq.*), although no motion to amend was made.

Counsel for United refused to join but separately moved to dismiss. The hearing examiner certified both motions to the Commission on April 22, 1970, and April 24, 1970, respectively, and on May 13, 1970, issued an order rescheduling the hearing until after the decision by the Commission on the certifications. After receiving comments from the Division of Mergers on June 22, 1970, the Commission granted to the parties an opportunity to comment on the views of that division on July 7, 1970. Respondent Harbor replied on July 15, 1970, and the Commission on November 13, 1970, denied the motions of both of respondents. A motion for reconsideration was certified to the Commission on December 1, 1970. Reconsideration was denied January 15, 1971. A final prehearing conference was held Feb. 8, 1971, at which the times and places for the hearings were agreed upon. On the same day, respondent Harbor made a motion for partial summary judgment. This was denied March 8, 1971. Permission to appeal was also denied April 1, 1971. In the meantime, subpoenas *duces tecum* were issued and motions to quash were denied. We now consider the hearings.

C. The Hearings

Hearings commenced April 12, 1971, at Washington, D.C. and continued there until April 27, 1971. There was then a brief recess, stipulated by all parties to be necessary and hearings reconvened on May 10, 1971, in Los Angeles, California, by consent. Hearings continued there until May 27, 1971. After another short recess, stipulated as necessary by the parties, hearings resumed in Washington, D.C. and continued until July 2, 1971, at which time the evidence was closed. Twenty four witnesses testified and more than two thousand exhibit pages were considered.

The Commission extended the time for filing this initial decision until December 1, 1971, after conclusion of the hearings.

A novel procedure was adopted during the presentation of the case for Harbor. Two experts, one an economist and the other an accountant, were called by Harbor. Each identified a printed report compiled by him and stated that he had prepared it for submission in this case. Over complaint counsel's objection, the hearing examiner, after insuring that an adequate opportunity was given to complaint counsel to examine the reports, received

the reports in evidence in the nature of economic and accounting briefs but with the reservations that such briefs would not be taken for the truth of any facts not otherwise in evidence. The hearing examiner regards this innovation appropriate provided there is ample opportunity for preparation for cross-examination and provided that the facts forming the basis for the expert opinions expressed are otherwise established. Some saving of time resulted. The reports cannot, of course, be considered apart from the direct and cross-examination of the witnesses as such examination substantially affected the weight to be given to the reports. With these reservations it was considered helpful to an understanding of the position of the parties to have the reports received. We turn now to the basis of this decision.

D. Basis of Decision

This decision is based on the evidence as a whole. Under the requirement of Rule 3.51(b) principal supporting items of evidence have been cited.⁹ However, this does not mean that the impact of the record in its entirety has not been considered or that there are not additional references which might be cited. In deciding on the weight to be given the evidence, the hearing examiner has considered particularly the demeanor of the witnesses and the contemporaneous records maintained. Consideration has been given to the proposed findings and conclusions of the parties. Those not adopted in terms or in substance are rejected as erroneous, irrelevant, or immaterial. On these bases the following findings of fact, reasons for decision, conclusions, and order are made.

II

FINDINGS OF FACT

For convenience ¹⁰ findings of fact will be grouped under headings and subheadings listed in the table of contents. We consider first the respondents.

⁹ In citing references the hearing examiner has depended in large part on the voluminous and carefully prepared findings supplied by counsel. In citing the proposed findings reference is intended to be made to the citations there given.

¹⁰ It is not intended or possible to insure, without undue repetition, that the material collected under each heading or subheading will include all data suggested by the title used. Accordingly, facts stated under one heading must be considered in connection with those stated under other headings.

A. The Respondents

1. At the time of the filing of the complaint herein, respondent United Fruit Company was a New Jersey corporation with its principal business offices located in Boston, Massachusetts (C., Par. 1; United's A., Par. 1). In 1969, the United Fruit Company was acquired by AMK Corporation, and the latter company was merged into the former company. Following the merger the activity of the former United Fruit Company was continued by an unincorporated division of the surviving corporate entity, and the corporate name was changed to United Brands Company (Tr. 998-999). The United Fruit Company Division of United Brands Company, and its predecessor, United Fruit Company, have engaged in and continue to engage primarily in the business of growing bananas in the tropics and transporting them in an unripened condition to worldwide markets including United States markets (Tr. 1001; 1113; RUPF I-1; CPF. 0.1, 0.2, 0.5).

