

IN THE MATTER OF
UNITED BRANDS COMPANY

ORDERS, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 7 OF THE CLAYTON ACT AND/OR SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT

Docket 8835. Complaint, Feb. 11, 1971—Orders & Opinion, May 14, 1974.

Order dismissing a complaint against a diversified New York City based company with decided interests in the food industry. The complaint challenged respondent's acquisition of the stock or assets of six California and Arizona farming operations producing lettuce and other vegetables.

Order requiring the filing of a special report and periodic subsequent reports informing the Commission of any increase since Feb. 11, 1971, or future increase in access to land commercially suitable for the production of lettuce.

Appearances

For the Commission: *Carl J. Batter* and *Lewis F. Parker*.

For the respondent: *Hourey, Simon, Baker & Murchison*, Washington, D.C. *M. Paul Gallop* and *Paul H. Farrell*, New York, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that AMK Corporation has acquired United Fruit Company, and subsequently consolidated AMK into United Fruit Company and changed its name to United Brands Company, and that United Brands Company, then the United Fruit Company, has acquired Nunes Bros. of California, Inc., as well as other similar concerns and corporations, in violation of Section 7 of Clayton Act, as amended, (15 U.S.C., Section 18), and/or in violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C., Section 45), hereby issues this complaint pursuant to Section 11 of the Clayton Act (15 U.S.C., Section 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C., Section 45(b)), stating its charges in that respect as follows:

I

DEFINITIONS

PARAGRAPH 1. For the purposes of this complaint the following definitions shall apply:

(a) *Fresh Produce* includes each and every vegetable and fruit specifically grown in the United States for sale at retail in fresh form, *i.e.*,

not canned, not frozen, or otherwise preserved except for normal refrigeration, such as lettuce, celery, broccoli, cantaloupe, etc.

(b) *Carlot* is an actual rail car shipment, and actual truck shipments converted to a carlot unit (e.g., for lettuce on the basis of 1,000 cartons per carlot).

II

RESPONDENT

PAR. 2. United Brands Company (United Brands), the respondent herein, is a corporation organized and existing under the laws of the State of New Jersey, with its offices and principal place of business at 245 Park Avenue, New York, N.Y.

PAR. 3. On or about June 30, 1970, United Brands, Inc. became a successor corporation to AMK Corporation (AMK) which was formed in 1928 under the name American Seal-Kap Corporation. It then, and for many years thereafter, primarily provided the dairy industry with milk bottle capping materials and machinery. In May of 1965, the name of the corporation was changed to AMK Corporation and subsequently AMK acquired John Morrell and Company, a wholly owned subsidiary. John Morrell & Co. ranks among the four largest meat packers in the United States, with annual sales in excess of \$800,000,000. AMK was a corporation organized and existing under the laws of the State of Delaware, with its offices and principal place of business at 245 Park Avenue, New York, N.Y.

PAR. 4. For its fiscal year ending October 31, 1969, AMK had net sales and other income of almost \$1,500,000,000, a net income of over \$26,000,000, and total assets of over \$1 billion. On the basis of the October 31, 1969 financial statements, the 1970 Fortune Directory listed AMK Corporation as the 70th largest industrial corporation in the United States.

PAR. 5. At all times relevant herein, AMK and its successor corporation, United Brands Company, sold and shipped, and is now selling and shipping, products in interstate commerce throughout the United States; hence AMK was at the time of each of the acquisitions challenged herein, and United Brands is now, engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

PAR. 6. John Morrell & Company ranks among the four largest meat packers in the United States and is particularly strong in hog slaughtering and in processed or cured pork products (not canned or made into sausage) made in meatpacking plants, sausage and similar products (not canned) made in meatpacking plants, and canned meats (except dog and

cat food) containing 20 percent or more meat and made in meatpacking plants, all of which products are or may be branded products carrying United Brand Company labels.

PAR. 7. United Fruit Company, (United Fruit), whose name was changed to United Brands Company, was a corporation organized and existing under the laws of the State of New Jersey with its head office and principal place of business in the Prudential Center, Boston, Mass.

PAR. 8. United Fruit was primarily a grower of bananas in Central and South America, and a seller and distributor of bananas in Europe, North America and Japan. United Brands, its successor corporation, has approximately 50 percent of the banana market in the United States. For the domestic distribution of bananas, United Brands maintains over 35 branch offices and has a network of distributors covering the entire United States. In recent years, it has diversified through acquisition, including (a) the acquisition in 1966 of J. Hungerford Smith Co., Inc., a syrup and flavoring concern, and its subsidiary, A & W International Inc., a root beer, restaurant and franchise operation, (b) the acquisition in 1967 of Baskin-Robbins, Inc., an ice cream and candy franchise operation, (c) the acquisition in 1968 of Nunes Bros. of California, Inc., and various other fresh produce grower-shippers in 1968 and 1969, and (d) the acquisition in 1969 of Cape Farms, Inc., and various other potted plants grower-shippers, among others.

PAR. 9. In 1968, United Fruit had total sales of \$464,297,000, net earnings of \$31,157,000, and total assets as of December 31, 1968, of \$439,799,000.

PAR. 10. Since 1960, United Fruit and United Brands have attempted to establish, and have on a region by region basis established, a brand differentiated banana under the trade mark "Chiquita." The Chiquita banana sells, throughout the United States and in particular regions, both at wholesale and at retail, generally at price levels in excess of the prices at which other bananas sell, differentiated or undifferentiated by brand. Brand differentiation was attained and is maintained in the banana market by United Fruit by means of substantial advertising, promotional and packaging expenditures.

PAR. 11. United Fruit was, and United Brands is, among the leading firms in the fast foods industry and the leading firm in the production and sale of root beer and root beer syrup, as well as a leading supplier of fruit flavors and extracts to the institutional market and the largest grower-shipper of fresh lettuce, fresh celery and potted plants in the United States.

PAR. 12. At all times relevant herein, United Fruit and its successor corporation, United Brands, sold, and shipped, and United Brands is now selling and shipping, products in interstate commerce throughout

the United States; hence United Fruit was at the time of the acquisitions challenged herein, and United Brands is now, engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

III

NUNES BROS. OF CALIFORNIA, INC., etc.

PAR. 13. Prior to October 15, 1968, Earle Myers Co. and Demco Farms, Inc., corporations organized and existing under the laws of the State of California with their principal places of business located at Salinas, Calif., were engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 14. Prior to November 7, 1968, Nunes Bros. of California, Inc., a corporation organized and existing under the laws of the State of California with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 15. Prior to November 1, 1968, Toro Farms, a partnership of Thomas P. Nunes, Robert F. Nunes and Thomas Nunes, Jr., located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 16. Prior to February 14, 1969, Peter A. Stollich Co., Inc., a corporation organized and existing under the laws of the State of California with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 17. Prior to February 14, 1969, Monterey County Ice and Development Company, a corporation organized and existing under the laws of the State of California with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 18. Prior to March 13, 1969, Jerome Kantro Enterprises, a corporation organized and existing under the laws of the State of

California with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 19. Prior to March 15, 1969, the Salinas Valley Vegetable Exchange, a partnership of Miyoko Yuki, Thomas M. Bunn, and the administration of the estate of Takeo Yuki, with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 20. Prior to July 2, 1969, Consolidated Growers, Inc., a corporation organized and existing under the laws of the State of California with its principal place of business located at Salinas, Calif., was engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce.

