

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

BOISE CASCADE CORPORATION, ET AL.

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

Docket 8958. Complaint, April 18, 1974 — Final Order, Jan. 11, 1978

This order, among other things, requires a Boise, Idaho manufacturer and seller of softwood plywood, and four of its competitors, to cease, in connection with sales and transportation of their products, employing weight estimates to determine freight charges; and using any rate of freight other than that applicable to particular business transactions. The order further requires that respondents, when offering delivered prices, provide purchasers of their products the option of obtaining point of origin prices and furnishing their own transportation. Additionally, respondents must advise persons responsible for sales and policy of the terms of the order, and publish such terms, as prescribed.

Appearances

For the Commission: *James C. Egan, Jr., Amy R. Richter, Roger J. Leifer and Robert J. Enders.*

For the respondents: *Hammond E. Chaffetz, James H. Schink, Steven D. McCormack and Stephen C. Neal, Kirkland & Ellis, Chicago, Illinois for Champion International Corporation, Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc. John T. Loughlin, Robert T. Johnson, Jr. and Robert W. Sheppy, Bell, Boyd, Lloyd, Haddad & Burns, Chicago, Illinois for Boise Cascade Corporation.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent Boise Cascade Corporation is a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office and place of business at Boise, Idaho. In 1971, Boise Cascade Corporation had sales of \$1,785,870,000.

PAR. 2. Respondent Champion International Corporation is a corporation organized, existing and doing business under the laws of

the State of New York with its principal office and place of business at 777 3rd Ave., New York, New York. In 1971, Champion International Corporation had sales of \$1,599,829,000. [2]

PAR. 3. Respondent Georgia-Pacific Corporation (hereinafter "Georgia-Pacific") is a corporation organized, existing and doing business under the laws of the State of Georgia with its principal office and place of business at 900 S.W. 5th Ave., Portland, Oregon. In 1971, Georgia-Pacific had sales of \$1,447,300,000.

PAR. 4. Respondent Weyerhaeuser Company is a corporation organized, existing and doing business under the laws of the State of Washington with its principal office and place of business at Tacoma, Washington. In 1971, Weyerhaeuser Company had annual sales of \$1,299,533,000.

PAR. 5. Respondent Willamette Industries, Inc., is a corporation organized, existing and doing business under the laws of the State of Oregon with its principal office and place of business at 3800 1st National Bank Building, Portland, Oregon. In 1971, Willamette Industries, Inc., had sales of \$194,173,636.

PAR. 6. Each of the respondents is substantially engaged in the manufacture, sale and distribution of softwood plywood. In the course and conduct of their business, each of the respondents is and has been for a substantial period of time engaged in selling such products to purchasers located in various States of the United States, and has caused such products to be transported from their facilities in various States of the United States to purchasers located in various other States of the United States. Each of the respondents is therefore engaged in "commerce," as "commerce" is defined in the Federal Trade Commission Act, and has been continuously so engaged for several years.

Definitions

PAR. 7. For the purpose of this complaint, the following definitions shall apply:

(a) "Softwood" - woods from coniferous trees such as pine, fir, spruce, and hemlock, which are generally light in texture, non-resistant and easily worked. [3]

(b) "Softwood plywood" (sometimes referred to as "plywood" in this complaint) - material consisting of sheets of softwood glued or cemented together with the grains of adjacent layers arranged at right angles or at a wide angle usually being made of uniformly thin veneer sheets on either side of a thicker central layer.

(c) "Phantom freight" - the difference between the actual freight and the phantom freight.

actual freight costs incurred in shipping a product and higher freight charges used as the basis for billing the customer.

Nature of Trade and Commerce

PAR. 8. The manufacture and sale of softwood plywood is a substantial and expanding industry in the United States. In 1971, domestic shipments were \$1,246,911,000. Softwood plywood is a material which enters heavily into the cost of construction of residential and commercial buildings. There has been a trend toward factory-built housing in which 29 percent - 39 percent more plywood is used than in conventional housing. Large markets for softwood plywood include the major urban areas and suburban centers in the northeast and northcentral regions of the nation and certain urban areas in the South and the West.

PAR. 9. Historically, plywood was made from Douglas-fir trees and manufactured almost entirely in the coastal areas of the Pacific Northwest. In more recent years, the industry expanded to inland areas as types of softwood other than Douglas-fir began to be used in the manufacture of plywood. As a result of the development of new laminating techniques permitting utilization of the woods of southern pine, Georgia-Pacific established the first plywood mill in the South in Fordyce, Arkansas in 1963. Most of the large western plywood manufacturers thereafter established plants in the South. All of the respondents now have softwood plywood plants in the South.

PAR. 10. By the end of 1971, there were 51 softwood plywood plants located in the South. Since 1963, there has been a significant increase in the production of softwood plywood nationally, with most of the increase occurring in the South. By the end of 1971, production of plywood in the South reached approximately one quarter of total U.S. output. [4]

PAR. 11. In 1969, the top eight softwood plywood producers accounted for approximately 64 percent of domestic plant shipments and the top four producers accounted for approximately 48 percent of shipments. The concentration level has increased since that time. The 1969 concentration level increased from 1963 when the top four and top eight softwood plywood producers had approximately 36 percent and 50 percent of domestic plant shipments, respectively.

PAR. 12. In 1971, the top eight softwood plywood producers accounted for approximately 74 percent of southern production and the top four producers accounted for approximately 61 percent of that production. A number of plants have recently been built in the South by the leading producers and this has resulted in an increase in

concentration in the South. The respondents are among the leading producers in either the nation or in the South.

Pacific Northwest Single Basing Point

PAR. 13. Before Georgia-Pacific opened its first softwood plywood plant in the South, respondents were charging softwood plywood delivered prices based upon rail freight rates computed from Portland, Oregon. Georgia-Pacific and each of the respondents which subsequently opened plants in the South have continued to charge delivered prices for softwood plywood computed on the basis of rail freight from the Pacific Northwest, despite substantial shipments of softwood plywood from respondent's plants located in the South and other places geographically distant from the Pacific Northwest. As part of this basing point system, respondents have refused to permit customers the option of purchasing softwood plywood at the plant at f.o.b. prices which did not include freight from the Pacific Northwest or to allow their customers to arrange for the mode of transportation cheapest to the customer.

PAR. 14. The parallel conduct of respondents and others in adhering to delivered prices based upon rail rates from the Pacific Northwest for shipments from mills located in other areas of the country has resulted in substantial margins of phantom freight accruing to respondents, particularly for shipments from plants in the South made to customers located in the southern, eastern, and northcentral areas of the [5] country. This conduct enables those respondents which have plants in the West to ship plywood from their western plants to customers in the East without being undercut in price by southern mills which have a substantial geographic cost advantage. An example of the extent of phantom freight involved in the basing point system is as follows:

In September 1972, a retail dealer in New Orleans, Louisiana, purchased softwood plywood produced at a plant located 60 miles away in Holden, Louisiana. The dealer paid a delivered price of \$4,289, which was computed on the basis of rail freight from Portland, Oregon. Portland is 2500 miles away and the freight was \$764. The supplying plant in fact shipped the plywood to the purchaser by truck at a freight charge of \$80. Approximately 16% or \$684 of the purchaser's total delivered price consisted of phantom freight.

PAR. 15. The American Plywood Association, 1119 A St., Tacoma, Washington, to which most of the respondents belong, has disseminated to the industry freight books specifying appropriate rail rates from the Pacific Northwest. This has facilitated the workings of the above-described basing point system.

1

Complaint

estimated weights to quote delivered prices to customers. Inaccuracies in a number of these weights further inflate the amount of phantom freight.

Nature of the Offense

PAR. 17. In the conduct of the aforesaid business, the respondents individually, and in combination with other companies, are now using and for a number of years have used and pursued parallel courses of business behavior constituting unfair methods of competition and unfair and deceptive acts in commerce. Among the unfair methods of competition and the unfair and deceptive acts and practices which respondents individually, and in combination, have been and are now engaged are the following: [6]

(a) establishing and maintaining a system of delivered prices based on computation of rail freight from the Pacific Northwest for shipments made from mills located outside of that region;

(b) establishing and maintaining a system of delivered prices based on computation of rail freight and applying it to shipments made by other and cheaper modes of transportation;

(c) refusing to permit customers who purchase from southern plants the option of picking up purchases at the plant at true f.o.b. mill prices; and

(d) using identical and inaccurate estimated weights as basis for quoting delivered prices.

Effects

PAR. 18. The capacity, tendency and effects of the conduct of respondents hereinbefore alleged are, among others, to:

(a) stabilize prices and provide certainty in the pricing of softwood plywood among competitors;

(b) reduce and hinder actual and potential competition among respondents in the sale and distribution of softwood plywood;

(c) create disincentives to the most efficient location of producing points;

(d) create disincentives to customers to locate close to producing points;

(e) discourage use of the cheapest and most efficient mode of transportation in given cases;

(f) discriminate in prices between customers; and [7]

(g) mislead and deceive customers with respect to freight.

PAR. 19. The conduct of respondents hereinbefore alleged were and are unfair methods of competition, and unfair or deceptive acts in

Initial Decision

91 F.T.C.

commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as amended.

INITIAL DECISION BY MORTON NEEDELMAN, ADMINISTRATIVE LAW
JUDGE

NOVEMBER 29, 1976

[2] I

STATEMENT OF THE CASE

The complaint in this proceeding issued on April 18, 1974. It charges that respondents, manufacturers of softwood plywood, have, individually, and in combination, pursued parallel courses of business behavior constituting unfair methods of competition, and unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

Specifically the complaint alleges that respondents, individually and in combination, have: (a) established and maintained a system of delivered prices for plywood¹ which is based on computation of the freight charge from the Pacific Northwest for shipments made from mills located in the South; (b) established and maintained a system of delivered prices based on computation of rail freight and applied these computations to shipments made by other and cheaper modes of transportation; (c) refused to permit customers the option of purchasing at respondents' southern plywood plants at a true F.O.B. price; and (d) used identical and inaccurate estimated weights as the basis for delivered price quotes. (Complaint ¶'s 17(a)-(d)).