2. At the time of the filing of the complaint herein, respondent United Fruit Sales Corporation was a Delaware corporation and a wholly-owned subsidiary of the United Fruit Company (C., Par. 2; United's A., Par. 2). The principal offices of United Fruit Sales Corporation were located in Boston, Massachusetts (C., Par. 2; United's A., Par. 2). United Fruit Sales Corporation's name was subsequently changed to Chiquita Brands, Inc. (Tr. 1000). Chiquita Brands, Inc., under both its present and previous corporate names has served and continues to serve as the sales agent for the United Fruit Company and, more recently, the United Fruit Company Division of United Brands Company¹¹ (Tr. 999; C., Par. 2; United's A., Par. 2; RUPF 1-2; CPF. 0.3).

3. United's worldwide sale of all products and services has ranged from about \$333 million in 1964 (CX 175) to about \$520 million in 1970. Total United Brands Company sales of all products for 1970 were about \$1.4 billion (Tr. 1042). United's worldwide sales of bananas were \$287 million in 1966, \$312 million in 1967, and \$322 million in 1968 (CX 178, 179, 181). United does not maintain separate figures for dollar sales of bananas in the United States. In 1969, United produced 101,750,000 forty-pound boxes of bananas (Tr. 1051), about 50 percent of which were

¹¹ United Fruit Company, the United Fruit Company Division of United Brands Company, United Fruit Sales Corporation, and Chiquita Brands, Inc., are sometimes hereinafter collectively referred to as "United," as they were loosely called United and United Fruit during the hearings (see CPF. 0.4).

imported into North America (Tr. 1051-1052). United imported about 56,455,000 boxes of bananas into North America in 1968 (CX 181). About 80 percent to 90 percent of United's bananas delivered to North America during the past several years have been their premium quality "Chiquita" brand product (Tr. 1051; CX 179, 181). During the ten years immediately past, United's share of the United States banana market has fluctuated from a low of 37 percent to a high of 55 percent (Tr. 1058; CPF. 0.5).

4. During all times relevant to this proceeding, United has maintained a substantial course of trade in bananas in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act (United's A.; CX 175-181; Tr. 1091-1092; CPF. 0.6).

5. Respondent Harbor Banana Distributors, Inc., was incorporated as a California corporation on December 18, 1964 (C., Par. 4; Harbor's A., Par. 4). Its principal place of business is in Long Beach, California (C., Par. 4; Harbor's A., Par. 4). Harbor is the successor to a banana wholesaling business theretofore owned and operated by the Dominick Jebbia family (C., Par. 4; Harbor's A.,¹² Par. 4). Harbor commenced operation in late July 1965 and since that time has continuously been engaged in the business of purchasing bananas from importers, processing the bananas, and reselling them at wholesale (C., Par. 4; Harbor's A., Par. 4; Tr. 1878; see RUPF 1-3; CPF. 0.7).

6. Respondent Harbor purchases, through advance orders based on anticipated needs of its regular customers, bananas which are cultivated and harvested in foreign countries located in the tropics and then imported into the United States (Admitted, Harbor A., CX 170, 171; Tr. 1063, 1104, 1110, 1111, 4491). Harbor sells such bananas to customers some of which are located outside the State of California (CX 225-232, 235-240; Tr. 1722-1725). The stockholders and most of the officers of Harbor are located outside the State of California and in New Orleans, Louisiana. There is of necessity substantial and regular communication between the general manager in California and its officials in Louisiana and regular transfer of funds and reports in the course of operation of Harbor (Tr. 1951-1953).

¹² In Harbor's proposed findings commencing at p. 150, that respondent seeks to avoid its admission that it succeeded to this business. Its recitation of the corporate history RHPF. 4.1-4.25, and the testimony of Dr. D'Antoni (Tr. 5217-5324) make it very clear that Harbor was, and was properly regarded by the trade as, successor to the business previously run by the Dominick Jebbia family (see also CPF. 0.8-0.12).

Harbor is thus engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and Clayton Act.

7. Respondent Harbor is now, and at all times relevant to this proceeding has been, engaged in the purchasing, ripening, selling, and distributing of bananas at wholesale in the Los Angeles, California, area. After ripening green bananas, Harbor sells them to retail grocers and general line produce wholesalers (Harbor A.; CX 233a, 220; Tr. 1700-1703). After 1968, Harbor began selling pineapples in quantity (Tr. 1721), but prior thereto the sale of pineapples constituted a very small part of Harbor's business (Tr. 1901). Harbor's total sales in 1966 were approximately \$4.6 million. In 1968, Harbor's sales were approximately \$9.4 million of which some \$9.1 million of sales were banana sales and some \$266,000 pineapple sales. In 1969, Harbor sold approximately \$8.4 million worth of bananas and approximately \$457,000 worth of pineapples (Attachment B, RHX 109; CPF. 0.14).