PAR. 21. At all times relevant herein, the corporations and concerns listed in Paragraph 13 through 21 hereinabove, sold and shipped products in interstate commerce throughout the United States, and were, at the time each such business was acquired as described herein, engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

IV

TRADE AND COMMERCE

PAR. 22. The lettuce and celery segments of the fresh produce industry consist primarily of a number of small independent concerns operating as grower-shippers and/or in some cases providing services, vacuum cooling for example, to themselves and/or other grower-shippers. No such concern was a large publicly held company with other non-related businesses. Each such concern was entirely dependent on its commercial farming operations, on local banks for credit, and upon local service companies for services and supplies.

PAR. 23. Since 1967 a merger trend has been developing in the lettuce and celery segments of the fresh produce industry. In addition to the AMK-United Fruit acquisitions, another company has acquired one or more such concerns.

PAR. 24. In 1967 and in 1968 no firm possessed more than a 10 percent

market share in terms of daily shipments, or in terms of acreage controlled in the California and Arizona growing areas, or in terms of shipments in any particular season and/or from any such growing area.

PAR. 25. Prior to 1968, the grower-shipper of lettuce and/or celery marketed his fresh produce in a substantially competitive market. In that market there were constant changes in prices in response to hourly, daily or weekly changes in the fresh produce market or in the retailing of fresh lettuce and celery, nor were there any long term supply arrangements, for a week or a month or a year, stabilizing prices and removing fresh lettuce and celery from the daily competitive market pricing. Each carlot was virtually a separate sale.

PAR. 26. Both AMK and United Fruit operated and United Brands operates primarily in oligopolistic industries, namely the banana industry, among others.

V

ACQUISITIONS

PAR. 27. On or about October 25, 1968, United Fruit acquired Earle Myers Co. and Demco Farms, Inc., by the purchase of all the outstanding shares of stock of these two corporations for approximately \$2,537,500.

PAR. 28. On or about November 7, 1968, United Fruit acquired Nunes Bros. of California, by the purchase of all the outstanding shares of stock of that corporation for approximately \$2,500,000.

PAR. 29. On or about November 1, 1968, United Fruit acquired the business and specified assets of Toro Farms by purchase for approximately \$1,500,000, and pursuant to other arrangements.

PAR. 30. On or about February 1, 1969, United Fruit and/or AMK-United Fruit acquired the business and specified assets of Peter A. Stollich Co., Inc. by purchase for approximately \$2,042,000, and pursuant to other arrangements.

PAR. 31. On or about February 14, 1969, United Fruit and/or AMK-United Fruit acquired Monterey Ice and Development Company by the purchase of all the outstanding shares of stock of this corporation for approximately \$2,537,500.

PAR. 32. On or about March 13, 1969, United Fruit and/or AMK-United Fruit acquired the business and specified assets of Jerome Kantro Enterprises by purchase for approximately \$395,000, and pursuant to other arrangements.

PAR. 33. On or about March 15, 1969, United Fruit and/or AMK-United Fruit acquired the business and specified assets of Salinas Valley Vegetable Exchange for approximately \$395,000, and pursuant to other arrangements.

PAR. 34. On or about July 2, 1969, AMK-United Fruit acquired the business and specified assets of Consolidated Growers, Inc. for approximately \$3,490,000, and pursuant to other arrangements.

PAR. 35. United Fruit and/or AMK-United Fruit have, or may have, made additional acquisitions, the identity of which presently are not known, by means of purchase, lease, joint venture, full supply agreement, etc., in the fresh produce industry.

VI

EFFECTS OF THE ACQUISITIONS

PAR. 36. The effect of the acquisitions by United Fruit and/or AMK-United Fruit, or United Brands, their successor corporation, of Earle Myers Co., Demco Farms, Inc., Nunes Bros. of California, Inc., Toro Farms, Peter A. Stollich Co., Inc., Monterey Ice and Development Company, Jerome Kantro Enterprises, Salinas Valley Vegetable Exchange, Consolidated Growers, Inc., and of others, individually and collectively, may be to lessen competition substantially or to tend to create a monopoly or to restrain competition in the fresh lettuce industry, the fresh celery industry, and in the fresh produce industry in the United States, or sections thereof, in the following ways, among others:

(1) Potential competition between AMK-United Fruit, or United Brands, and the acquired concerns in the growing, shipping and marketing of fresh lettuce and of fresh celery and other fresh produce has been, or may be, eliminated.

(2) Concentration has been increased in the fresh lettuce, in the fresh celery industry, and in the fresh produce industry generally.

(3) The substitution of United Fruit and AMK-United Fruit or United Brands, for the numerous small firms acquired by them has given United Fruit, AMK-United Fruit, and United Brands decisive competitive advantages over the remaining firms in the industry due to, but not limited to, (a) subsidization of financial losses in one product line by numerous other products and over long periods of time, (b) selling through nationwide organizations, national advertising, long term contracts, and special pricing, (c) sources of credit, (d) size of company, (e) dominant market share and position, and (f) opportunities for reciprocity.

(4) The structure of the fresh lettuce industry and the celery industry has been transformed or is being transformed, from industries of small independent profitable concerns selling in a competitive market at prices determined by the short term balance of supply and demand into industries dominated by large conglomerate companies selling at stable prices arrived at outside the competitive market by means of such

control mechanisms as brand differentiation, pre-selling of consumers, long term quotes or supply arrangements, and other means.

(5) Barriers to entry into the fresh lettuce industry and the fresh celery industry have been, or may be, heightened as a result of United Fruit's and AMK-United Fruit's or United Brands (a) substantial financial resources, (b) advertising and promotional capabilities, (c) nationwide selling and distribution organizations, (d) brand differentiation, (e) long term leases in major growing areas, (f) ability to borrow money at a lower interest rate than others, (g) ability to purchase inputs directly from the manufacturer at lower prices than others, (h) reciprocity, and (i) large market share, absolutely and relative to competitors, among other things, or any one or more of these factors.

(6) AMK's and United Fruit's, or United Brands' non-competitive pricing practices characteristic of their participation in oligopolistic industries are being, or may be, transferred to the lettuce industry, the celery industry, and the fresh produce industry.

VII

VIOLATIONS

PAR. 37. The acquisition of Earle Myers Co., of Demco Farms, Inc., of Nunes Bros. of California, Inc., of Toro Farms, of Peter A. Stollich Co., Inc., of Monterey County Ice and Development Company, of Jerome Kantro Enterprises, of Salinas Valley Vegetable Exchange, of Consolidated Growers, Inc., and of others, as alleged above, constitute separately and collectively, a violation of Section 7 of the Clayton Act (15 U.S.C. 18) as amended, and/or a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) as amended.

INITIAL DECISION BY DONALD R. MOORE, ADMINISTRATIVE
LAW JUDGE

MARCH 19, 1973

CONTENTS

	<i>Page</i>
PRELIMINARY STATEMENT	1622
FINDINGS OF FACT	1623
United Brands Company	1623
The Challenged Acquisitions	1625
Relevant Market	1629
Product Market	1629
Geographic Markets	1631
The Lettuce Industry	1633
Production and Distribution	1636
Competitive Climate	1639

1622 FEDERAL TRADE COMMISSION DECISIONS

Initial Decision

83 F.T.C.

Competitive Effects	1642
Reciprocity	1642
Potential Competition	1642
Competitive Advantages	1644
Concentration	1651
Barriers to Entry	1656
Industry Restructuring	1666
Respondent's Special Defenses	1667
CONCLUSIONS	1669
Rationale of the Order	1671
ORDER	1675

PRELIMINARY STATEMENT

The complaint in this proceeding, charging violation of Section 7 of the Clayton Act and of Section 5 of the Federal Trade Commission Act, was issued on Feb. 11, 1971, and was duly served on respondent. The complaint challenged respondent's acquisitions of corporations and other enterprises engaged in the fresh produce industry in Calif. and Ariz. Respondent filed answer on Mar. 29, 1971, admitting certain of the factual allegations of the complaint but denying generally any violation of law and also pleading certain affirmative defenses.