The complaint further alleges that the effects of these practices have been to: stabilize prices and provide certainty in the pricing of plywood among competitors; reduce and hinder actual and potential competition among respondents in the sale and distribution of plywood; create disincentives to the most efficient location of plywood producing points; create [3] disincentives for customers to locate close to plywood producing points; discourage use of the cheapest and most efficient mode of transporting plywood; discriminate in prices between customers; and to mislead and deceive customers with respect to freight. (Complaint ¶'s 18(a)-(b)).

Respondents' answers, filed by Boise Cascade on May 22, 1974 and by the others on June 7, 1974, admit certain corporate and jurisdictional facts, but deny all substantive allegations in the complaint.

¹ Unless otherwise specified, the term "plywood" as used in this initial decision means softwood plywood only. The

In the prehearing stage, complaint counsel had extensive discovery of respondents' records. Upon completion of the discovery phase, the case-in-chief began on December 2, 1975, and was concluded on December 22, 1975. The defense case was presented between January 19, 1976, and April 1, 1976. The rebuttal and surrebuttal cases were heard between April 19 and June 8, 1976. During these hearings, all counsel were afforded full opportunity to be heard, and to examine and cross-examine witnesses.

The record was closed on June 30, 1976, for the receipt of evidence. Proposed findings of fact and conclusions of law, together with briefs were filed by the parties on July 30, 1976. Answering briefs were filed on August 30, 1976. Oral argument on the briefs was heard on September 8, 1976. On September 7, 1976, complaint counsel moved to strike from the record certain documentary exhibits which had not been relied on either in proposed findings or in replies. This motion was opposed in part by respondents, and except for those deletions which respondents were against, complaint counsel's motion was granted by my order dated September 13, 1976. By leave of the Commission, the date for filing this initial decision was set for November 29, 1976. [4]

After reviewing all the evidence, the proposed findings, conclusions, and briefs submitted by the parties, and based on the entire record, including my observation of the demeanor of all witnesses, I make the following findings of fact.²

² Proposed findings not adopted in the form proposed or in substance, are rejected as either not supported by the entire record, or as involving immaterial matters.

The following abbreviations are used in citing to the record: "Tr." (transcript of testimony); "CX" (complaint counsel's exhibits); "RX" (respondents' exhibits). CX 1, an index to complaint counsel's exhibits, contains a description of each document, date received or rejected, source, and part of the document which is in evidence. (Exhibits which were offered and received for only a part of the document, indicate received portion bracketed in red.) The same information for respondents' exhibits appears on RX 1.

All *in camera* exhibits are listed in my omnibus *in camera* order of June 23, 1976. By the terms of this order (§ 4) there is no limitation whatever on the public use of this material in decisions written by the undersigned, the Commission, or other reviewing authorities. Also, my *in camera* order of June 23, 1976 (§ 5) states that *in camera* status will end on June 30, 1981, when all *in camera* exhibits are to be placed on the public record.

In reviewing documentary exhibits, it is helpful to consult CX's 801A-805E which give the employment history of senders and recipients of respondents' memoranda and letters. [5]

The record, excluding pre-hearing conferences, consists of 4,703 pages (121 of which are oral argument on briefs). There are approximately 1,000 trial exhibits consisting of several thousand pages. The witnesses were as follows:

Name	Called By	Tr. Pages
Robert E. Smith	Complaint	314-367
C.C. Crow Publications, Inc.	Counsel ("c.c.")	535-569
Lester E. Anderson		
Random Lengths Publications, Inc.	c.c.	368-527
Gordon J. King		
Hampton Lumber Sales (formerly with Boise Cascade)	c.c.	570-702
James C. Schmidt		
Louisiana Pacific Corporation (formerly with Boise Cascade)		

(Continued)

FEDERAL TRADE COMMISSION DECISIONS

	Initial Decision	91 F.T.C.
<i>(Fn 2. Continued)</i>		
and Georgia-Pacific	c.c.	703-802
William R. Coston		
Oregon-Pacific Company (formerly with Champion)	c.c.	804-913
Donald K. Barton		
(formerly with Georgia-Pacific)	c.c.	914-981
George W. Rummel		
Gulfgate State Bank (formerly with Champion)	c.c.	991-1045 [6]
James F. Lynn		
MacMillan-Boedel Corporation	c.c.	1056-1108
Mahlon W. Day		
National Building Centers (formerly with Weyerhaeuser)	c.c.	1131-1205
Michael Glassman		
Federal Trade Commission	c.c.	1215A-1287
Frank V. Langfitt		
Georgia-Pacific	Resp.	1370-1563
Stanley S. Dennison		
Georgia-Pacific	Resp.	1566-1734
William Swindells, Jr.		
Willamette	Resp.	1737-1874
Paul A. MacDonnell		
Georgia-Pacific	Resp.	1879-1984
Robert A. Starling		
Georgia-Pacific	Resp.	1997-2080
Daniel I. Allred		
Georgia-Pacific	Resp.	2083-2184
R. Paul Kay		
Weyerhaeuser	Resp.	2193-2318
Donald W. Cobb		
Boise Cascade	Resp.	2392-2452 [7]
Craig Marshall		
Boise Cascade	Resp.	2456-2520
Conrad R. Kelley		
Champion	Resp.	2561-2756
Bob Prange		
Bowie-Sims-Prange	Resp.	2759-2859
David Vagos		
Furman Lumber Company	Resp.	2862-2915
Milton Sandy, Jr.		
Sandy Lumber Sales Company	Resp.	2920-2949
John P. O'Reilly		
Haggerty Lumber and Supply Company	Resp.	2958-2975
Robert L. Fallow, Jr.		
Roseburg Lumber Company (formerly with Boise Cascade)	Resp.	2981-3031 3065-3260
Roy Weinstein		
National Economic Research Associates	Resp.	3263-3460 3464-3579
Peter O. Steiner		
The University of Michigan	Resp.	3587-3825 4433-4566
Robert E. Ridgeway		
American Plywood Association	c.c.	4047-4154
Gilbert N. Miller		
Georgia-Pacific	Resp.	4201-4388

[8] II

FINDINGS OF FACT

The Respondents

1. Respondent Georgia-Pacific Corporation ("Georgia-Pacific") is a Georgia corporation with its principal office and place of business located at 900 S.W. Fifth Ave., Portland, Oregon. (Complaint and Georgia-Pacific Answer ¶ 3.)

2. Georgia-Pacific is a manufacturer and distributor of softwood and hardwood plywood, paper and other forest products. In 1971, Georgia-Pacific's total corporate sales were \$1,447,300,000. (Complaint and Georgia-Pacific Answer ¶ 3; CX 460.)

3. Respondent Champion International ("Champion") is a New York corporation. At the time complaint issued its principal office and place of business were located at 777 3rd Ave., New York, New York. (Complaint and Champion Answer ¶ 2.) Champion's corporate headquarters was subsequently moved to Stamford, Connecticut. (Tr. 2570.)

4. Champion (through its United States Plywood Division) is a manufacturer and distributor of plywood and other wood products. (Tr. 2561.) Champion's 1971 sales of all products were \$1,599,829,000. (Complaint and Champion Answer ¶ 2.)

5. Respondent Boise Cascade Corporation ("Boise") is a Delaware corporation with its principal office and place of business located in Boise, Idaho. (Complaint and Boise Answer ¶ 1.)

6. Boise manufactures and distributes wood products, including plywood,³ and had total sales [9] in 1971 from all products of \$1,785,870,000. (Complaint and Boise Answer ¶ 1.)

7. Respondent Weyerhaeuser Company yellow is a State of Washington corporation with its principal office and place of business located in Tacoma, Washington. (Complaint and Weyerhaeuser Answer ¶ 4.)

8. Weyerhaeuser is a manufacturer and distributor of plywood and other forest products, including lumber, particleboard, wallboard, and paper. In 1971, Weyerhaeuser's sales of all products were \$1,299,533,000. (Complaint and Weyerhaeuser Answer ¶ 4; CX's 101H-i, 110E, 807B.)

9. Respondent Willamette Industries, Inc. ("Willamette") is an Oregon corporation, with its principal office and place of business located at 3800 1st National Bank Building, Portland, Oregon. (Complaint and Willamette Answer ¶ 5.)

10. Willamette is a manufacturer and distributor of paper products, plywood, lumber, and particleboard. In 1971, Willamette's total

³ In addition, Boise's Eastern Division produces "Kingsberry" pre-fabricated homes which are manufactured in panelized sections and assembled on site. (CX 421, p. 9.)

sales from all products were \$194,173,636. (Complaint and Willamette Answer ¶ 5; CX 65B.)

The Product

11. This case involves plywood manufactured by respondents from two types of softwood evergreen trees — the Douglas fir grown principally in or near the Pacific Northwest, and the yellow pine grown in the South.⁴ [10]

12. Plywood is a flat wood panel, constructed of thin sheets of wood bonded together with the grain direction of each sheet or “ply” at right angles to the one adjacent to it. The plywood “sandwich” consists of thin outer veneer sheets on either side of a thicker central layer. (CX 320, p. 2; Tr. 572, 1374, 1895.)

13. Plywood is manufactured by debarking and cutting logs into “peeler blocks” approximately 8 feet 6 inches in length. The peeler blocks are softened by steaming. (Tr. 1373.)⁵

14. After the steaming process, the “peeler blocks” are then revolved against a sharp blade and “peeled” into continuous sheets in much the same manner as paper is unwound from a roll. (Tr. 1373-74.)⁶ These peeled veneer sheets are passed down a conveyor, clipped to the desired lengths and dried. (CX 320, pp. 2-3, 11-12; Tr. 1374.)

15. The veneer sheets are then graded by quality according to the incidence of defects. The highest grades, designated “N” (intended for natural finish) and “A,” must be completely smooth and devoid of any open defects when sanded. The remaining grades — “B,” “C,” and “D” — may have defects of specified size and in some instances of specified number. Grade “D” veneer [11] may have any number of defects so long as these defects do not seriously impair the strength or serviceability of the panel. (CX 320, pp. 2-3, 11-12; Tr. 386-87, 1894-95.)