B. Other Importers

8. Standard Fruit and Steamship Company (Standard) is a corporation with principal business offices located in New Orleans, Louisiana (URX 49). It is a major importer of unripened bananas into the southern California market (URX 55). Standard entered the market in 1960, importing bananas grown principally in Ecuador (Tr. 1689-1690, 2266, 1040, 4491). By the end of 1964, Standard was supplying approximately 36 percent of the market area's banana requirements (Tr. 2264; URX 55n, o, s, t). At the time of the formal hearing, Standard supplied approximately 50 percent of the area's needs (Tr. 2406, 4566; RUPF I-4).

9. Driscoll Strawberry Associates (Driscoll) is a corporation with principal business offices located in Watsonville, California. It entered the business of importing unripened, Nicaraguan bananas into the southern California market in 1967 and continued such importations until late 1969 (URX 55h-k; Tr. 5898-5900; RUPF I-5).

C. The Banana and Its Distribution

10. A banana is the fruit of a tropical plant of the musaceae family of which there are a large number of varieties. Prior to

1960 most of the bananas imported into the United States were of the Gros Michel variety. In the 1960's, because of the susceptibility of the Gros Michel to Panama disease, the Valery or Cavendish banana replaced the Gros Michel (Tr. 1206; RHPF 2.9-2.10). This change of variety required changes in shipment and in ripening techniques (RHPF 2.10-2.11; Tr. 1207). These were in the process of change immediately preceding and during the period with which this proceeding is concerned.

11. Nearly all of the bananas consumed in the United States are produced in tropical regions of the Western Hemisphere and sales of bananas represent about 1 percent of all food sales in the United States (Tr. 1267-1268).

12. The principal importers of bananas into the United States are the respondent United and its chief competitor, Standard Fruit and Steamship Company. United customarily produces bananas either by itself, growing them on its own farms, or by making specific contracts with associated producers. United's bananas are grown in Costa Rica, Panama, Colombia, Honduras, Santo Domingo, Guatemala, Dominican Republic, Ecuador and Nicaragua. Standard Fruit and Steamship Company customarily has used Ecuador as the source of its bananas although Costa Rica has provided some of its fruit (see Tr. 1040; RHPF 2.6; CPF. 0.15; CX 175-180; Tr. 1013-1021).

13. Both United and Standard maintain their own fleets of refrigerated ships (some are chartered others are company owned) for transporting the bananas to the markets. After harvesting, United's bananas are now boxed and shipped to one of seven major United States port terminals for delivery to United's customers (CX 177, pp. 1-4). This proceeding is concerned principally with the ports of Los Angeles, California—Wilmington and Long Beach.

14. The bananas imported into Los Angeles are harvested while still green (Tr. 1113). During the period of time relevant to this proceeding, the green fruit was first transported to California on stems and during a later period taken to boxing stations in the tropics where the stems were cut into hands and packed in 40-pound boxes for transportation to California (Tr. 1028-1030, 1442). The change from shipping on stems to shipping in boxes into California took place between 1963 and 1964 largely as a consequence of the change from Gros Michel to

Cavendish variety bananas. This was because the Cavendish or Valery banana was more fragile and had to be protected against bruising (Tr. 4518-4519). The fruit was shipped under carefully controlled temperature and humidity conditions in the importers refrigerated ships (Tr. 1085).

15. The importers do not ripen bananas. Sales to their customers are usually f.o.b. alongside ship (at the waterfront). United also maintains inland sales offices with which this proceeding is not concerned. Both importers have developed trade names for their bananas and participate to some extent in consumer advertising (Tr. 1396; CX 514a-b; Tr. 4495, 4497).

16. Both United and Standard sell to three classes of customers: (1) banana-wholesaling specialists, known as banana jobbers; (2) larger general produce wholesalers with processing facilities; and (3) direct-purchasing, self-processing, retail grocery organizations (see RHPF 2.7; CPF. 0.15; Tr. 1031; URX 55).