After extensive prehearing procedures, hearings were held between April 18 and July 11, 1972, in Wash., D.C., Boston, Mass., San Francisco, Calif., and Phoenix, Ariz.

At these hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. The testimony and evidence presented—aggregating 4106 pages of transcript and thousands of pages of documentary exhibits—have been duly recorded and filed.

The parties were represented by counsel and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to introduce evidence bearing on the issues.

After the presentation of evidence, proposed findings of fact and conclusions of law and a proposed form of order were filed by counsel supporting the complaint and by counsel for respondent, together with supporting briefs and reply briefs. The proposed findings of the parties not adopted, either in the form proposed or in substance, have been rejected as lacking support in the record or as involving immaterial matters.

Having heard and observed the witnesses and having carefully reviewed the entire record in this proceeding, together with the proposed findings and briefs filed by the parties, the administrative law judge makes the following findings of fact, enters his resulting conclusions, and issues an appropriate order.

As required by Section 3.51(b)(1) of the Commission's Rules of Practice, the findings of fact include references to the principal supporting items of evidence in the record. Such references are intended to serve as convenient guides to the testimony and to the exhibits supporting the findings of fact, but they do not necessarily represent complete summaries of the evidence considered in arriving at such findings. Where references are made to proposed findings submitted by the parties, such references are intended to include their citations to the record unless otherwise indicated.

References to the record are made in parentheses, and certain abbreviations are used as follows:

CPF—Proposed Findings of Fact and Conclusions of Law filed by counsel supporting the complaint.

CRB—Reply Brief of complaint counsel.

CX—Commission Exhibit.

RPF—Respondent's Proposed Findings of Fact and Conclusions.

RRB—Respondent's Reply Brief.

RX—Respondent's Exhibit.

Tr.—Transcript. (References to testimony sometimes cite the name of the witness and the transcript page number without the abbreviation "Tr."—for example, Bradshaw 3868.)

FINDINGS OF FACT

United Brands Company

Respondent United Brands Company ("United Brands" or "respondent") is a corporation organized and existing under the laws of the State of New Jersey, with its office and principal place of business at 245 Park Avenue, New York, N.Y. ¹ Respondent United Brands is a successor corporation to AMK Corporation (AMK).

AMK was a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 245 Park Avenue, New York, N.Y. AMK had been organized in 1928 under the name American Seal-Kap Corporation, which then and for many years thereafter was a supplier to the dairy industry of materials and machinery for the capping of milk bottles. Its name was changed to AMK in May 1965, and it subsequently acquired John Morrell & Company, one of the largest meat packers in the United States, with annual sales in excess of \$800 million. Total annual sales of AMK before its acquisition of United Fruit Company were approximately \$850 million.

¹ The term "respondent" may be used interchangeably to refer to the present corporation or to its predecessor corporations, AMK and United Fruit, as well as subsidiaries or divisions thereof.

In 1969 AMK acquired a controlling interest in United Fruit Company. On or about June 30, 1970, the two corporations were merged, and the corporate name was changed to United Brands Company.²

United Fruit Company was a corporation organized and existing under the laws of the State of New Jersey, with its principal office in Boston, Mass. United Fruit was primarily a grower of bananas in Central and South America and a seller and distributor of bananas in Europe, North America and Japan.

Prior to its acquisition by AMK, United Fruit had embarked on a program of diversification through acquisition, including the acquisitions challenged by the complaint herein (*infra*). Acquisitions other than those that are the subject of this proceeding included:

(1) The acquisition in 1966 of J. Hungerford Smith Co., Inc., a syrup and flavoring concern, and its subsidiary, A&W Root Beer Co., a root beer, restaurant, and franchise operation;

(2) The acquisition in 1967 of Baskin-Robbins, Inc., an ice cream and candy franchise operation;

(3) The acquisition in 1969 of various grower-shippers of potted plants, including Cape Farms, Inc.

In 1968, United Fruit had total sales of \$464.3 million, net earnings of \$31.2 million, and total assets (as of December 31, 1968) of \$439.8 million. In that year, United Fruit had virtually no debt; it had more than \$70 million in cash; and it had a capability of borrowing up to \$150 million on the basis of its net worth.

For its fiscal year ended October 31, 1969 (after the acquisition of United Fruit), AMK had net sales and other income of about \$1.5 billion, a net income of more than \$26 million, and total assets of more than \$1 billion. It was ranked 70th in the 1969 Fortune Directory of the 500 largest industrial corporations in the United States. At the end of 1971, United Brands, as the successor corporation to AMK and United Fruit, had some \$70 million in cash and marketable securities.

At all times relevant to this proceeding, AMK, United Fruit, and United Brands sold and shipped, and United Brands is now selling and shipping, products in interstate commerce throughout the United States; hence, AMK and United Fruit were, and United Brands was and now is, engaged in commerce, as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

(The foregoing facts about respondent and its corporate predecessors are essentially undisputed. Salient record references include the following: Complaint and Answer, Pars. 2-5, 7-9, 12; CX 200, pp. 2-3; CX 226;

² The proposed complaint issued under the Commission's consent order procedure in April 1970 contained a count challenging the AMK-United Fruit merger, but that count had been eliminated when the instant complaint was issued in 1971 (CPF, Par. 2, p. 1).

CX 396, p. 32; CX 224, p. 9; CX 199, p. 14; Black 1720-23; Fox 1450, 1466-67.)

The Challenged Acquisitions

The acquisitions under challenge were the outgrowth of a diversification program instituted by United Fruit in 1960, when it announced its intention "to enter the general field of food and food processing" as an area "best suited to the Company's potentialities" (CX 152, pp. 2, 8; Fox 1451-52). By 1965, a modest beginning in diversification had been made, concentrating on the food industry in the United States and on non-banana activities in Latin American (CX 223, p. 8).

During 1968,

* * * the Produce Group took several steps toward its objective of establishing a multinational, diversified fresh fruit and produce business which will take full advantage of the Company's strengths in the production, distribution and marketing of fresh and perishable products (CX 200, p. 10).

The plan called for an increase of tropical production, and new production in other areas of the world, while making wider use of United Fruit's shipping abilities. The 1968 Annual Report characterized as "[o]ne of the most significant steps in the Company's pursuit of a broader line of produce items" the acquisition of Nunes Bros. of California, Inc., Earle Myers Company, and Demco Farms, Inc., "firms engaged primarily in growing and marketing lettuce, celery and other produce" (CX 200, p. 10). The report emphasized that:

Finally, but most important, the plan will open up a wider range of produce items to which the CHIQUITA marketing strategy, the most outstanding branding success in produce history, can be applied.

At the time of respondent's diversification into the fresh vegetables business, it was dependent for its income principally on one product, *i.e.*, bananas. The management of respondent felt that it should stabilize its revenues and income by diversifying into other business areas so that respondent would not be completely exposed to the ups and downs of the banana business. Bananas are grown commercially, for the most part, in Central American countries, and their production is subject to the vagaries of the weather—sometimes violent—and the vagaries of the political climate in such countries—also sometimes violent. Bananas must be transported by ships to markets, with attendant shipping difficulties. Another significant factor that created the desire of respondent to diversify was the fact that statistics indicated a continually increasing over-production of bananas world-wide which, in respondent's opinion, limited the potential growth of its profits from the banana business. (Fox 1451-52, 1480)

After extensive studies of the fresh vegetables industry and

market—primarily lettuce—in 1967 and early 1968 (CPF, Pars 36-48, pp. 15-21), United Fruit's board of directors on July 22, 1968, authorized negotiations "for the purchase of the production facilities and related activities of one or more companies or partnerships [engaged in] the production, packaging, distribution, and sale of vegetable crops at an estimated price of \$20,000,000 * * *" (CX 158 A).