16. The veneers are coated with glue and arranged together in the desired number of plies — most plywood is made in 3, 4, or 5 plies — to form the plywood “sandwich.” The stacked veneers are then glued under pressure in a hot press. (CX 320, p. 2; Tr. 572, 1374.)

17. Plywood panels with inner cores composed of D grade veneers are known as “interior type.” Interior grade panels are not used in

⁴ “Southern yellow pine” is not one species. It is a term applied to Loblolly, Slash, Shortleaf, and Longleaf pines. (CX 320, p. 4.)

⁵ The technical standard for the manufacture of plywood is established by the plywood industry under the auspices of the Product Standards Section of the U.S. Department of Commerce and is published by the National Bureau of Standards in “Softwood Plywood — Construction and Industrial Standard PS 1-66,” and its successor, PS 1-74. (CX 320; Tr. 1895.)

⁶ Because it is impossible to peel the log entirely, there is always a small “core block” remaining after the peeler block is converted into veneers. These cores constitute a by-product of the plywood production process and are either sold outright or ground into chips and then sold. (CX 320; Tr. 4299.)

applications where there is constant exposure to weather. Plywood panels of "exterior type" construction, which may be exposed to weather, are constructed with C grade inner veneers. (CX 320, pp. 2-3; Tr. 350.)⁷

18. Following the drying process the plywood panels are trimmed to desired size. Panels 4 feet by 8 feet are the most commonly produced. (RX's 434A-435F; Tr. 350, 1374.)

19. Plywood panels containing higher veneer grades are often sanded to meet the requirements of such specialized end-uses as interior cabinet work and stair treads. In addition, panels may be improved or upgraded by repairs (patches) which eliminate defects in the face veneers. (CX 320, pp. 11-12, 20; Tr. 1374.) Plywood which incorporates the N, A or B grades of veneer on the face panel and which is fully sanded for complete smoothness on both sides is known as "sanded" plywood. (CX 320, p. 11.)

20. Unsanded plywood — also known as "sheathing" — contains C and D grades of veneer in the face and back. Since plywood grade designation is expressed by reference to the face and back veneers, sheathing designated as [12] "CD interior" consists of C grade veneer on the face, D grade veneer on the back and D grade inner plies. (CX 320, p. 11; Tr. 353, 1895-96.)

21. In addition to the sanded and sheathing products,⁸ plywood veneers of various grades may be manufactured into specialty products designed for particular uses. Among these are special engineering grades designed for applications in which unusually rigid structural properties are important. (CX 320, p. 20.)

22. Of the 12.5 billion square feet of plywood shipments reported by the American Plywood Association in 1974, approximately 8.7 billion square feet, or 69.7 percent, were sheathing; 2.7 billion square feet (21.9 percent) were sanded; and 1 billion square feet (8.3 percent) were specialty products. The most commonly produced softwood plywood product is CD interior with exterior glue,⁹ which accounted for approximately 66.6 percent of sheathing shipments reported by the American Plywood Association in 1974. (RX's 11N, Q.)

23. Residential construction in which CD sheathing is widely used for flooring, walls, and roofing,¹⁰ is the principal plywood application. The American Plywood Association estimates that 54.8 percent of

⁷ Almost all plywood — western or southern, interior or exterior — is now made with a moisture repellent exterior glue line. (Tr. 361.)

⁸ "Plyform" or "concrete form" is a plywood product which has an oiled edge and is used to form the mold for poured concrete. After the concrete hardens, the plyform is removed and used again. (Tr. 353, 536.)

⁹ Also known as "Standard Exterior" or "CDX." Note that CDX is an "interior"-type panel bonded with an exterior glue. (Tr. 360-61, 1894-96.)

¹⁰ Plywood has taken over almost all of the roof-sheathing market, and is an important factor in sidewall sheathing as well as in flooring where it is replacing the traditional oak floor. (Tr. 1375.)

industry production in 1973 was used in residential construction. [13] Other construction accounted for 13.6 percent. The industrial market including such applications as packaging materials and furniture accounted for 18.6 percent. The agricultural and over-the-counter markets accounted for 13 percent of industry production. (RX 12G; Tr. 353, 1374-75, 1423.)¹¹

The Industry

24. The production and sale of plywood is a substantial industry. In 1964 there were 164 plywood mills producing 11,678,621 thousand square feet (3/8 inch basis).¹² In 1974 the number increased to 195 mills which produced 15,878,380 thousand square feet (3/8 inch basis). (RX 11E.)

25. From the origin of the plywood industry in the early twentieth century until 1947, all plywood was produced in the States of Washington and Oregon. In 1947 the western plywood industry expanded into northern California, and in 1952 to the States of Idaho and Montana. (RX's 11E-F.) [14]

26. During the early 1960's, the technology of laminating southern pine veneers into a successful plywood bond was developed. The first southern mill specifically designed for plywood was constructed by Georgia-Pacific at Fordyce, Arkansas,¹³ and the first shipment of plywood from that mill was made in December 1963. (CX 460; p. 10; Tr. 1377-78.) Before the lamination problem was solved, southern pine was mainly used in the manufacture of pulp, paper or lumber, but it was not used for plywood. (RX 90B.)

27. Today there are three major plywood producing regions in the United States: the original "western" region encompassing the States of Oregon and Washington west of the Cascade mountains and

¹¹ These end-use percentages have remained relatively constant during the time period 1971-73:

	1971	1972	1973
Residential construction	53.6%	54.6%	54.8%
General construction	12.8	12.8	13.6
Industrial	19.5	19.2	18.6
Agriculture/over-the-counter	14.0	13.4	13.0

(RX 12G)
¹² For statistical purposes, various thicknesses of plywood are frequently converted to a uniform 3/8 inch basis for measuring volume in square feet regardless of thickness. For example, a 4 foot x 8 foot panel of 1/2 inch plywood contains 32 square feet (4 feet x 8 feet) of surface footage on an actual basis and 42.7 square feet [1/2 inch divided by 3/8 inch (4 feet x 8 feet)] of surface footage on a 3/8 inch basis.

¹³ During 1962 and 1963, Georgia-Pacific acquired the Crossett Company in Crossett, Arkansas and the nearby Fordyce Lumber Company. With these acquisitions, which together cost about \$140 million, Georgia-Pacific obtained 800,000 acres of pine timber. (RX 90B.)

1

Initial Decision

northern California; the "inland" (or "Inland Empire") region, which includes those portions of Washington and Oregon east of the Cascade mountains, and the States of Idaho and Montana; and the "southern" region comprising Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Arkansas, Louisiana, Texas, and Oklahoma. (RX 11C.) The production share by region in 1974 was as follows:

Western	61.4%
Southern	32.3
Inland	6.3

(RX 11D)

In terms of the key product manufactured in the South, plywood sheathing, the regional shares in 1974 were as follows:

Southern	45.7%
Western	35.6
Inland	18.7

(RX 11Q)

[15] 28. Total industry and respondents' production of all softwood plywoods are as follows:

TABLE 1: Production of All Plywood By Industry and By Individual Respondents

(In thousands of square feet - 3/8 inch basis)

	1964	1969	1971	1973
Industry	11,678,621	13,694,392	16,634,971	18,304,599
Georgia-Pacific	1,038,000	1,944,000	2,709,000	2,434,000
*Boise	401,985	920,419	1,366,648	1,352,480
Weyerhaeuser	624,280	851,600	1,036,700	1,213,200
*Champion	763,683	1,046,125	1,134,717	1,200,600
*Willamette	510,463	811,434	1,001,523	1,074,800

(Source: CX 930C)

* Includes all production of joint venture mills in which the particular respondent is a joint venture partner.

29. The five respondents account for the following percentage of total industry production:

TABLE 2: Percentage of Total Production Controlled By Each Respondent

	1964	1969	1971	1973
Georgia-Pacific	8.89	14.20	16.28	13.30
*Boise	3.44	6.72	8.22	7.39

	Initial Decision			91 F.T.C.
Weyerhaeuser	5.35	6.22	6.23	6.63
*Champion	6.54	7.64	6.82	6.56
*Willamette	4.37	5.93	6.02	5.87
5 firm total	28.59	40.70	43.57	39.74

(Source: Finding 28)

* Includes all production of joint venture mills in which the particular respondent is a joint venture partner.

[16] 30. Total industry and respondents' production of southern pine plywood are as follows:

TABLE 3: Total Softwood Plywood Production By Industry And By Respondents

(In thousands of square feet - 3/8 inch basis)

	1964	1969	1971	1973
Industry	80,024	2,875,355	4,410,062	5,558,618
Georgia-Pacific	64,000	962,000	1,729,000	1,824,000
*Boise	0	52,802	66,202	123,447
Weyerhaeuser	0	196,000	310,100	472,600
*Champion	0	189,041	264,037	265,481
*Willamette	0	157,650	280,696	328,407

(Source: CX 930C)

* Includes all production of joint venture mills in which the particular respondent is a joint venture partner.

31. The five respondents account for the following percentage of total southern plywood production:

TABLE 4: Percentage of Total Southern Production Controlled By Each Respondent

	1964	1969	1971	1973
Georgia-Pacific	79.98	33.46	39.21	32.81
*Boise	0	1.84	1.50	2.22
Weyerhaeuser	0	6.82	7.03	8.50
*Champion	0	6.57	5.99	4.78
*Willamette	0	5.48	6.36	5.91
5 firm total	79.98	54.17	60.09	54.22

(Source: Finding 30)

* Includes all production of joint venture mills in which the particular respondent is a joint venture partner.

[17] 32. The record does not contain precise proof of the dollar value of annual plywood production, but it can be estimated. In 1973, Georgia-Pacific, the dominant southern plywood producer, had an average sales realization of approximately \$100 (per thousand square feet) on sales from its southern sheathing plants. (RX 452 *in camera*.) Applying the Georgia-Pacific experience to total southern production

sales of southern sheathing of \$555,861,800. Western production is more difficult to estimate because the product mix of the western and inland regions is varied and includes higher priced items such as sanded and specialty. In any event, since southern production was only 30 percent of total industry production in 1973 (CX 321, p. 3), it can readily be seen that total industry production (18,304,599 thousand feet) produced sales of approximately \$2 billion. Census data, which combines softwood plywood with veneers, show 1972 sales valued at \$2,011,500,000. (CX's 677A-E.)