17. The method of ordering bananas from importers is of some significance because of differing prices which result. Importers' customers buy either at an advance-order price, a seaboard price, or a roller price. We now consider these three types:

(a) *Advance-Order Price*

Several weeks before a given ship is scheduled to arrive in port, United, after attempting to gauge market conditions on the anticipated date of arrival, sets an "advance-order price" for fruit to be delivered by that ship (Tr. 1405-1406, 1420, 1422). Approximately two weeks in advance of the ship's arrival and prior to its departure from the tropics, orders at the stated price are solicited from potential purchasers (Tr. 1104, 1824-1826). By placing such an advance order, the purchaser is able to guarantee himself a source of supply for his regular customers' needs rather than gamble on the ultimate availability of excess fruit at lower prices. He can not cancel without penalty (Tr. 2292). Advance-order opportunities are also available from Standard with less stringent requirements (Tr. 2291-2292; see RHPF 2.58). The term "preorder" is synonymous with "advance order" (Tr. 1824; RUPF p. 16).

(b) *Seaboard Price*

During the week before a given banana ship arrives in port,

the importers announce the price at which unsold fruit (fruit which has not been advance ordered) on that ship will be sold at dockside as the ship unloads (Tr. 1420-1421, 1423). This "seaboard price," is usually the same as the advance-order price (Tr. 1827). If, however, demand is less than anticipated by the importer, it will normally set a seaboard price which is less than the advance-order price (Tr. 1421, 1827). In such a case, the advance-order price is adjusted downward to the seaboard price (Tr. 1105-1107, 1827-1828). If demand is higher than anticipated, the seaboard price may exceed the advance-order price.

(c) *Roller Prices*

"Rollers" is a term used widely in the perishable-produce industry to refer to unsold products which traditionally are loaded on rail cars or trucks (Tr. 1103, 1416, 5933-5934). These rolling vehicles are then moved away from their point of origin (in the case of bananas the importation terminal) in the hope that somewhere along their path the produce can be sold before spoiling (Tr. 1103, 5933-5934). When a banana importer is unable to sell all the fruit from a given cargo before the ship finishes discharging, the bananas are committed to rail cars or refrigerated trucks at dockside and become rollers (Tr. 1416, 1828-1829). In subsequent days, the importers attempt to sell these "rolling" bananas to purchasers at a price which varies with market conditions and the age of the fruit (Tr. 1104, 1829). The price of rollers is always lower than the advance-order and seaboard prices and tends to get lower the longer the fruit remains unsold (Tr. 1104, 1416, 1829). During the relevant time period, rollers were irregularly available from both Standard and United in the southern California market area (Tr. 1103, 2290; RUPF pp. 17-18). They were offered to customers in rotation (RHPF 2.57).

It is not clear just how Driscoll Strawberry Associates sold its imports during the two years of its operation. Its prices were, however, lower than the other importers (Tr. 5899; URX 55).

18. Except in the case of respondent Harbor, which had direct conveyor delivery arrangements it sometimes used, bananas are delivered by the importers to customers at the back of trucks or in rail cars and then, at the customers expense, delivered to his ripening room (see findings, *infra*, relating to alleged discrimination for references).

19. During the period when stems were available, jobber ripeners, in addition to ripening bananas in controlled temperature rooms, cut and boxed the fruit and delivered it to their customers. After boxes packed in the tropics with the new Cavendish variety banana became available, the bananas were ripened in the original packages received from the importers with the assistance of an ethylene gas treatment in airtight refrigerated banana rooms (see CPF. 0.15; RHPF 2.11-2.13; Tr. 1208-1209).

20. Bananas should be ripened in from four to seven days. After seven days they begin to spoil. Bananas can be forced, but when bananas are ripened too fast, they are commercially less desirable because they have less "shelf life" at the retail level and they spot and deteriorate faster (Tr. 5936; see RHPF 2.5).

Banana ripening is thus an exacting procedure and requires experienced personnel and adequate facilities.

21. After ripening, the bananas purchased by banana jobbers are sold to other jobbers or to retailers. A large proportion of the retailers are chain-store organizations, many of whom maintain docks for the receipt of merchandise in downtown Los Angeles relatively near the downtown Los Angeles markets (see CX 402b map of Los Angeles, for location of the downtown markets). And, most of the banana jobbers maintain stalls in one or another of the markets within the downtown market area where they receive buyers and maintain a small quantity of bananas for stall delivery. A large proportion of sales are made by telephone, and many deliveries are made by banana jobbers to their retail customers' dock or receiving point (which might be a truck) in the vicinity of the market. There have been a few routes maintained by banana jobbers (see findings re: Count IV for further details).