Basic facts respecting the acquisitions challenged by the complaint are as follows:

Earle Myers Co. and Demco Farms, Inc.

The purchase of these companies was the first acquisition made by United Fruit in the vegetable crops industry. In October 1968 United Fruit purchased all the capital stock of these companies for \$2,537,500. Both companies were California corporations engaged in the growing, harvesting, packing, and selling of various fresh vegetables, including celery and cauliflower. In effect, the two corporations were one entity engaged in the production and sale of fresh vegetables. Demco Farms conducted the growing operation, and Earle Myers Co. handled packing and selling.

The Myers companies grew their crops on leased land in the Salinas Valley of California. Celery was the primary crop, but the farm land was capable of producing other vegetable crops. United Fruit considered that it was acquiring through these acquisitions a "strong organization with expertise in growing, processing, quality control and marketing of vegetable crops." Purchase arrangements included a five-year noncompetition agreement on the part of David E. Myers.

(Record references: Complaint and Answer, Pars. 13, 27; CX 167 A-E; CX 173 A-O)

Nunes Brothers of California, Inc., and Toro Farms

In November 1968 respondent purchased the capital stock of Nunes Brothers of California, Inc. (a California corporation) and selected assets of Toro Farms (a partnership) for \$4 million. Both the Nunes Brothers corporation and the Toro Farms partnership were owned and operated by the Nunes family (primarily two brothers). Many of the vegetable crops harvested and sold by Nunes Brothers were grown by Toro Farms. In essence, Toro Farms was a part of the Nunes Brothers' farming entity.

The Nunes companies were engaged in the growing, harvesting, packing, and selling of a wide variety of vegetable crops. Although their major crops were lettuce (1.8 million cartons in 1967), celery (312,000 cartons); and cauliflower (268,000 cartons), Nunes Brothers also grew and sold broccoli, beans, carrots, sugar beets, potatoes, onions, garlic,

tomatoes, and cabbage. Production was from leased land or from joint deals with other growers.

The Nunes operations were primarily located in the Salinas and Imperial Valleys of California, with additional leased land in Arizona.

Certain of the principals in the Nunes enterprise were subject to covenants not to compete with respondent for five years.

(Record references: Complaint and Answer, Pars. 14, 15, 28, 29; CX 166 A-W; CX 174 A-M; CX 175 A-Q; CXs 182-185)

Peter A. Stolich Co., Inc.

In February 1969 respondent purchased the business and selected assets of Peter A. Stolich Co., Inc. (a California corporation) for \$2,042,000. Stolich was engaged in the growing, harvesting, packing and selling of various vegetable crops, primarily lettuce, both on owned land and leased land, and through joint deals with other growers. Stolich produced crops in Salinas, Brentwood, and El Centro (Imperial Valley). Its lettuce volume was about one million cartons a year and accounted for 85 percent of revenues. About 48 percent of Stolich's lettuce volume was grown by it, and the remainder came from joint deals. Stolich lettuce was sold through Mutual Vegetable Sales, a growers' agent.

(Record references: Complaint and Answer, Pars. 16, 30; CX 170 A-I; CX 176 A-T)

Jerome Kantro Enterprises

Respondent's board of directors approved in February 1969 the purchase of the business and certain assets of Jerome Kantro Enterprises, a California corporation in which Jerome Kantro was the sole stockholder. Kantro Enterprises was the successor to a sole proprietorship formerly conducted as the Jerome Kantro Company. The acquisition was accomplished in March 1969 for a purchase price of \$395,000.

Kantro was engaged in the growing, packing and shipping of lettuce and other vegetable crops. Kantro had an annual volume of 1.3 million cartons of lettuce produced in Salinas and Brentwood, Calif., and Phoenix and Yuma, Ariz. Respondent acquired, among other things, leases on land owned by Kantro, as well as the right to use the Kantro name.

(Record references: Complaint and Answer, Pars. 18, 32; CX 172 A-K; CX 178 A-S)

Monterey County Ice & Development Company

Respondent also purchased in February 1969 for \$2,287,299 all of the stock of Monterey County Ice & Development Company, a California corporation that owned and operated vacuum and cooling facilities in

Salinas and in El Centro for the cooling of fresh vegetables. This company was primarily owned by individual and corporate shareholders associated with the Stolich and Kantro enterprises, who had sold their businesses to United Fruit.

(Record references: Complaint and Answer, Pars. 17, 31; CX 171 A; CX 177 A-Q)

Salinas Valley Vegetable Exchange

Pursuant to action of the board of directors in February 1969, respondent purchased for \$3,490,000 the business and selected assets of Salinas Valley Vegetable Exchange, a partnership engaged in the growing, harvesting, packing, and selling of fresh vegetables, including lettuce and celery, in the Salinas Valley, the Imperial Valley, and the Phoenix, Ariz., area. Its lettuce volume was then 2.2 million cartons.

Respondent brought the farming organization and business, including goodwill, but leased crop land owned by the individual partners. One partner executed a covenant not to compete, and the other became a consultant to respondent.

(Record references: Complaint and Answer, Pars. 19, 33; CX 169 A-J; CX 172 D-F; CX 179 A-R; CX 190)

Consolidated Growers, Inc.

Pursuant to authorization by the board of directors, respondent purchased in July 1969, the business and selected assets of Consolidated Growers, Inc., for approximately \$2.4 million. Consolidated was engaged in growing, harvesting, packing and selling vegetable crops produced on owned and leased land located in Salinas and Brentwood. Its crop land aggregated 1,594 acres, and it had annual lettuce sales of 890,000 cartons.

Respondent acquired virtually all of Consolidated's business assets, including those of Reliable Trucking Company, and the goodwill associated with both of these companies.

The principals of Consolidated signed covenants not to compete.

(Record references: Complaint and Answer, Pars. 20, 34; CX 168 A-J; CX 180 A-P; CX 192 A-C; CXs 193, 194 A-M)

In summary, during 1968 and 1969 respondent purchased, for an aggregate price of about \$17 million, the capital stock or selected assets of six fresh vegetable farm operations in California and Arizona and one cooler operation. The six farm enterprises grew and shipped several varieties of vegetables—predominantly lettuce, with one exception. Total annual lettuce shipments of the acquired companies were more than 7 million cartons in the year prior to acquisition:

Nunes Bros.	1,800,000 cartons
Stolich	1,000,000 "
Kantro	1,300,000 "
Salinas Veg. Exchange	2,200,000 "
Consolidated Growers	<u>890,000</u> "
TOTAL	7,190,000 "

The lettuce shipped by the acquired companies was in excess of 7 percent of the total national lettuce shipments in 1968 (Bradshaw 3907; CX 364, p. 11).³

Assets acquired by respondent included trucks, tractors, and other farm equipment, buses, sheds, and sales offices. The primary assets acquired were rights to the unexpired leases of land, experienced personnel, and farm equipment (RPF, Par. 18, p. 9).

At all relevant times, each of the corporations or other entities acquired by respondent sold and shipped products in interstate commerce throughout the United States, and their operations were in the flow of such commerce; hence, at the time of acquisition, each was engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act. Although respondent initially denied the "commerce" allegation (Answer, Par. 21), it now appears to have conceded the point. In any event, the record references cited (mostly from respondent's own documents), as well as other evidence, leave no doubt that the acquired companies were in commerce.

The operations of the acquired companies were ultimately consolidated in a United Fruit subsidiary, Inter Harvest, Inc., although it appears that the names United Fruit Sales Corp. and United Fruit Produce, Inc., had also been used (CX 396, p. 18; Bradshaw 3906-07; Gibbons 1777; CX 309 C; CX 340).