33. Georgia-Pacific is the largest manufacturer of softwood plywood, and it is recognized by other softwood plywood manufacturers, including respondents, as the industry leader and the dominant southern plywood producer. (CX's 110Z9, 325B, 356A, 461, p. 47, 502A, 589, 616; RX 90A-B.)

Respondents' Plywood Operations

34. With the exception of respondent Willamette,¹⁴ which for all practical purposes has no distribution outlets apart from its mills, respondents operate multiple level distribution systems where sales are made either directly from producing mills through centralized mill sales offices (usually in carload lots or from owned and operated and geographically dispersed distribution outlets variously called "distribution centers," "branches," "warehouses," "CSC's" ("Customer Service Centers," [18] Weyerhaeuser's name for its outlets) or "BM & S's" ("Building Materials and Service," Boise's name for its outlets). (See Findings 35-58.)

These distribution outlets may make sales out of inventory in "break-bulk" quantities or may sell on the basis that the plywood is to be shipped directly from the mill in carload or truckload lots, referred to as a "direct mill" sale by a branch. Customers of both the mills or the distribution outlets may range across the entire spectrum of plywood customers from end-users such as residential and industrial contractors and manufacturers to intermediate buying groups, retail lumberyards, and the distribution outlets of other plywood producers. But essentially, respondents' distribution outlets are wholesale warehouses which sell to lumber dealers who, in turn, resell to building contractors. (CX's 56A, 461, p. 48; Tr. 995-96, 1133-34).

¹⁴ Almost all of Willamette's sales are made from its mills: only 2 percent of its sales are made from company-owned retail lumberyards located in Oregon. (See Finding 55.)

Georgia-Pacific

35. In 1975 Georgia-Pacific produced plywood at 18 mills located as follows:

West

Coos Bay, Ore.
Coquille, Ore.
Springfield, Ore.
Toledo, Ore.

South

Crossett, Ark. (2 mills)
Emporia, Va.
Fordyce, Ark.
Gloster, Miss.
Louisville, Miss.
Monticello, Ga.
Russellville, S. C.
Savannah, Ga.
Taylorsville, Miss.
[19] Whiteville, N. C.
Talladega, Ala.
Warm Springs, Ga.
Prosperity, S. C.¹⁵

(CX's 452; Tr. 1529-30)

36. Georgia-Pacific's Building Products Division initially market all of Georgia-Pacific's softwood plywood (whether produced at Georgia-Pacific mills in the West or South or purchased from other producers) through sales departments located in Portland, Oregon; Crossett, Arkansas; and Augusta, Georgia. The Crossett and Augusta sales departments are under the control of the Portland sales office. About 90 percent of Building Products Division sales of plywood are made to Georgia-Pacific's own Distribution Division. (CX 133A; Tr. 1427, 1570.)

37. In addition to its own production, Georgia-Pacific purchases plywood from several sources including both manufacturers and independent wholesalers. (Tr. 2087.) Virtually all of the plywood purchased from outside sources is sold by the Georgia-Pacific

¹⁵ A Georgia-Pacific mill in Chiefland, Florida was closed during 1974. Three mills (Urania, Louisiana; New Waverly, Texas; and Corrigan, Texas) were spun off in 1972 to Louisiana-Pacific Corporation pursuant to an order of

Initial Decision

Distribution Division. (Tr. 1561-62.) Plywood purchased from outside sources accounts for approximately 25 percent of the plywood sold by Georgia-Pacific's Distribution Division.¹⁶

38. Georgia-Pacific's Distribution Division has 145 "Distribution Centers" operating throughout the United States. The centers or branches are wholly-owned outlets which sell a full line of wood and other building material products to dealers, industrial accounts, and [20] major contractors. Each of these centers is operated as an individual profit center which means that plywood produced at company mills or outside sources is transferred or sold at a certain cost and the centers are responsible for making a profit on the resale. (CX 461, p. 48; Tr. 954, 1560-61, 1566-68, 1891, 2000, 4383; see also Findings 97, 98.)

39. As indicated in Finding 36, more than 90 percent of Georgia-Pacific's plywood sales are made through the branches. The remainder is made directly from the mills through "Product Managers" located in Portland, Oregon; Crossett, Arkansas; and Augusta, Georgia. (Tr. 1372-73, 1427, 1483-85, 1569-70.)¹⁷

Boise

40. Boise began producing softwood plywood in 1959. (Tr. 2334.) Presently, it owns and operates 13 softwood plywood mills, located as follows:

West

Kettle Falls, Wash.
Yakima, Wash.
Spokane, Wash.
Camp Adair, Ore.
Valsetz, Ore.
Albany, Ore.
Independence, Ore.
Medford, Ore.
Sweet Home, Ore.
Elgin, Ore.
Emmett, Idaho

¹⁶ Only 1 1/2 percent of total sales of southern plywood are derived from the sale of outside purchases. (Tr. 1549-50.)

¹⁷ In addition, there are mill representatives located in Atlanta, Georgia; Clifton, New Jersey; Washington, D. C.; Chicago, Illinois; and Dallas, Texas. (Tr. 1483-85.)

[21] *South*¹⁸

Moncure, N. C.
DeQuincy, La.¹⁹

(CX's 315A-C *in camera*, 363C *in camera*, 401; Tr. 573, 2334)

41. A Boise subsidiary, Bovill, Inc., is a 50 percent joint venture partner with a Southern Natural Gas Company subsidiary, Southern Natural Resources, Inc., in Boise Southern Company ("Boise Southern"). Boise Southern operates the softwood plywood mill located in DeQuincy, Louisiana, which began production in 1972. (CX's 316, 317 *in camera*, 421, p. 20, 682A-Z67 *in camera*; Tr. 2393.)

For the purpose of this litigation, and specifically in ruling on the admissibility of certain Boise Southern exhibits, I have concluded that evidence relating to the acts and practices of Boise Southern in connection with the operation of the DeQuincy mill may be received in evidence as indicative of the policies of respondent Boise for the following reasons:

[22] First, the joint venture agreement between Boise and Southern Natural Gas contemplates that respondent Boise will contribute its lumber expertise to the joint venture. Southern Natural Gas had no expertise in this area. (CX's 682M-N, S-U *in camera*.)

Second, by the terms of the joint venture agreement respondent Boise may appoint or remove the chief executive officer of Boise Southern at will. (CX's 682G-i *in camera*.) This indicates latent control over the policies of Boise Southern.

Third, key operating personnel have transferred freely between Boise Southern and respondent Boise. For example, the current president of Boise Southern (Bill Patterson) had previously worked for Boise (CX 802K) and Jerry Johnson, the plywood sales manager at Boise Southern, was initially employed by Boise and later returned to work for Boise. (Tr. 2412-13, 2451.) A Boise official testified: "before the [DeQuincy] mill started operating and before he [Johnson] moved down there we instructed him on procedures of selling down there." (Tr. 2412.) While he was employed at DeQuincy Mr. Johnson conferred with a plywood sales control manager at Boise several times a week. (Tr. 2413-14.) Weekly market reports prepared by Mr. Johnson at Boise Southern, which included pricing, production, and shipment informa-

¹⁸ In addition to the southern mills indicated, Boise acquired a plywood plant in Pensacola, Florida in December 1969. This plant was permanently closed in October 1974 and the equipment was removed. Its primary products throughout its years of operation were hardwood plywood, hardwood plywood paneling, and hardwood plywood siding made from woods such as mahogany, cypress, and cativo. It produced small amounts of softwood plywood between 1972 and 1974. (CX 315A *in camera*; Tr. 575, 669, 2352-57.) Still another Boise plywood mill located at Fort Bragg California was sold in 1973. (CX 401.)

1

Initial Decision

tion, were sent to officials at Boise. (CX's 370, 802A-P.) Moreover, while he was in the employ of Boise Southern, Mr. Johnson received a copy of the Moncure weekly market report which contained pricing, production and shipment information, as well as a copy of the Boise quarterly plywood price forecast. (CX's 383, 389, 840A-D.)

Finally, the Boise Southern profit statement indicates that Boise has the responsibility for selling the softwood plywood produced by Boise Southern (CX 350F *in camera*), but apparently Boise's actual role in marketing has been advisory. (Tr. 2413.) [23]

42. Boise's Building Materials and Services Division ("BM & S") currently operates 44 outlets which sell a variety of wood and hardware products, including softwood plywood. Each of these "BM & S" outlets is a profit center. (CX's 318A-C, 319, 421, p. 9; Tr. 596-97, 738.)

43. Western softwood plywood produced by Boise and *not* sold through "BM & S's" is sold by the Boise Wood Products Division located in Portland, Oregon. Southern softwood plywood is essentially sold by Boise directly from its mill sales office located in Moncure, North Carolina. (Tr. 2333, 2381-82.)²⁰ In addition, some of Moncure's plywood production has been sold by the six Boise "BM & S's" located in Springfield, and Newport News, Virginia; Georgetown, Delaware; and Raleigh, Charlotte and Greensboro, North Carolina. (CX's 387A-B; Tr. 2389, 2478-80.) Boise Southern (the joint venture with Southern Natural Gas) sells southern softwood plywood directly from its mill sales office in DeQuincy, Louisiana. (Tr. 2393-94.)

Weyerhaeuser

44. Weyerhaeuser produces softwood plywood at 12 mills located as follows:

West

Longview, Wash.
Snoqualmie Falls, Wash.
Coos Bay, Ore.
Cottage Grove, Ore.
Klamath Falls, Ore.
Springfield, Ore.

[24] *South*

Dierks, Ark.

²⁰ Until mid-1970, southern pine plywood produced at Moncure was sold by Boise's Portland, Oregon sales office. Tr. 576, 671, 2381.)

Jacksonville, N. C.
 Mountain Pine, Ark.
 Philadelphia, Miss.
 Plymouth, N. C.
 Wright City, Okla.