22. There are five chain-store organizations in the southern California area that purchase directly from importers, ripen, or cause the bananas to be ripened, and then sell them through their retail stores. One of these chain organizations, Safeway, commenced ripening its own bananas in 1934. Two chains, Von's Grocery Co. (Von's) and Alpha Beta Acme (sometimes Alpha Beta or Acme), commenced ripening with the advent of the boxing program (Tr. 6067-6069). Another chain bought a produce jobber and uses almost the latter's entire output. And, a fifth has ripening facilities to a limited extent (Tr. 6179, 2160).

D. Price Discrimination (Count I, Sec. 2(a))

1. *Discriminatory Action in Direct Ship Delivery Solely to Harbor Plant*

23. Respondent Harbor Banana Distributors, Inc., and the Jebbia family business that Harbor succeeded to, have purchased bananas from respondent United at all times relevant to this proceeding (URX 55). The Jebbia family business was the most important banana jobber from the point of number of purchases and profitability with whom United did business (CX 169a-b; Tr. 1094, 1179).

24. During July 1965, Harbor completed construction of its waterfront banana processing plant on Pier A, Port of Long Beach, Long Beach, California (CX 209a). Harbor's plant was separated from the water by parts of two continuous string-pieces, one leased by United and one leased by Standard Fruit and Steamship Company and known respectively as Berth 209 and Berth 208 (CX 404b, 521a-b; Tr. 2061-2063; CPF. 1.2).

25. On July 27, 1965, United discharged 12,008 (40 pounds net) boxes of bananas from its ship, SS Junior, at Berth 209, Long Beach, by conveyors directly into Harbor's processing plant. All of the longshore labor for such discharge was furnished by United, but Harbor reimbursed United for that portion of the longshore labor performed in the warehouse (CX 145). Approximately once each week thereafter, until March 4, 1969, United made similar direct discharges to Harbor from ships at Berth 209, Long Beach, and maintained equipment there for that purpose. United made no charge to Harbor for the ship delivery service to Long Beach (C.RUA and RHA.; Tr. 1031, 1093-1096, 4903; CPF. 1.3-1.4).

26. During the years 1965 through 1967, United's weekly direct deliveries of branded and unbranded bananas to Harbor by ship from Berth 209, ranged from about 6,000 boxes to about 25,000 boxes. In 1965 United's ships discharged 21 times into Harbor's plant, delivering 194,842 boxes of bananas, an average of over 9,000 boxes per discharge, with a total valuation of \$693,130.40 (CX 411a). In 1966 United ships discharged 51 times into Harbor's plant, delivering 536,208 boxes, an average of over 10,000 boxes per discharge, with a total valuation of \$1,702,358.10 (CX 411b 1, 2). In 1967 United discharged 47 times into Harbor's plant, delivering 517,399 boxes, an average of over

11,000 boxes per discharge, with a total valuation of \$1,721,138.10 (CX 411c 1-2; CPF. 1.5).

27. United's facility at Berth 209, Long Beach, was a temporary facility intended for Harbor's discharge only and no other United customer received delivery of bananas at Long Beach (Tr. 1170-1171; CPF. 1.7-1.8; CX 160).

28. From July 1965, until March 1969, all of United's other southern California customers received their deliveries at United's regular terminal located at Berth 147, Wilmington, (Tr. 1031, 1092-1097). United never delivered or offered to deliver directly to any other southern California customer (Tr. 1128) and never paid or offered to pay any southern California customers any compensation in lieu of delivery (Tr. 1126; CPF. 1.11-1.12).

29. Among the southern California customers of United that received delivery of bananas solely at United's regular terminal, Berth 147, Wilmington, California, were the following banana jobbers located in Los Angeles who competed with Harbor (when it was getting direct delivery) in the sale and distribution of bananas purchased from United:

Charles C. McCann Company and its affiliated firm, Tradewinds Produce, Inc., operating under the name W. W. Crenshaw Company (Tr. 3872) (until the asset purchase by Harbor in February 1968);

Pacific Banana Company (Tr. 3317);

Growers Marketing Company (Tr. 2885);

Pan Am Distributing Corp. (Tr. 2427) and

Los Angeles Banana Distributors (Tr. 2504).

In 1965 Paramount Banana Distributors also competed with Harbor, but Paramount's banana operation was taken over by a general produce wholesaler, Kaplan's Fruit & Produce Co., Inc., in 1966 that continued to compete with Harbor (Tr. 2719-2720).