Relevant Market

Product Market

At the outset, there remains a dispute as to the line of commerce or product line within which the legality of the challenged acquisitions is to be tested. The complaint (Par. 36) alleges that the effect of the acquisitions "may be to lessen competition substantially or to tend to create a monopoly or to restrain competition in the fresh lettuce industry, the fresh celery industry, and in the fresh produce industry * * * " Fresh produce is defined in the complaint (Par. 1) as including "each and every vegetable and fruit specifically grown in the United States for sale at retail in fresh form, *i.e.*, not canned, not frozen, or otherwise preserved except for normal refrigeration, such as lettuce, celery, broccoli, cantaloupe, etc."

³ For a tabulation of the total cartons of lettuce shipped annually, 1967-71, see p. 16 [p. 1633 herein], *infra*.

In describing the business of the acquired companies, the complaint Pars. 13-20) states that they were "engaged in one or more phases of the fresh produce industry, particularly lettuce and/or celery, namely, the growing, shipping and marketing of fresh produce or the providing of supplies or services to growers, shippers or marketers of fresh produce."

Elsewhere in the complaint (Pars. 22, 23), reference is made to the "lettuce and celery segments of the fresh produce industry."

At another point, in describing the market in which the grower-shipper of lettuce and/or celery operated, reference is made to the "fresh produce market" (Complaint, Par. 25).

In listing the specific effects allegedly stemming from the challenged acquisitions, the complaint refers to the "growing, shipping and marketing of fresh lettuce and of fresh celery and other fresh produce" and otherwise makes reference to the fresh lettuce industry, the fresh celery industry, and the fresh produce industry (Complaint Par. 36 (1)-(2), (4)-(6)).

Complaint counsel acknowledge that the "major thrust of the testimony related to the lettuce industry," but add that other evidence related to cauliflower⁴ and celery, and to some extent to other crops grown in the particular geographic areas involved, *i.e.*, artichokes, carrots, garlic, broccoli, cantaloupes, and tomatoes (CPF, Par. 65, p. 28). The proposed findings go on to cite evidence tending to show that each commodity constitutes a separate product market (CPF, Pars. 66-70, pp. 28-30). Finally, they propose a conclusory finding that "each item of fresh produce—lettuce, celery, cauliflower, carrots—is a separate and distinct relevant market for antitrust purposes" (CPF, Par. 198, p. 125).

There is substantial evidence in the record to support the following conclusory findings:

1. Each fresh produce item is regarded by the industry and by State and Federal Governments as a separate market.
2. There is little or no cross-elasticity of demand between the various items.
3. End uses are often different.
4. Grower-shippers specialize in one item or another of fresh produce.
5. Even where grower-shippers do not specialize, they often have specialized personnel assigned to just one item (CPF Pars. 65-70, pp. 28-30; Par. 197, p. 124).

⁴ Complaint counsel erroneously state that the "cauliflower industry" was pleaded as a relevant market in the complaint (CRB, Par. 261, p. 2).

On the authority of the leading cases dealing with the definition of a "line of commerce"⁵, it is found and concluded that within the fresh produce market, there is a fresh vegetables submarket, which, in turn, breaks down into a multiplicity of individual product submarkets, such as lettuce, celery, and cauliflower.

The fact that individual growers produce various crops and may shift their planting and production from season to season does not require, as respondent urges (RPF, Pars. 21-31, pp. 11-21; RRB, pp. 70-75), that the relevant line of commerce be broader than a single crop and embrace the entire fresh vegetables industry. True enough, to the degree that there is some interchangeability of production facilities, this poses some problems in determining market share, concentration, and other factors necessarily taken into account in assessing the legality of the acquisitions in this case, and this will be considered *infra*. Nevertheless, the record clearly establishes a line of commerce in lettuce, celery, and cauliflower, as well as in other fresh produce commodities.

The difficulty is not in the delineation of lettuce, celery, and cauliflower as submarkets within a broader fresh vegetables market or produce market. The question is whether the evidence is sufficient to determine the competitive effect in each of those submarkets. Careful review of this record has persuaded the administrative law judge that complaint counsel have presented adequate evidence only as to the lettuce submarket.

The evidence concerning celery and cauliflower is so fragmentary, and much of it is of such dubious reliability (CPF, Pars. 80-85, 105-06, 119-20, 149-50, pp. 36-37, 45, 64, 98-99; compare RRB, pp. 39-47), that the record does not permit definitive findings. As to the broader lines of fresh produce and fresh vegetables, there is only generalized information (CPF, Par. 71, pp. 30-31) that again precludes definitive findings. Accordingly, the specific findings herein are limited to the lettuce industry as a submarket within the fresh vegetables line of commerce. Lettuce is the line of commerce to be analyzed. (This limitation does not preclude the drawing of proper inferences as to the fresh produce industry or the fresh vegetables industry on the basis of the facts developed concerning the important lettuce segment. See *Conclusions, infra*, p. 60. [p. 1669 herein.]

Geographic Markets

The parties are in agreement, and the record confirms, that there is a national market for lettuce, as well as for other products included in the category of fresh vegetables or fresh produce (CPF, Par. 200, pp. 125-26; RPF, Pars. 51-72, pp. 45-62; RRB, pp. 75-76). Although there

⁵ *Brown Shoe Co. v. U.S.* 370 U.S. 294, 325 (1962); *General Foods Corp. v. FTC*, 386 F.2d 936, 940-43 (3rd Cir. 1967); *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962); *U.S. v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957); *U.S. v. Aluminum Company of America*, 377 U.S. 271, 273-77 (1964).

are, of course, sales for resale and consumption within each of the growing areas, it is clear that of the lettuce grown, harvested, and packed in the principal production areas (California, Arizona, Colorado, New Mexico, and part of Texas)—

* * * [V]irtually any given lot may be, and often is, sold or transported to any market in the United States. The industry's domestic market for lettuce is the entire United States and its members are in daily contact with buyers across the Nation. (RX 1 I). Thus, lettuce from the designated production areas "is shipped to virtually every city in the United States" (*id.*; see also CX 269, p. 31).

Despite complaint counsel's concession as to the existence of a national market, the evidence as to market shares in such national market is limited to data for respondent and for a few other grower-shippers, including the acquired companies.

The national market, in turn, subdivides into a series of terminal markets in major cities throughout the country (CPF, Par. 201, p. 126). However, although the record contains references to such terminal markets and their impact on shipments, prices, etc., complaint counsel have not sought any finding respecting their relationship to the instant case.

For assessing the impact of the challenged acquisitions, complaint counsel have elected to rely on data concerning the principal shipping areas, or shipping point markets, in California and Arizona, which account for more than 80 percent of the Nation's lettuce (CPF, Pars. 202-03, p. 126). Despite respondent's attack on complaint counsel's analysis of these markets and the resulting "concentration" tabulations, respondent does not, in terms, deny that they constitute relevant markets.

The nature and significance of these "shipping point markets" are spelled out in one of respondent's exhibits (RX 4, p. 38):

The fresh fruit and vegetable industry can be divided into three sectors: production, wholesale, and retail sectors. The wholesale sector can be further divided into shipping point wholesale markets and receiving or terminal wholesale markets * * *.

The principal difference between the two wholesale sectors is proximity to producers and consumers. Shipping point wholesale markets are comprised of wholesale-distributors located in or adjacent to the major fresh fruit and vegetable producing areas. The primary function of these firms is to provide the marketing services necessary for transferring fresh fruits and vegetables from producing areas to consuming markets. Wholesale terminal markets are concerned with the receiving and break-bulk marketing functions.

A fresh fruit and vegetable shipping point market is distinguished by volume shipments beyond local markets and the performance of attendant marketing services required by such shipments.