(CX 167; Tr. 2198)

45. Weyerhaeuser sells over 50 percent of its plywood through direct carload and truckload facilities ("trading centers") located in Tacoma, Washington and Hot Springs, Arkansas. (Tr. 2194-95.)

46. The balance of Weyerhaeuser's domestic plywood sales (about 32 percent of production) are made through 62 wholly-owned distribution outlets, known as Customer Service Centers ("CSC's"), located throughout the United States.²¹ (Tr. 2194-95, 2244.) Weyerhaeuser's "CSC's" are warehouses which receive direct carloads and resell in smaller quantities. (Tr. 2194, 2199.)

47. The Weyerhaeuser "CSC's" are individual profit centers. (CX's 881A-B; Tr. 1166.) The profit of a "CSC" is calculated by subtracting from its gross sales, the transfer cost of the wood sold and the costs of operation. (Tr. 1166-68, 1170.)

48. In addition to the distribution of its own production, Weyerhaeuser annually purchases for resale approximately 500 million square feet of plywood from other manufacturers. (Tr. 2244-45.) Approximately 90 percent of the sales of this outside plywood are made through the Weyerhaeuser "CSC's." (Tr. 2245.) [25]

49. Weyerhaeuser, through its "CSC's" and trading centers, sells mainly to retail dealers (RX's 434B, D, H) including chains such as Lowe's (RX 434i; Tr. 2286) and Wickes (Tr. 2284) as well as some independent wholesalers and wholesale buying organizations. (CX 112; RX 434C; Tr. 2284.)

Champion

50. Champion, through its U.S. Plywood Division, produces plywood at 14 mills which are located as follows:

West

Shasta, Calif.
 Seattle, Wash.
 Mapleton, Ore.
 Willamina, Ore.

²¹ If Weyerhaeuser's outside purchases of plywood (500 million feet or 1/3 of total sales) are included, the "CSC's"

1

Initial Decision

Gold Beach, Ore.
Lebanon, Ore.
Roseburg, Ore.
Bonner, Mont.

South

Hammond, La.
Waycross, Ga.
Newberry, S. C.
Corrigan, Texas
Cordova, Ala.
Pocomoke City, Md. (50% interest)

(Tr. 2565, 2743-44, 2944)

51. Virtually all of the plywood produced by Champion mills or purchased from outside sources is sold by wholly-owned company warehouses or branches. Champion owns 125 warehouses located throughout the United States. Each of these branches operates as an independent profit center. (Tr. 813-14, 1022-23, 2569-72, 2698.) The branches sell a full line of wood products, primarily to retail dealers and to the building and industrial markets. (Tr. 2569-72.) [26]

52. The Champion branches order softwood plywood through Champion's central purchasing office, located in Eugene, Oregon, and known as West Coast Purchasing (WCP). Plywood is ordered by the branch either for direct shipment to the customer or for its own inventory for subsequent distribution to customers, usually by truck. (Tr. 2572-73.)

53. Approximately 60 percent of total Champion sales are made out of branch inventory while about 40 percent of total sales are made directly from the mill. Mill sales are usually in carload or truckload quantity. Sales shipped directly from the mill to the branch's customer, save the branch the transactional cost of breaking bulk and putting the plywood into inventory. Accordingly, branches try to sell as much plywood as they can directly from the mill. (Tr. 814, 2572.)

Willamette

54. Willamette owns and operates 11 softwood plywood mills located as follows:

West

Sweet Home, Ore.
Dallas, Ore.

Foster, Ore.
Lebanon, Ore.
Griggs, Ore.
Springfield, Ore.
Redmond, Ore. (50% owned)

South

Dodson, La.
Natchitaches, La. (50% owned)
Ruston, La. (85% owned)
Minden, La. (50% owned)

(CX's 39A, 65B; Tr. 1738-39)

[27] 55. Approximately 98 percent of the plywood produced by Willamette is sold directly from its various mills. Most sales are made by telephone out of offices located in Albany, Oregon and Ruston, Louisiana. Only about 2 percent of Willamette's production is sold through seven wholly-owned retail lumberyards located in Oregon. (Tr. 1740-41.)

56. Virtually all products sold through Willamette's Albany and Ruston sales offices, as well as the sales by its wholly-owned retail lumberyards, are manufactured by Willamette. (Tr. 1743.)

57. Willamette's principal plywood customers at the mill level are office wholesalers (those who ordinarily buy and sell without taking physical possession of the plywood) and wholesale distributors (those wholesalers who ordinarily take possession of the plywood before reselling it), although mill direct sales are also made to retail lumberyards and industrial accounts such as fabricators. (CX's 87C, i.) From its wholly-owned retail lumberyards, Willamette sells primarily to building contractors and to do-it-yourself consumers. (Tr. 1740.)

"Commerce"

58. Each respondent manufactures, sells, and distributes softwood plywood throughout the United States, and each is engaged in "commerce" as "commerce" is defined in the Federal Trade Commission Act. (Complaint and Answers ¶ 6.)

Significance of Price

59. Competition in the southern plywood industry is essentially in terms of price since pine sheathing, the primary item produced by

respondents and other southern producers, is considered to be fungible and not readily susceptible to quality differentiation. (Tr. 1896, 2603.)²²

[28] 60. The demand for plywood sheathing is mainly a function of the residential housing industry. (RX's 11H, 12D, 13i, 14A; Tr. 675, 1423, 1966.) Overall demand for the product does not increase by reason of a price reduction at a time of depressed housing starts. (RX's 10G, 69M, Z9.) On the other hand, prices increase sharply when the number of housing starts accelerate. (Tr. 1423 and see note 98, *infra.*) There are long-term contracts for the sale of plywood, but in those instances the price is left open to be decided at time of shipment. (See Finding 94.) Generally plywood is bought by the housing industry at time of actual need. (RX's 10G-H, 11D, 13C, i, 14A-16B.) These ultimate purchasers do not build up inventories.²³

Because of the price inelastic nature of the product, a price reduction does not produce an overall increase in demand; it merely means that the existing business, as determined by the housing market, will be shared at a lower profit among the producers. Given the nature of the demand for the product, and the concentrated structure of the industry (Finding 31), plywood producers have a strong incentive to avoid price cutting. As a Georgia-Pacific branch manager put it:

If all of a sudden I am starting, or I feel that I am getting more than my share of that market, it is an indication to me that maybe I am selling my wood too cheap. (Tr. 1892-93; see also Tr. 1758-59, 2742.)

Or in the words of a Willamette official who was giving his version of why West Coast freight was added to southern pine plywood prices to arrive at a delivered price which was near the western price: [29]

He [the plywood purchaser] couldn't buy plywood any cheaper from anyone else so there was no reason to cut our prices. (Tr. 1754.)

Respondents' Pricing Practices

61. The central issue in this case is the legality of the pricing practices followed by respondents since 1963 after the opening of the southern pine plywood industry.

62. As indicated earlier (Findings 25, 26), prior to the opening of the southern plywood industry in 1963 by Georgia-Pacific, virtually all²⁴ plywood was manufactured from the Douglas fir trees grown in

²² For evidence of quality differences between southern and western plywood see Findings 131(a), (b).

²³ Purchases for inventory, however, may be made by lumber wholesalers and retailers in anticipation of rising markets. (Tr. 849.) But see CX 356A which indicates that independent distributors are becoming increasingly "less willing to stock [plywood] . . . for redistribution" and Tr. 2871 for evidence that retailers do not tend to buy for future needs.

²⁴ Plywood had been manufactured in the South prior to Georgia-Pacific's entry, but Georgia-Pacific was the first producer to build a southern plant designed exclusively for plywood manufacture. (Tr. 1376-77.)

the Pacific Northwest and the "Inland Empire" areas of Idaho and Montana.

63. All softwood plywood, whether produced in the West or the South, is generally bought on a delivered price basis. (CX 665D; Tr. 321, 956-57, 1084, 1148-49, 1911, 2340.)²⁵

64. Both before and after the opening of the southern plywood industry in 1963, the delivered price of western plywood was a function of a mill price to which actual freight from the West Coast was added. (Tr. 1391-92, 1747, 1863.)²⁶ In the sale of western plywood, the [30] freight charge, which was paid by the purchaser to the carrier, was the actual rail rate from the West Coast to the customer's destination.²⁷

65. The reason Georgia-Pacific was anxious to expand into plywood production in the South was that it had found that southern pine plywood for rough uses, such as sheathing for residential construction, costs no more to produce than its Douglas fir counterpart, and Georgia-Pacific expected that in the long run it would cost less. The main advantage however which Georgia-Pacific anticipated from the opening of the southern plywood industry was in the area of freight. In 1965 it cost buyers \$15 to \$18 to ship 1,000 square feet of plywood from the Pacific coast to southeastern cities such as Memphis and Atlanta. Actual freight costs from southern pine plywood mills, even allowing for slightly heavier weight per square foot, ranged from a third of that amount to practically nothing depending on mill and customer location. By pricing its southern pine plywood at or near the same *delivered* price of Douglas fir plywood, Georgia-Pacific planned to add this saving in freight to its gross margins. (RX's 90A-B.)²⁸ [31]

66. There were several possible impediments to Georgia-Pacific's plan. In the first place, the mere fact that plywood was to be shipped from the South could add materially to price uncertainty in the industry and thereby reduce margins. This particular hazard came about because of the crucial differences between western and southern freight rates. (Findings 67, 68.)

²⁵ For different forms of delivered pricing in the South, see Finding 126.

²⁶ While the freight charge is based on the actual rail rate from the West Coast, the total amount paid may be overstated because the rate is multiplied by "association" weights rather than the actual weight of a particular shipment. See Finding 85.

²⁷ Except for inland (Idaho and Montana) mills which use the West Coast rate. (See note 30, *infra*.)