30. Although the former vice president in charge of marketing testified that delivery at Long Beach was offered to all other jobbers (Tr. 1437), there was only one instance in which a jobber expressed interest (Tr. 1437). In that instance United failed to send its usual confirmation notice and the jobber did not send its trucks to Long Beach (Tr. 4456-4459). There were some preliminary discussions with jobbers, prior to the time the Long Beach discharge was started, looking toward interesting jobbers in participating in a facility to be established at Wilmington by United (Tr. 1482-1485). The terms and conditions of the agree-

ment were not stated, (Tr. 1632) and while some jobbers expressed some interest (Tr. 1475), they generally adopted a wait and see attitude (CX 52b; RHPF 6.14). No later offer was made (see CPF. 1.22-1.25).

31. The bananas sold contemporaneously by United to Harbor and to its other banana jobbers during the period July 1965 to March 1969 were sold for use, consumption, and resale in the United States and were (whether branded or unbranded) of the same grade and quality (Tr. 1099).

32. The direct delivery to Harbor occurred in commerce, as that term is defined in the Federal Trade Commission Act. Both United and Harbor were engaged in commerce, and the bananas were in the flow of commerce at all times until delivered to the retailer for sale to ultimate consumers. United caused the bananas to be boxed in the tropics in Central and South America. The bananas normally remained in their original boxes until delivered to the retailers. A substantial number of the bananas were advance ordered several weeks before delivery (CPF. 1.32; Tr. 1823-1842), and as Harbor's general manager testified, such advance orders are made to take care of the nucleus of Harbor's customers who buy on a regular and consistent basis, and most of the bananas must be ordered on that basis (Tr. 1832-1833; CPF. 1.33). These advance orders have an effect on the number of banana boxes that will be shipped from the tropics into the United States (Tr. 1110, 1832; CPF. 1.34-1.35). In addition, the very method by which United conducts its business necessitates the flow of messages, funds, orders, credits, and other communications across state lines and into, and out of, foreign nations (CPF. 1.37-1.42). Harbor admittedly makes regular sales to customers located in states other than the State of California (CPF. 3.179-3.195; CX 235a-240b). Its bistate management requires regular and frequent (interstate) communications.

33. The measure of benefit to Harbor is what its cost of delivery to its plant would have been if United had not provided direct delivery by ship. This amounted to approximately 9 cents a box by common carrier during the period from July 1965 to March 1969 at which time Harbor was also taking delivery in Wilmington as well as in Long Beach (Tr. 1882-1883, 2306, 5869). The suggestion that Harbor's payment to United of the cost of the longshore labor performed inside the warehouse should be considered as a deduction, is unsound (see RHPF 4.49-4.53).

Such payment was made as a matter of agreement between Harbor and United to simplify bookkeeping and to prevent Harbor from securing an extra loading service that was not rendered to other purchasers of United's bananas (Tr. 5124-5125, 1555-1556; CX 140). Also, the fact that this work could have been performed by teamsters at an unspecified cost were it not for the labor union agreements in force in no way lessens the benefit provided by United to Harbor for the direct delivery by steamship (see RHPF 4.51). The cost of the service inside Harbor's plant for which Harbor agreed to pay is Harbor's responsibility. Just as extra incidental loading services performed by a trucker cannot be deducted even though not performed for all other jobbers, so the extra restrictions imposed on Harbor by reason of union requirements cannot detract from the benefit granted by United.

34. By a parity of reasoning, positing that the benefit to Harbor is the test, the suggestion that there is no cost to United in making a ship delivery because it was not required to reschedule the ships' runs and because United was not required to add ships is equally unsound (see RUPF IV-125, IV-130-IV-136). The benefit to Harbor properly takes into account what it would have cost Harbor—not United—to secure delivery by water. Such cost would be approximately twice the cost of transportation by truck (see CX 409 M; CPF. 1.91-1.96). A tangential suggestion that since cargo rates to all West Coast ports are identical there is no discrimination (Tr. 5901-5932) is also beside the point.

35. Still another suggested measure of differences (see CPF. 1.98) is the cost of delivery from Wilmington to the downtown market area where many competing jobbers had their plants. This cost is approximately 12 cents to 12½ cents a box by common carrier (see CPF. 1.97). Like the cost to Harbor of the labor charge within its plant, this cost is not a sound test of discrimination by United. It cannot be attributed to United.

36. Whether the differential in Harbor's favor be 12 cents, 9 cents, or twice that amount, the difference is sufficiently significant that damage to competition must be inferred. Such significance is demonstrated by the figures of Harobr's expert and the testimony of competing jobbers (RHX 109, p. 22 and p. 36, fn. 40; CPF. 1.00-1.114).