* * * * *

Fresh fruit and vegetable shipping point markets are an important segment of the industry. As the assemblers and first handlers of producers' crops, these markets are instrumental in determining farm prices, the number and quality of initial marketing

services, and interregional shipment patterns. In addition, the frequent integration of the production and shipping point marketing functions provides the marketing sector a direct influence on the industry supply response and results in a portion of farm income deriving from the efficient organization and profitable operation of shipping point marketing firms. Finally, trends in the marketing and production of fresh fruits and vegetables such as geographic specialization, direct marketing, larger farm units, and improved transportation facilities indicate a more important future role for shipping point markets.

In any event, there can be no question that each of the major producing and shipping areas constitute, within the meaning of Section 7 of the Clayton Act, a "section of the country" in which it is appropriate to measure the competitive effects of the acquisitions under scrutiny (*U.S. v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 336-37 (1962). The location and characteristics of these California and Arizona areas are described *infra*.

The Lettuce Industry

Before analyzing the competitive impact of the acquisitions, it is necessary to outline the industry setting in which the acquisitions took place. For the most part, the facts herein recited are not subject to serious dispute.

Lettuce is the Nation's most important fresh vegetable crop in terms of volume and total value, with an average annual farm value of more than \$220 million (RX 1 I). Its retail dollar value in 1967 was \$667.5 million (CX 158 C).

Lettuce is commercially grown in and shipped from each major area of the United States—the West (primarily California, Arizona, Colorado, New Mexico, and Washington); the Midwest (primarily Michigan, Ohio, and Wisconsin); the South (primarily Texas and Florida) and the East (principally New Jersey and New York). (CX 364, p. 11) Total U.S. shipments of lettuce during the five-year period 1967-1971 were as follows:

<i>Year</i>	<i>No. of carlots or carlot equivalents</i>	<i>Cartons</i> ⁶
1967	95,602	94,049,925
1968	98,445	97,167,850
1969	99,500	98,250,850
1970	101,596	100,381,150
1971	101,536	100,280,725
		(CX 364, p. 11)

⁶ The difference between the number of cartons shown here and complaint counsel's tabulation (CPF, Par. 73, p. 32) is due to the fact that complaint counsel used a conversion factor of 1,000 cartons per car or carlot equivalent, whereas the 1,000-carton conversion factor is applicable only to the States of California, Arizona, Colorado, New Mexico, and Texas. Elsewhere, the number of cartons per car or carlot equivalent is 825 cartons. (CX 364, p. 11, footnote c; Saylor 1309-11, 1323-24)

California and Arizona constitute the principal lettuce-producing areas. In recent years, the combined production of California and Arizona has approximated 85 percent of total United States production, with California accounting for more than 60 percent and Arizona, from 20 percent to 25 percent (CX 246, pp. 77-78; CX 158 D, N; CX 133 Z-6). The percentages vary by growing season, but the overall dominance of California and Arizona is plain. In 1969, for example, on the basis of harvested acres and total value, California and Arizona lettuce production accounted for the following percentages of total production:

YEAR SEASON	California		Arizona		ARIZONA- CALIFORNIA	
	Harvested Acreage	Value	Harvested Acreage	Value	Harvested Acreage	Value
1969						
Winter	64%	61%	18%	27%	82%	88%
Spring	38%	38-	47%	53%	85%	91%
Summer	70%	74%	—	—	70%	74%
Fall	63%	54%	23%	31%	86%	85%

(CPF, Par. 72, p. 31)

The following tabulation (CX 374 A, C, E) shows the percentages of total U.S. shipments of lettuce accounted for by California and Arizona for each month during 1968, 1969 and 1970:

	1968			1969			1970		
	Calif.	Ariz.	Total	Calif.	Ariz.	Total	Calif.	Ariz.	Total
January	77.4%	18.4%	95.8%	72.9%	18.9%	91.8%	76.8%	15.6%	92.4%
February	79.0	15.8	94.8	75.1	15.6	90.7	81.4	10.8	92.2
March	42.7	51.9	94.6	53.7	36.0	89.7	51.1	41.4	92.5
April	48.7	46.7	95.4	30.8	62.4	93.2	44.6	53.7	98.3
May	75.2	3.4	78.6	65.9	14.8	80.7	79.6	9.9	89.5
June	86.1	1.5	87.6	84.9	2.6	87.5	86.3	1.8	88.1
July	80.5	-	80.5	79.2	-	79.2	78.2	-	78.2
August	74.2	-	74.2	76.0	-	76.0	73.5	-	73.5
September	79.3	0.6	79.2	85.3	0.3	85.6	82.0	0.4	82.4
October	55.9	7.4	63.3	61.2	6.5	67.7	72.4	4.1	76.5
November	30.6	54.2	84.8	32.9	59.6	92.5	38.1	52.5	90.6
December	53.8	37.6	91.4	49.0	45.4	94.4	50.6	40.9	91.5

These data demonstrate California's domination of winter and summer lettuce and also the strong position of California lettuce during the rest of the year.

Within California, Monterey County is the principal lettuce producing area in summer, spring, and fall, while Imperial County is the principal lettuce-producing area in the winter (CX 380; CXs 295-305).

Lettuce shipments from Monterey County during each of the years 1968-1971 were as follows:

Year	Cartons
1968	28,326,492
1969	27,331,631

1970	28,327,177
1971	29,098,468
	(CX 309 B-E; CX 367 A-D)

Imperial County lettuce shipments were as follows:

<i>Year</i>	<i>Cartons</i>
1968-69	17,803,962
1969-70	19,418,611
1970-71	18,883,375
1971-72	19,654,528

(CXs 306 J-K, 307 B-C, 308 B, 368 A-D, 395 A-B; Taylor 2985-92)

(There are some discrepancies in some of the totals shown for each county in the cited exhibits, but the differences are negligible.)

California's next largest producing area is the Santa Maria-Guadalupe District (Santa Barbara and San Luis Obispo Counties), with between 7 million and 8 million cartons in 1971 (CX 364, p. 13; CX 414 A). Another major area is the Blythe District (Riverside County), which shipped 4.7 million cartons of winter lettuce in 1971 (CX 364, p. 13). The San Joaquin Valley, embracing 8 counties (CX 247), accounted for 5.9 million cartons in 1971, the bulk of it comprising fall lettuce (CX 364, p. 13).

Other lettuce-producing areas include Santa Cruz County, Kern County, and Santa Clara County, but their production of less than 3 million cartons annually is dwarfed by the totals for Monterey County and Imperial County (CXs 298-300, 295-297, 305, 312; see also CX 380; CPF, Pars. 75-77, p. 34; RPF, Pars. 55-72, pp. 48, 62; RRB, pp. 26-39).

In Arizona, the major lettuce-growing areas are as follows:

Salt River Valley (Phoenix area), with 4.4 million cartons in 1971.

Marana-Red Rock-Maricopa-Eloy (southeast of Phoenix), with 5.6 million cartons in 1971.

Yuma area, with 7.6 million cartons in 1971. (CX 324)

Other lettuce-producing areas include Willcox (eastern Arizona), Parker-Poston (western Arizona), Aquila-Date Creek, and Harquahala (both in central Arizona). They account for less than 3 million cartons annually, with Parker-Poston shipping about half this total (CX 324).

Except for Yuma, Arizona's production is limited to spring and fall lettuce. Yuma is in production through the winter at the same time as the Imperial Valley of California, but it has also developed spring and fall seasons that overlap with the other Arizona areas. The Salt River Valley and the Marana area, both in central Arizona, are the major source of spring and fall lettuce in Arizona, while Yuma provides the only Arizona winter lettuce, as well as some spring and fall lettuce. (CXs 248-250, 264-265, 289-291, 324)

Total Arizona lettuce shipments in recent years have been as follows:

<i>Year</i>	<i>Cartons</i>
1968	19,481,000
1969	22,227,000
1970	20,016,000
1971	20,682,000

(CX 364, p. 11)

Accordingly, except for generalized statistics as to other lettuce-producing areas, the evidence in this case has been essentially limited to California and Arizona. Moreover, within California, "concentration" indices have been limited to Monterey County and Imperial County.