²⁸ In 1963, Georgia-Pacific projected an annual return on investment before taxes of 59.7 percent from a Crossett, Arkansas plywood mill and a net profit before taxes of \$14.93 (per thousand square feet on average sales of \$57.75). (CX's 845A-C *in camera*.) In 1964, Georgia-Pacific projected a return on investment after taxes of 27.5 percent from a second Crossett, Arkansas mill and a capital recovery period of about three years. From this mill Georgia-Pacific projected an average net profit before taxes of \$23.90 (per thousand square feet) on average net sales of \$66.75 (per thousand square feet). (CX's 488A-B, F.) A basic assumption of the planning for this Crossett mill was that there would be a freight "advantage" (i.e., difference between West Coast and actual freight) of \$3.75 per thousand square feet. An even greater "advantage" (\$15) was projected from a Virginia plywood mill. (CX 490B.) For similar calculations for Louisville, Mississippi (\$12) see CX 491F; for a Moncks Corner, South Carolina plant (\$12.00) see CX 493C; for Waverly, Virginia (\$15.00) see CX 493E; for Savannah, Georgia (\$12.50) see CX 495D; and for Chiefland, Florida (\$12.50) see CX 501D.

Initial Decision

67. The Interstate Commerce Commission rail rates applicable to *western* plywood shipments are established in the form of concentric bands or zones running north and south and originating with the Portland, Oregon zone which includes most of the western plywood producing region. As a shipment of plywood travels from the West to the East, it enters progressively higher West Coast freight zones and the rail rate is commensurately higher.²⁹ Almost all plywood shipments originating in the zone of origin where the Douglas fir plywood mills are located have the same freight rate (the so-called "Portland, Oregon" rate) to any point within one of the [32] eastern destination zones.³⁰ Under this "zone" freight rate for western plywood, there is no uncertainty about the freight rate factor in delivered prices. A customer located in Greensboro, North Carolina, for example, pays the same freight rate regardless of the mill in Oregon or Washington from which the plywood originated. Similarly, that precise same freight rate is applicable to customers located anywhere in the freight band stretching from Maine to Florida along the East Coast of the United States. (CX's 51A-B, 348A, 681; Tr. 579, 1391-92, 1445-46, 1745, 1932-34, 2806.)

68. In contrast to the predictable West Coast freight rate, the Interstate Commerce Commission plywood freight rates from points of origin in the southern United States are established on a "point-to-point" basis; that is, the published freight rate for each point of origin varies to each point of destination. For example, the rail rate from Ruston, Louisiana, to Greensboro, North Carolina, is significantly different from the rate from Ruston to Griffith, North Carolina, and still other freight rates apply to shipments from Minden, Louisiana to either Greensboro or Griffith, North Carolina. (CX's 51B, 91Z32, 865; Tr. 374, 510, 1391-93, 2741.)³¹

[33] 69. In addition to the problem of the southern freight rate, there were other factors which could have created uncertainty in the new southern plywood venture, and thereby depress prices. Thus as southern plywood output grew, it was anticipated that pressure would

²⁹ Rail freight rates for plywood are ordinarily expressed as dollars and cents per 100 pounds. (Tr. 1933.) Plywood prices are ordinarily expressed as dollars and cents per 1,000 square feet. For pricing purposes, the weight of 1,000 square feet of 1/2 inch plywood is 1,525 pounds (an "association" weight, see Finding 84) and the freight charge to the "\$2.79" zone will be \$2.79 (per hundred pounds) times 1,575 pounds (per thousand square feet), or \$42.55 per 1,000 square feet.

³⁰ There is a separate West Coast freight schedule for plywood shipped into the southwest United States from mills located in northern California. (CX's 348A, 681; Tr. 999-1000.) Although mills located in Idaho and Montana, as well as mills located in eastern Washington and Oregon, are not in the West Coast (*i.e.*, the Portland, Oregon) zone, it is common industry practice to use the higher West Coast rate in calculating delivered prices from these "inland" mills. (CX 348A and Tr. 2626-27.)

³¹ In addition, while western freight rates are applied uniformly to the total weight in a car, southern freight rates are based on an "incentive" system, which means that there is a lower freight rate per 100 pounds as the total weight in the car increases. (Tr. 1393, 1785-86.)

be created for producers to share at least some of the freight savings with their customers. (RX's 90A-B.)³²

70. Also, Georgia-Pacific's planning for the opening of the southern pine industry contemplated that the southern production would add no more to the available supply than "about 10 percent of the normal annual growth in the industry" and —

Since no let-up is in sight and since the market research people have projected a long-range substantial growth in the industry, there would seem to be no problem from this standpoint. (CX 488C.)

Clearly a "problem" would exist (in the form of a threat of sharply lower prices) if as the new southern production came on stream, instead of "normal annual growth" there existed a severely depressed housing market.³³

[34] 71. Finally, there was concern that instability in southern prices and any tendency of southern production to depress plywood prices in general, would have an adverse impact on major producers of Douglas fir plywood in the Pacific Northwest. (RX's 90A-B.)

72. Against the background of a plan to add the difference between West Coast and actual freight to its gross margins, and the possible creation of price instability because of factors inherent in the southern venture, Georgia-Pacific adopted a policy at the opening of the southern pine plywood industry in 1963 of including in the delivered price for southern yellow pine plywood, freight calculated on the basis of the West Coast rail freight rate from Portland, Oregon, rather than the actual freight from its southern mills. (RX's 90A-B; Tr. 1391-95.) In other words, a West Coast freight factor was used to arrive at prices for pine plywood which were intended to be the same as the delivered prices of fir plywood. (Tr. 1431, 1634-35.) Georgia-Pacific's policy of including West Coast freight in Southern plywood delivered prices has continued since 1963. (Findings 75(a), 76(a), 78(a), 96(a).)

73. Georgia-Pacific's policy of calculating delivered prices by adding West Coast freight was followed by the other respondents when they subsequently entered the southern pine plywood industry. The record shows the following:

(a) *Willamette*. Willamette began producing southern pine plywood in 1965 at

³² See also CX 490C where calculations were made by Georgia-Pacific in 1964 on the difference between maintaining and losing the "freight advantage." Note that in 1971, Georgia-Pacific personnel are concerned about a customer "... trying to find out about any freight advantage that might be enjoyed by Southern Pine sheathing producers." (CX 584, see also CX 585.)

³³ At about the same time that Georgia-Pacific was making its projections, Weyerhaeuser anticipated that the production of the southern mills could have created a severe competitive problem in the form of a price depressant unless housing starts increased. (CX's 99W; see also Tr. 2210-11.) This fear of the southern plywood industry persists: in September, 1974, a Boise Southern official reported "there is not enough demand to use all that is produced." (CX

the Ruston, Louisiana mill of its Santiam Lumber Company subsidiary. (CX 1A; Tr. 1750-51.) With its entry into the southern plywood industry, Willamette told its customers that "These prices [southern pine plywood prices] are based on the current Coast mill less 5 & 3% with freight from the Coast added." (CX's 2B, 5A, 12A.) Willamette has added West Coast freight to its southern plywood prices ever since. [35] (CX's 3, 5A-C, 6A-B, 7, 9A-15A, 16-17C, 18, 20, 22-25, 68, 69A, 88A-L, 89A, 90, 861, 862A, 884H; see also Findings 76(e), 78(d), 79(d).)

(b) *Weyerhaeuser*. Weyerhaeuser began producing southern pine plywood in 1964 and 1965 at mills located in Jacksonville and Plymouth, North Carolina. (CX 99C; Tr. 2199.) Weyerhaeuser entered the southern yellow pine industry with the expectation that the delivered prices of its southern mills would approximate the delivered prices of West Coast plywood, with the difference between actual and West Coast freight "to be an incremental gain for the [southern] mill." (CX 99V(1); Tr. 2216.) Thereafter, Weyerhaeuser continued to add West Coast freight to the price of its southern pine plywood. (CX's 97, 98, 104A, 106A, 107A, 108, 111A, 112B, 113B, 114A, 130A, 137A, 883A, 885-87; see also Findings 75(b), 76(c), 78(c), 96(c).)

(c) *Champion*. U.S. Plywood (Champion's plywood division) entered the southern pine plywood industry in 1964 as a 50% partner with Temple Industries in a joint venture called "Southern Pine Plywood Corporation" of Diboll, Texas. (Tr. 2609.)³⁴ From the outset of its southern plywood business, it was U.S. Plywood's policy to sell pine plywood at a price equal to the price of Douglas fir delivered from the West Coast. (Tr. 2610.) Champion has added West Coast freight to its southern plywood prices ever since. (CX's 192A, 200, 202A-B, 203A, 205B, 219B, 238A-B, 266, [36] 271H, J, 362A-C; Tr. 811, 1016; see also Findings 75(c), 76(d), 78(e), 96(d).)

(d) *Boise*. Boise's initial investment in the southern plywood industry was in the form of the purchase of a minority interest in the Triangle Plywood Corporation, Moncure, North Carolina, in 1968. Boise acquired a majority interest in this mill in 1969 and 100% ownership in 1973. (CX 364D *in camera*; Tr. 2335.) Boise planned for its entry into the southern pine plywood industry on the basis of the freight advantage between West Coast and southern rates. (CX's 324A-J.) With its entry into the southern plywood business, Boise used West Coast freight in calculating delivered prices. (Tr. 578-79, 717, 757.) For current use by Boise of West Coast freight, see Findings 76(b), 78(b), 96(b).)

74. The southern pine plywood prices of respondents and all other southern plywood producers,³⁵ include West Coast freight, whether the transaction is in the [37] form of contract or spot sales, or made from distribution centers or from mills, and irrespective of the "form" in

³⁴ By 1967, in addition to its joint venture at Diboll, Texas, U.S. Plywood had a wholly-owned plywood mill located in Hammond, Louisiana, and a joint venture plywood mill in Pocomoke City, Maryland. (Tr. 2727.)

³⁵ The only important exception to this pattern is the practice of one non-respondent producer, MacMillan-Bloedel, of quoting an F.O.B. price plus actual freight. (Tr. 1058-60.) However, even in the case of MacMillan-Bloedel the West Coast freight is absorbed into the quoted F.O.B. price. (CX's 202A-B, 417.)