37. From the foregoing findings we have determined that respondent United discriminated between its customers by making a direct delivery to respondent Harbor's plant, and we must infer

that such discrimination has injured competition. We now turn to respondent United's defense of good-faith meeting of competition (RUPF pp. 19-91).

E. The Meeting Competition Defense

1. *Background*

38. For many years United had been the sole supplier of bananas to the Jebbia family business and the only regular importer from the tropics to the Los Angeles area. In 1960, Standard Fruit and Steamship Company dispatched ships to the port of Wilmington in Los Angeles, and under the able direction of Albert Maligie, who was West Coast manager, it started a vigorous campaign to secure business from jobbers and from retail ripeners (URX 1b, 2b; Tr. 1691; RUPF II-9). Standard's efforts met with considerable success, and the shipside price of bananas in Los Angeles dropped 2 cents a pound (Tr. 6107-6108). Nationwide, between 1960 and 1964, Standard's sales rose from \$54 million to more than \$85 million and it turned a loss into a profit (URX 46-52). Standard secured the business of the Safeway chain; and by 1964, when the Acme and Von's chains became self-ripeners, they purchased large quantities of bananas from Standard. Pan Am Distributing Corp., one of the smaller jobbers, shifted to Standard. Even the Jebbia family bought about 15 percent of their imports from Standard (RHPPF 5.72; URX 55).

39. About this time United was attempting a recovery from a series of events which had seriously curtailed its earning power (CX 175). These included:

(a) Extensive damages to its plantations due to Panama disease and blowdowns.

(b) Changeover from Gros Michel variety to Valery/Cavendish bananas, which required development of a boxing program to replace stems.

(c) Expropriation of assets by the Cuban government.

(d) Changeover of management.

(e) Emergence of Ecuador as a seemingly limitless source of supply to Standard with deterioration of banana prices worldwide (RUPF II-1; CX 177, III-2, Tr. 1204-1209).

A bright point in United's sales picture was its sales to the Jebbia family, its largest customer in southern California and second largest in North America. A profit of some \$880,000 had

been realized in 1963 from the Jebbia business (Tr. 1209-1210, 1283, 1468-1470; CX 37a-b; RUPF II-35).

40. As early as mid-1962, the Jebbias expressed concern to United about the construction by chain stores of their own ripening rooms and their purchase of bananas direct from the importers. The impending change from importation of stem fruit to boxed fruit increased that concern (Tr. 1200-1212, 1140-1141, 1146, 1147; RUPF II-2). In July 1962 Dominick and Norf Jebbia visited United's top management in Boston and sought to prevent boxing and direct sales to chain retail stores (Tr. 1439, 1212-1214; RUPF II-3). United refused, with an explanation, but it agreed to give ample notice of conversion to boxing (RUPF II-4; Tr. 1440-1443; CX 3a-b). In December 1962 Norf Jebbia proposed construction of a waterfront ripening facility in Wilmington adjacent to United's terminal to meet the chain-store threat with increased efficiency (Tr. 1443; CX 7; RUPF II-6). United gave him little encouragement (Tr. 1446). In July 1963, Norf Jebbia again went to Boston to urge United not to sell to chain stores. Again, he received a negative reply (Tr. 1447-1448; CX 10). Thus, there was, presumably, considerable disenchantment of the Jebbia family in their relationship with United.

41. Meanwhile, Standard found its facility at Berth 160 in Wilmington inadequate for its increased business, and early in 1963 it started negotiations with the Port of Long Beach for the construction of a new terminal there (RUPF II-9; URX 172; Tr. 1690). Albert Maligie had also been attempting, without success, to sell the Jebbias (Tr. 2281-2286; RUPF II-11); but when Standard announced construction of its new terminal, Norf Jebbia told Mr. Maligie of the Jebbias' interest in constructing a processing facility adjacent to the proposed Standard terminal (Tr. 2284; RUPF II-10). Extensive negotiations ensued during the remainder of 1963, and joint plans were discussed with M. A. Nishkian & Company, which designed both the Jebbia and the Standard facilities (RUPF II-13). Negotiations between Standard and the Jebbias were concluded in January 1964, and an agreement was entered into for the construction of adjacent facilities to permit the passage of bananas across Standard's wharf and into Jebbias' banana rooms (Tr. 2287). Standard agreed that if it withdrew from the terminal within 20 years it would pay to the Jebbias the then unamortized portion of their investment (Tr. 2287; RHX 11; RUPF II-16). About the time

of the signing of this agreement, the Jebbias began to purchase bananas from Standard, and during the remainder of 1964, they bought about 15 percent of their total requirements from Standard (URX 55r, s; Tr. 2287; RUPF II-17).