Production and Distribution

The lettuce industry consists of a combination of growers, grower-shippers, and shippers, together with brokers and buyers located at the various shipping points. The shipping points vary during the year. Starting with spring shipments, the Salinas-Watsonville-King City area (Monterey County and Santa Cruz County) furnishes the major share of the lettuce during the period May through October. In November, the largest share comes from Arizona. From December through March, the largest share of the shipments comes from California (the Imperial Valley plus—especially in March—the Blythe District). During April, as in November, the largest share comes from Arizona. In addition, there are other smaller shipments originating from other areas throughout the year. (CX 374 E; Faris 3413)

As outlined in this record, with little or no dispute between the parties (CPF, Pars. 86-111, pp. 38-47; RPF, Pars. 73-74, pp. 62-63; Pars. 94-101, pp. 79-83), the harvesting, shipping, and sale of lettuce is substantially as follows:

Lettuce is usually sold the same day it is harvested. Once the lettuce ripens, it must be harvested within a relatively short period—within three or four days (CX 246 M). The lettuce is cut, packed, and inspected in the field (Garner 1893). It is normally packed 24 heads to a cardboard carton and then trucked to a vacuum cooler, where the temperature is lowered to about 34 degrees. From the vacuum cooler the cartons are shipped by rail or truck to destinations throughout the United States. (Derdivanis 2052)

As a perishable product, lettuce must be cut, packed, and shipped daily or, at the latest, the succeeding day.

Most lettuce is shipped "naked" in the carton; the heads are not individually wrapped. The clear plastic film in which lettuce is displayed in retail stores is ordinarily added by the store after the lettuce head is cut and trimmed of any discoloration that may have taken place in transit. However, some retailers prefer the plastic film to be applied by

the shipper, and from 5 percent to 15 percent of lettuce shipments involve shipper-wrapped lettuce. This involves an extra cost for the grower-shipper of from 45¢ to 60¢ a carton. Wrapped lettuce accordingly is normally sold at premium prices to at least cover this cost. The major shipper of wrapped lettuce is Bud Antle, Inc., which has wrapped approximately 40 percent of its lettuce. The imprinting of a brand name on these wrappers is minimal, and the brands are not otherwise advertised to the consumer. (CX 157 C; Sherwin 4053-54; Bradshaw 3940-42; Antle 2721.)

Harvesting decisions are made on a day-to-day basis and depend on a variety of factors, including the volume shipped and the prices received on the preceding day, information as to the unloads and prices in major terminal markets, local weather conditions, weather conditions in terminal markets, and the condition of the crop (CX 246).

Growers, grower-shippers, and shippers keep abreast of the market by contacts with one another and through the services offered by the Federal-State Market News Service. By personal contact, by telephone, and by publications—some of them daily—both sellers and buyers have available a wide range of information concerning the market for lettuce. This includes information on unloads and on prices in terminal markets, on weather conditions in such markets, as well as in other producing areas; the shipping volume and prices for the preceding day; and also the current day's volume and pricing. Market News Reporters seek and disseminate information on both the selling and buying side of the market. This is done through contacts with shippers and with purchasers.

All concerned may obtain from the Market News Service the latest available information as to prices and shipping volumes. Such information is double-checked and published the following day.

As indicated, lettuce is sold on a day-to-day market basis. Negotiations over any particular sale begin in the morning and terminate in the afternoon after each party has had the opportunity of informing himself fully on the day's market, both through the Market News Service and by contacts with the trade. The purchasers are represented by brokers or by their own representatives.

Buyers and buyer representatives have an opportunity to inspect the lettuce at the vacuum cooling plant or even in the field.

Inspection normally takes place before a final purchase is made. Buyers have an opportunity to compare quality as between different grower-shippers or between the lettuce produced in different fields but handled by the same shipper or grower-shipper. Quality is an important factor in pricing and accounts in significant measure for the range of lettuce prices at each shipping point.

Most lettuce is sold f.o.b. at the shipping point. However, some lettuce is sold on a consignment basis. This usually represents an established relationship between a particular terminal market wholesaler and grower-shipper, with a consequent sharing of the profits or losses involved in resale at the terminal market.

At times, consignments are made on a distress basis—that is, cars that could not be sold at the shipping point are consigned to a wholesaler or another representative who will undertake to sell the contents at the terminal market for the best price he can get. In other words, the car has a “home,” where a designated representative will undertake to sell it.

In the absence of either a shipping point sale or a consignment, a grower-shipper may “roll” the car and endeavor to sell it while it is en route toward eastern markets. Otherwise, he may “no-bill” the car—that is, provide no bill of lading for that day but hold the car over for another day for possible sale or consignment at that time.

To the extent that the existence of any substantial volume of no-bills, rollers, and distress consignments is known in the trade—as it frequently is—this tends to depress the market since such cars are surplus at the going prices.

The seasonal lettuce crops in California and in Arizona are produced and sold pursuant to a variety of arrangements. There are several integrated operations that directly own or lease farm land and engage in the complete operation from production of the crop through harvesting and packing to sale (Garin 2839; Hansen 2301-02; Derdivanis 2023; Hart 3017; Schultz 3086). United Brands functions in this manner, producing and selling its own crops (Dale 2150-51; Willis 2138; Mohamed 2694-2718). Some lettuce producers sell through cooperatives (Lumsden 2212; Bertelsman 2507). Under this type of arrangement, the individual or the company takes all the risks and accordingly reaps all the profits or suffers all the losses (Bertelsman 2508).

At the other extreme, there are instances when the shipper takes the full risk by contracting for a farmer to grow his requirements of lettuce, paying the farmer a flat fee per acre of lettuce, for example, with the farmer receiving his full compensation whether or not the crop was harvested. In this type of arrangement, the farmer takes no risk but his profit is generally minimal. (Lee 2331-33.)

This record indicates that much of the lettuce grown in California and Arizona is produced by joint ventures between the farmer and the shipper, with the latter denominated as a grower-shipper. These “joints,” as they are known in the trade, involve a sharing of risks and profits between the farmer and the shipper. The exact arrangements vary, with the details subject to bargaining between farmer and ship-

per. Under many of these arrangements, the farming operation is basically allocated to the farmer, with some supervision by the shipper; and production costs, such as seed, fertilizer, irrigation water, etc., are shared under some agreed ratio. The expenses of harvesting and packing are incurred by the shipper. Upon sale of the crop, the profits, if any, are allocated between the two parties according to their contractual agreement, subject to the deduction of at least the harvesting and packing costs. (Derdivanis 2017; Bertelsman 2542-44; Martin 2804; Senini 3231-32)⁷

Competitive Climate

At the time of respondent's entry, the lettuce industry was basically a small company industry, consisting essentially of privately-held or family-held corporations, cooperatives, partnerships, and proprietorships (Crossetti 2339-40; Laine 2197; Lumsden 2211; Bertelsman 2507; Morris 2891). With the exception of Bud Antle, Inc., which had annual sales of about \$27 million (Tr. 2722), these companies had annual sales ranging from \$500,000 to \$8 million (CPF, Par. 104, pp. 44-45). The enterprises acquired by respondent were fairly typical; their annual sales in the year prior to acquisition ranged from \$1 million to \$6 million (CX 233 F). Many of the grower-shippers specialized in lettuce, while others had related agricultural operations (CPF, Pars. 66-67, pp. 28-29; Par. 103, p. 44; Par. 197, p. 124). None were publicly held companies⁸ or conglomerate enterprises. For the most part each was dependent on local banks for financing and on local concerns for services and supplies. (CPF, Pars. 109-110, p. 46.)