Subsequent to issuance of the proposed complaint in this matter, Georgia-Pacific changed, at least temporarily, to an F.O.B. mill form of pricing southern pine plywood. That change remained in effect for approximately two months. (CX's 631A, 642, 661, 808A, 809A-810B; Tr. 1408-09, 1667-68.) Georgia-Pacific's F.O.B. mill price was not a bona fide mill price, however, since it was calculated on the basis of West Coast freight. (CX 631A.) Georgia-Pacific has reverted to pricing southern pine plywood (both for internal transfers and for sales to outside customers) on the basis of a "mill price" to which West Coast freight is added. (Tr. 1539.) Also, in September, 1974, a Boise official reported that a number of mills in Georgia and Alabama (not otherwise identified) had gone to an F.O.B. mill price plus actual freight. (CX 417; see also Tr. 739-40, 866.) In February 1974, Willamette contemplated using a true F.O.B. mill price and discontinuing the practice of quoting on a West Coast basis in order "to give a clearer, more concise price to our customer while preventing us from making mistakes as to where we can get the best price and still give our customer the most competitive price." (CX 68.)

which the price may be quoted. (Findings 75-80, 125, 126.) Moreover, the West Coast freight factor is included in intra-corporate transfers, which means that it is passed on to dealers, builders, and eventually to the consuming public. (Findings 75-80, 96-98.)

75. In sales of southern plywood from respondents' distribution outlets, the record shows the following about the use of West Coast freight:

(a) *Georgia-Pacific*. The Georgia-Pacific distribution centers include West Coast freight in setting prices to their customers. (CX's 610A-i, 867-69; Tr. 919, 931, 934, 956-57.)³⁶

[38] (b) *Weyerhaeuser*. In order to determine the "CSC" selling price for southern pine plywood, West Coast freight "must be added" to a base price. (CX's 104A, 106A, 107A, 108, 111A, 114A.)

(c) *Champion*. West Coast freight is added to a base price in arriving at the delivered price which the U.S. Plywood branches charge their customers. (CX's 238A, B, 263, 266, 271H, J; Tr. 810-11, 1016.) In addition, West Coast rail freight is added in sales by branches which are shipped directly from the U.S. Plywood mills to the customers of the branch. (CX's 232-37, 239A-251A; Tr. 814, 1026-27.)

76. In contracts for the sale of southern plywood, the record shows the following with respect to the use of a West Coast freight factor:

(a) *Georgia-Pacific*. In 1969 50% of Georgia-Pacific's southern pine sheathing sales in the southeast were made pursuant to contracts. The 1969 contracts, as well as later Georgia-Pacific contracts, included West Coast freight in the prices. (CX's 366A, B, 531, 586G.)

(b) *Boise*. West Coast freight is part of the delivered price in contracts negotiated at the Moncure mill. (Tr. 719-20, 3000.)

(c) *Weyerhaeuser*. In all contracts for the sale of southern pine plywood, West Coast rail freight is added by Weyerhaeuser. (Tr. 1190-92.)

(d) *Champion*. Approximately 15% of the total softwood plywood sales of U.S. Plywood branches is sold pursuant to [39] long-term contracts. (Tr. 2654.) In Champion's long-term contracts for the sale of southern plywood West Coast freight is added. (CX's 194-196, 205A-B, 209A-B, 215A-B, 216A-B.)

(e) *Willamette*. As much as 40% of Willamette's southern production has been sold pursuant to contracts. (Tr. 1845-47.) These contracts include West Coast freight. (CX 90; Tr. 1838.)

77. In intra-corporate transfers of southern plywood between respondents' mills and respondents' distribution outlets, West Coast freight is added. (See Finding 96.)

78. In sales of southern plywood from respondents' mills, the record shows the following with respect to use of West Coast freight:

³⁶ See also CX 590 which shows that a Georgia-Pacific branch sets its price "based on Crow's." As indicated in Finding 91, the *Crow's* price always requires the automatic addition of West Coast freight.

Initial Decision

- (a) *Georgia-Pacific*. In sales of southern pine plywood made directly by Georgia-Pacific's mills, West Coast freight is added. (CX's 581, 880; Tr. 712, 739-40.)³⁷
- (b) *Boise*. In sales from the DeQuincy mills, the Boise Southern policy is —

We sell our wood on a net delivered price to destination. To figure this price you take your base price less a 5-3 discount and add the West Coast freight. (CX 417; see also CX 35A, F *in camera*.)

For Boise's policy respecting use of West Coast freight in sales of plywood produced by its Moncure, North Carolina mill, see Finding 93(b) and Tr. 578-79.³⁸

(c) *Weyerhaeuser*. In direct mill sales of southern pine plywood by Weyerhaeuser, West Coast freight is added. (CX's 885-87; Tr. 1186.)

(d) *Willamette*. Since Willamette began selling southern pine plywood, its mills have computed their delivered prices by adding on the West Coast rail freight rate to base prices. (CX's 2A-B, 3, 5A-C, 6A-B, 7, 9A-15A, 16-17C, 18, 20, 22-25, 68, 69A, 88A-L, 89A, 90, 861, 862A, 866A.)

(e) *Champion*. In its direct mill sales, U.S. Plywood adds West Coast freight to a base price. (Tr. 814, 863-64, 1026-27; see also Tr. 2132, 2724.)

79. In inter-manufacturer sales and purchases of southern plywood between respondents, or between respondents and other manufacturers, the record shows the following about the use of West Coast freight:

(a) *Georgia-Pacific*. In purchases of southern pine plywood by Georgia-Pacific, West Coast freight is added to a mill price. (CX's 360A-C, 601A-B, 609A-B, 628A-B; Tr. 1551.)

(b) *Boise*. In Boise's purchases of southern pine plywood for its Kingsberry Homes Division (a manufacturer of panelized homes), West Coast freight is added to [41] arrive at the delivered price. (CX's 336A-C, 353, 361, 362A-C, 366A-B, 397, 405.)

(c) *Champion*. The West Coast rail rate is used in purchases by U.S. Plywood from other southern mills. (CX's 199A-B, 595A-C, 664.)

(d) *Weyerhaeuser*. In purchases of southern plywood by Weyerhaeuser from Willamette, a base price is used which requires that West Coast freight be added. (CX's 41, 58, 884H.)

80. Although a substantial proportion of southern plywood is shipped to buyers by truck, the West Coast *rail* rate is used by respondents to arrive at delivered prices, whether shipments are made by rail or truck. (CX's 15A, 75C, 76E-F, 88D, 89A, 158P-Z15, 238A-B, 253B, 254, 255, 263, 401, 440A, D, L, S, 441A, E, i, K-L, 442A, G, N, S, X, Z3, Z7, Z8, 581, 596A-C, 702B; RX's 347A-E; Tr. 579, 1536.)³⁹

81. Southern plywood is invoiced either freight prepaid or freight collect with the delivered price calculated to include West Coast

³⁷ See also CX 549 which shows that sales by mills are treated in the same manner as mill direct sales by branches. In mill direct sales by branches, West Coast freight is added. (See Finding 97.)

³⁸ Until it was closed in 1974, Boise's Pensacola, Florida mill included West Coast freight in sales of southern plywood. (CX's 355W *in camera*, 360A-C.)

³⁹ See Findings 120-122 for respondents' policies respecting truck pick-ups by customers.

freight. In terms of net return to the seller or payments by the buyer, there is no difference between a transaction invoiced freight collect or freight prepaid. If freight is prepaid, the mill pays the actual freight to the carrier and receives from the buyer the total invoiced delivered price including West Coast freight. If the terms of the transaction are freight collect, the buyer deducts the amount of actual freight, pays it to the carrier, and remits the balance of the delivered price, which includes West Coast freight, to the seller. [42]

I attach no significance to the fact that most southern pine plywood is invoiced on a freight prepaid basis while most western plywood is invoiced freight collect.⁴⁰ Complaint counsel failed to prove, as alleged in Complaint ¶ 18(g), that there is any deception in the sale of southern plywood whether it is sold freight prepaid or freight collect. Purchasers of plywood know that the delivered price includes West Coast freight, and there is no evidence that respondents intend to conceal (or have concealed) the West Coast freight factor by invoicing on a freight prepaid basis. (See Tr. 2240-41, 2804.)

West Coast Freight Formula and Price Uncertainty

82. By using the West Coast freight factor, respondents have transferred the certainty of the western freight rate schedule to the South. As a result the freight factor in the price of southern pine plywood does not vary by mill or customer location.⁴¹ The freight is calculated as if all the southern mills were located in the Portland, Oregon zone, and as if all customers were located in one of the neatly concentric (and predictable) West Coast zones where the rates increase as plywood is shipped from the West to the East. (CX 51A-B; see also Tr. 374, 713, 1402, 1525, 2741.)

83. Uncertainty about other aspects of southern plywood prices was also limited by practices followed by respondents. One of these practices relates to the fact that the freight charge on a particular transaction involving either western or southern plywood is a function of the West Coast rate multiplied by the weight of the plywood. Because the weight of plywood may vary from mill to mill (depending in part on the particular [43] species of softwood used in the manufacturing process), this factor, too, could have caused price uncertainty. (CX's 471, 808C, 864; Tr. 1828-29, 2723.)

84. The problem of weight uncertainty has been resolved by use of the so-called "association" weight of plywood rather than the actual weight of each shipment. The "association" weights (CX's 192A, 470A;

⁴⁰ See CX's 69A, 126A, 863A, 866A, 886Z29; Tr. 1830, 2240; but see also Tr. 880, 1657 for evidence of a contrary practice (freight collect shipments from southern mills) by several respondents.

⁴¹ See however, Finding 149 which discusses certain "add-ons" to customers located in...