42. Although the Jebbias did not inform United that they were planning an arrangement with Standard, at a New Year's Eve dinner, December 31, 1963, Norf Jebbia told Mr. Fox, then United's vice president, that they were considering a location other than Wilmington and that he was going to New Orleans for Mardi Gras as the guest of Dr. D'Antoni, Standard's president. Since Mr. Fox knew of Standard's plans for a terminal, he reasonably assumed that the Jebbias might be joining forces with Standard (Tr. 1217-1219; RUPF II-14). On January 27, 1964, the Jebbias sought a guarantee of one boat delivery a week to a new waterfront facility at an unspecified place with a penalty that United would pay the cost of their facility minus 5 percent a year of operation, if boat delivery were discontinued (RUPF II-20; CX 13b). On February 27, 1964, United responded that it would make direct delivery on payment of expenses but would not agree to an indemnity if the deliveries were discontinued. Mr. Fox proposed that as an alternative to a Jebbia waterfront facility, United would construct a joint jobbers ripening facility at Wilmington (CX 17a; RUPF II-21-22). A news article the following month, describing a facility being built adjacent to Standard's terminal, reasonably increased the concern of United's management, since it assumed that the plant was being built for the Jebbias (CX 16A, 4b; RUPF II-15).

On April 16, 1964, Norf and Dominick Jebbia appeared at the Boston office of United without prior arrangement. Norf Jebbia demanded that United sign an agreement that he brought with him. The agreement provided that United would build a waterfront ripening facility at an undisclosed location for lease to the Jebbias (CX 26b-d). Norf Jebbia told the group of United executives, who dined with him and then met with him at United's offices that night, that if United did not sign, its major competitor would. All the United people recognized that Norf Jebbia meant Standard. Mr. Jebbia at first insisted that the agreement be signed that night, but later he relented and granted an overnight delay. During the delay United's attorneys, at the request of Mr. Fox, drafted a cover sheet to the proposed agreement providing that it should be subject to the approval of United's board

of directors. Then the agreement was signed in its conditional form (Tr. 1229-1230, 1462-1467, 1346; RUPF II-29).

United at this point had not yet been informed that the Jebbias had reached an agreement with Standard, nor did it know of the location of the proposed facility, so, counsel caused an inquiry to be made in Los Angeles. This inquiry resulted in United's receiving confirmation of its suspicion that Standard and the Jebbias had signed leases for adjacent property with the city of Long Beach and that the Jebbias' lease was conditioned upon Standard's proceeding with the construction of its terminal prior to July 31, 1964 (RUPF II-30—II-33; Tr. 1345-1346).

In May, United further learned that the Jebbias had broken ground for the new facility at Long Beach (RUPF II-37; Tr. 1485-1486). United's management was concerned, and with good reason, that it would lose all or a large portion of the Jebbia business to Standard (RUPF II-37; Tr. 1486). However, United's board of directors at its May 25, 1964, meeting refused to ratify the conditional contract made with Norf Jebbia, on April 17, 1964 (RUPF II-42; CX 44; Tr. 5069, 1234). United's board was reasonably concerned that the ratification of the April 17, 1964, agreement might be construed to be in violation of a consent decree filed February 4, 1958,¹³ presumably those provisions that prevented United from extending credit to banana jobbers or participating directly or indirectly in ripening bananas.

43. The extent of United's concern about the possible loss of the Jebbia business is indicated by United's records analyzing the effect of such loss (URX 32a-b) and by the remedial action taken by it in June 1964 of dispatching a second ship to Wilmington in an attempt to increase the banana purchases of other jobbers (see RUPF II-39; Tr. 1412).

44. Mr. Fox attempted to renegotiate the April 17, 1964, conditional agreement with the Jebbias prior to its rejection by the board of directors in May, but these attempts incensed Norf Jebbia to such an extent that he expressed open distrust of United's executives (CX 40; RUPF II-40). Immediately following the board of director's action, three senior executives of United attempted to work out something else that might retain the Jebbia business. One suggestion was that United would establish its

¹³ We take official notice of the decree of the United States District Court for the Eastern District of Louisiana entitled *United States v. United Fruit Company*, CCH 1958 Trade cases ¶68,941.