As a generalization, most of the growers and grower-shippers have grown up in the business. They have tended to begin as small producers; if they had ability in management and skill and experience in production (plus a little luck), they grew and accumulated resources until they became one of the larger firms in the industry. (Faris 3422-23; CRB Par. 281, p. 10.) The entry into or exit from the lettuce industry was primarily on the basis of the ability of the individual (Derdivanis 2015-16).

This competitive climate is not disputed by respondent. In its preliminary consideration of the lettuce industry, respondent recognized that the industry was "fragmented" and consisted mainly of "small producers." (CX 158 C) And it now concedes that—

⁷ For an analysis of the various grower-shipper relationships, see CX 274, pp. 15-17.

⁸ At the time of trial, Bud Antle, Inc., was in the process of registering with the Securities and Exchange Commission for the public sale of its stock (Tr. 2727, 2033).

The fresh vegetable industry is fragmented and is lacking in any concentration or oligopolistic characteristics to such extent that it approaches, as much as in any other industry in the United States, the concept of pure competition * * *. (RPF, Par. 3 (3), p. 2).

Although phrased in the present tense, this is a concession as to the state of the industry before respondent's entry. Whether it is an accurate characterization today is the question to be resolved.

Respondent's entry into the industry was not the only change in the picture. At about the same time that respondent began its acquisitions, a similar program was undertaken by Purex Corporation, a conglomerate with annual sales of about \$300 million. This company made several acquisitions of lettuce enterprises and other agricultural operations and operated them through a subsidiary, Freshpict Foods, Inc. Indications were, however, that Purex, at the time of trial, was in the process of de-emphasizing its agricultural activities, particularly in the lettuce business, possibly because the Commission had issued a complaint challenging the acquisitions. (Leach 2443-54)

Traditionally, the industry has been characterized by considerable price uncertainty. Because of the perishable character of lettuce, huge volumes must be moved to market in a brief period of time. Supplies are highly variable, not only from area to area and from season to season, but also from year to year. Both the vagaries of weather and the uncoordinated production of many growers may result in sudden shortages or unanticipated surpluses. (RX 3, p. 49; CXs 246, 247, 274)

Moreover, the price elasticity of demand is inelastic for the industry. This means that a small change in quantity will generate an opposite but relatively larger change in the prevailing market price. On the one hand, if shipments are reduced by a given percentage, there is an opposite and more than proportional increase in price, resulting in greater total grower-shipper returns. On the other hand, if shipments are increased by given percentage, there is an opposite and more than proportional decrease in price, with a resultant decrease in total revenue for the industry. (CXs 246, 281; Blauch 1327-38; Faris 3411-15; Lumsden 2213; RX 1)

In addition, the record shows that weather conditions in consuming markets have a marked impact on consumer demand and consequently on the prices in terminal markets.

With the industry subject to so many variables on both the supply side and the demand side, prices tend to fluctuate widely and wildly. Prices may drop or rise by as much as 300 percent in a week's time—from \$5.50 to \$1.50 or the converse (RX 74, p. 31; CX 251, p. 25; see RPF, Pars. 98-101, pp. 81-83).

In its review of lettuce prices (RPF, Pars. 80-101, pp. 68-83), re-

spondent has emphasized the periods of depressed prices, with consequent industry losses. But the statistics also show periods of prosperity for the grower and shipper of lettuce (CRB, Pars. 269-277, pp. 7-9). The situation of the lettuce industry was aptly described in a California Department of Agriculture study (CX 246, pp. 5-6) as follows:

[T]he lettuce industry often will be faced with average annual prices over a two or three-year period which do not cover total costs of production and harvesting. For this reason, well-established grower-shippers and shippers plan their schedules and evaluate financial performance over relatively long periods of operation of up to four to five years, with the expectancy that losses in one year will be offset by income gains in others. As would be expected, successful shippers and grower-shippers require sufficient cash reserves to carry them through possible years of low return.

During periods of oversupply and resultant low prices, lettuce may be sold at prices below the cost of production, harvesting, and sale. Or the lettuce may be left in the field unharvested—plowed up.

As a rough rule of thumb, it is considered that the return on a carton of lettuce should exceed \$1.75 to show a profit to the grower. However, since the fixed costs of production have already been incurred once the lettuce is in the ground, grower-shippers will harvest and sell lettuce at any price that will exceed the cost of harvesting, packing, and selling, so as to contribute some revenue to the "land"—that is, toward the fixed or sunken costs. The record indicates that the costs of harvesting, packing, and shipping a carton have ranged in recent years between \$1.00 and \$1.25. (CPF, Par. 98, pp. 42-43; CRB, Pars. 311-313, pp. 23-27; RPF, Pars. 98-99, pp. 81-82)

In the face of the price volatility that characterizes the lettuce industry, resulting in periodic low prices and consequent losses, there has been an increasing trend for the larger grower-shippers to develop year-round operations. Not only does this spread the risks in both time and space, but it also provides a continuing source of supply to customers and results as well in certain economies in the utilization of manpower and facilities. However, there are limitations on the availability of land suitable for lease or development for profitable year-round production.

Such limitations constitute a barrier to entry into the lettuce industry and were recognized as such by respondent when it decided on entry by acquisitions rather than on *de novo* entry (CX 158 P). (This will be considered in more detail *infra*.)

The picture that emerges from this record shows a fragmented, substantially competitive industry, consisting of many sellers, with even the largest grower-shippers having relatively small market shares. There was no brand differentiation of product. The market was from day to day, with the daily pricing of lettuce dependent on actual

supply and demand factors. Price was determined by market forces and was not subject to the conscious control of any individual seller. In respondent's words, prices have been "dictated by supply and demand," and the industry approached "pure competition" (RPF, Par. 3 (3) (4), p. 2).

Competitive Effects

Such, in brief, was the state of the lettuce industry before respondent became a grower-shipper in 1968-69. The question for decision is whether respondent's entry by acquisition has had or may have the effect of substantially lessening competition or tending to create a monopoly in the lettuce industry (Complaint and Answer, Par. 36).

This is a case involving the entry by a giant corporate conglomerate into a traditionally small-enterprise industry. The case has some unique aspects, but despite the protestations of respondent, the problem posed is amenable to the application of traditional antitrust concepts. The parties are in agreement, and the record confirms, that the fresh vegetables industry, including the lettuce segment, has been atomistic in structure and vigorously competitive, with prices determined by supply and demand. Essentially, they part company on the question whether the entry of United Brands by acquisition has resulted or may reasonably result in such a change in these characteristics as to bring the acquisitions within the ambit of Section 7 of the Clayton Act or of Section 5 of the Federal Trade Commission Act. In this section, we shall examine a variety of competitive factors that are important in arriving at a proper answer to this question.

Reciprocity

At the outset, we can dispose of two of the allegations of the complaint. First, the Government offered no proof concerning reciprocity (Complaint, Par. 36(3) (F)). Respondent's lettuce customers are brokers, fresh produce wholesalers, and chain stores. The uncontradicted testimony is that respondent buys nothing from these customers and therefore has no buying power to use in forcing lettuce sales (Fox 1484; Mason 3870-71).

Potential Competition

Second, complaint counsel appear to have abandoned the potential competition charge of the complaint (Par. 36(1)) to the effect that the acquisitions are actionable under Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act because potential competition between respondent United Brands and the acquired companies in the growing, shipping, and marketing of fresh lettuce and of fresh celery