1

Initial Decision

Tr. 357-58, 394-95, 815) are also known in the industry as "estimated," "standard," "shipping," "guaranteed,"⁴² "established," "average," or "industry" weights. (Tr. 357-58, 395, 587, 1063, 1537, 2722-23.) There is a different "association" weight for each thickness, to wit:

<i>Thickness (Inches)</i>	<i>"Association" Weight Per Thousand Pounds</i>
1/4	790
5/16	950
3/8	1125
1/2	1525
5/8	1825
3/4	2225

(CX's 17B, 604)⁴³

[44] 85. The "association" weights are usually above the actual weights of western plywood resulting in "underweights" which always accrue to the benefit of respondents' mills. (CX's 32A, 36B-D, 37A, 40A-B, 191B, 192A-B, 213, 325A-B, 365Z11 *in camera*, 423A, C-F, H, J, L, N, P *in camera*, 424A-429B *in camera*, 430A, C, E, G-H, *in camera*, 431A-C *in camera*, 432A, C, E, G *in camera*, 433A *in camera*, 434E *in camera*, 435A, C-J *in camera*, 436D *in camera*, 437E *in camera*, 438 *in camera*, 439D *in camera*, 473A-484D *in camera*; Tr. 595, 815-16, 2239-40.)⁴⁴ Southern pine weighs more than Douglas fir; therefore, the actual weights of southern plywood are closer to the "association" weights. (CX 192A; Tr. 815, 1066, 2242, 2476-77.) Nevertheless, there are "underweights" in the southern plywood industry. See, for example, CX's 471, 559K which indicate underweights at most Georgia-Pacific southern plywood mills and CX 864 which shows that all Willamette southern mills have had underweights on an annual basis; but see also CX 192A ("there really are no underweights, as a rule, on southern pine").

⁴² A U.S. Plywood official believed that the term "association" weights implies "that someone got together and decided on a set of weights for all plywood shipped. The fact that many other mills use the same shipping weights we do is purely coincidental." Accordingly, this official advised his sales personnel "Please make certain that all of your people who handle plywood sales are aware of the importance to always refer to shipping weights as 'Guaranteed Weights.'" (CX 193.)

⁴³ The "association" weights currently in use in the plywood industry were contained in the National Recovery Act Code of Fair Competition, published in 1934. (RX's 8D, 9D.) The same weights were subsequently published by the Office of War Information in 1943 (RX's 6A, 7F), and by the Office of Price Stabilization in 1952. (RX 5F.) The use by the Douglas fir plywood industry of such a weight schedule was erroneously thought to have been discontinued prior to a Commission challenge to the legality of the practice in *Douglas Fir Plywood Association*, 47 F.T.C. 416, 440 (1950) *rev'd sub. nom. Oregon-Washington Plywood Co. v. FTC*, 194 F.2d 48 (9th Cir. 1952).

⁴⁴ For evidence that respondents' marketing strategy (shipment of lightest wood to distant markets) is directed at maximizing "underweights," see CX's 323, 377C *in camera*, 499A. Additional evidence respecting the preservation of "underweights" is shown in CX's 54, 192A, 213.

86. While the use of association weights in the South may not result in the same volume of "underweight" profit as that produced in the West, such an industry-wide schedule is essential in order to reduce price uncertainty, and, in fact, it has resulted in freight charges which are absolutely predictable. (Finding 88.) Aside from its [45] role in assuring such certainty in freight charges, industry-wide "association" weights serve no apparent legitimate purpose. Thus an official of Georgia-Pacific observed that actual average weights for each mill can be calculated and this "would be beneficial to both the railroad industry and Georgia-Pacific." (CX 472A; see also CX 485B and Tr. 1541.) One producer, MacMillan-Bloedel, on the basis of actual tests, has established with the railroads a schedule containing an approved weight for each thickness of plywood which is substantially different from the "association" weight. (Tr. 1064-65.)

87. Respondents use "association" weights in arriving at the total West Coast freight charge, whether the sale of southern plywood is made from a distribution center or mill, and whether it is a spot or a contract sale.⁴⁵ In addition, "association" weights are used in all intra-corporate transfers. The record evidence showing the use of "association" weights appears as follows:

(a) *Georgia-Pacific*. Georgia-Pacific's sales of southern softwood plywood, including intra-corporate transfers, are made on the basis of freight charges calculated from "association" weights.⁴⁶ (CX's 487B, D, 516A-C, 544A-E, 559K, 591B, 594B, 597D, 604, 617B, 618B, 620B, 623B.)

(b) *Boise*. Boise calculates freight charges for southern plywood on the basis of "association" weights. (CX's 387A-388C; Tr. 587, 590-91, 2382, 2390.)

(c) *Weyerhaeuser*. At all times since Weyerhaeuser has sold southern softwood plywood, it has computed the freight charges [46] on the basis of association weights. (CX's 97, 98, 111A, 114A; Tr. 1164-66, 1190, 2239.)

(d) *Willamette*. Willamette uses "association" weights in calculating freight charges in its mill sales. (CX's 17A-B, 51B, 69A, 88D; Tr. 1828.)

(e) *Champion*. U.S. Plywood uses "association" weights in its computation of freight charges. (CX's 192A-B, 238A-B, 282A-G, 284A-D, 362B; Tr. 2722-23.)

88. The combination of the West Coast rail freight rate and "association" weights eliminates all uncertainty about the freight factor in the delivered price of southern plywood. The freight charge to any customer in any of the West Coast freight zones is completely predictable; in fact, no calculation is necessary since *Crow's* and *Random Lengths*, the industry's trade publications, conveniently multiply the West Coast rate by the "association" weights. For example, *Crow's* typically reports:

⁴⁵ ". . . all shipments [of southern pine] are based on West Coast freight to destination, again using association or guaranteed weights. . . ." (CX 192A.)

⁴⁶ Except for the period when Georgia-Pacific experimented with F.O.B. mill prices. (CX's 808A-810B; see note 35, . . .)

1

Initial Decision

PLYWOOD FREIGHT RATES¹

	.46 ²	.50	.65	.83	1.34	1.45	1.53	1.60	1.63
790 ³	3.65	4.75	5.15	6.55	10.60	11.55	12.10	12.65	12.90
950.....	4.35	5.70	6.20	7.90	12.75	13.85	14.55	15.20	15.50
1125.....	5.20	6.75	7.30	9.35	15.10	16.45	17.20	18.00	18.35
1525.....	7.00	9.15	9.90	12.65	20.45	22.25	23.35	24.40	24.85
1825.....	8.40	10.95	11.85	15.15	23.45	25.65	27.90	29.20	29.75
2225.....	10.25	13.35	14.45	18.45	29.80	32.50	34.05	35.60	36.25

	1.65	1.67	1.70	1.72	1.80	1.84	1.91	1.93	1.97
790 ³	13.05	13.20	13.45	13.60	14.20	14.55	15.10	15.25	15.55
950.....	15.70	15.85	16.15	16.35	17.10	17.50	18.15	18.35	18.70
1125.....	18.55	18.80	19.15	19.35	20.25	20.70	21.50	21.70	22.15
1525.....	25.15	25.45	25.95	26.25	27.45	28.05	29.15	29.45	30.05
1825.....	30.10	30.50	31.05	31.40	32.85	33.60	34.85	35.20	35.95
2225.....	36.70	37.15	37.85	38.25	40.05	40.95	42.50	42.95	43.85

(CX 879B)⁴⁷

¹ Plywood freight rates per thousand pounds as of January 29, 1971. Rates have increased substantially since that time. For example, the rate in the \$1.97 zone has increased to \$2.79 as of January 19, 1976. (Tr. 1392.)

² Rate in zones from West Coast to the East Coast.

³ "Association" weights per thousand pounds.

[47] 89. Price uncertainty in the plywood industry is further reduced by the widespread use of prices published by *Crow's* and *Random Lengths* as the mill or base prices to which West Coast freight multiplied by "association" weights is added. (Findings 90-99.)

90. *Crow's*⁴⁸ and *Random Lengths*⁴⁹ are trade publications which report the prices for plywood and other wood products that prevailed in the market during the preceding week. Prices reported in these publications are based on a rotating sample of mills and wholesalers throughout the country. (Tr. 335-36, 340-41, 377-81, 383, 412, 414-15.) The prices reported in the two publications are considered by the publishers to be "judgment calls" and are representative prices at the time the publications go to press. (Tr. 343-44, 421-22.) Three of the respondents (Georgia-Pacific, Champion, and Willamette) have been

⁴⁷ Tables such as the one appearing in CX 879B are known throughout the industry and are used daily by all plywood buyers and sellers. (Tr. 539.)

⁴⁸ Published by C.C. Crow Publications, Inc., Portland, Oregon. "*Crow's*" is used herein to refer to both *Crow's Plywood Letter* which has been published on Friday of each week since April 1958, as well as the *Mid Week Report* which first appeared in March 1974. (Tr. 315-16, 320-23, 325.)

⁴⁹ Published by Random Lengths Publications, Inc., Eugene, Oregon. "*Random Lengths*" is used herein to refer to a weekly *Price Guide and Market Report*, which has reported plywood prices since the late 1950's, as well as a Wednesday *Midweek Report* which first appeared in January 1974. (Tr. 368-71.)

asked regularly by these publications to report their prices, while two others (Boise and Weyerhaeuser) have been surveyed sporadically. (Tr. 336, 382, 413-14, 561.)

91. The prices quoted in *Crow's* and *Random Lengths* are in the form of a "mill" or "base"⁵⁰ price to which rail freight from the West Coast *must* be added, and the [48] standard industry wholesale discounts of 5 percent and 3 percent⁵¹ are deducted, in order to arrive at delivered prices. This "mill" form is used by *Crow's* and *Random Lengths* in the reporting of both southern pine and western fir plywood prices. (CX 680A; Tr. 321, 334-35, 354, 374, [49] 376, 402-03.) The prices appearing in *Crow's* and *Random Lengths* are intended to be the prices charged by producing mills in sales to independent wholesalers or to company-owned distribution outlets: they do not purport to be the prices charged by wholesalers or distribution outlets in sales to retailers. (Tr. 418.)

92. The position of the respondents that there is no pattern of uniform price lists⁵² in the plywood industry to which West Coast freight is added, vastly understates the importance of the two industry price reporters. The weight of the evidence is that in calculating offering prices, respondents routinely use *Crow's* or *Random Lengths* in arriving at their base prices.⁵³ Thus Champion's Southeast Regional Sales Manager observed:

⁵⁰ In the case of southern pine plywood, the "mill" or "base" price should not be confused with a bona fide F.O.B. price since customers cannot pick up at the "mill" or "base" price and thereby avoid West Coast freight. (See Finding 120.) The buyer's delivered cost is the "mill" or "base" price plus an amount equal to West Coast freight which is automatically added; or when a mill pick up is made by the buyer, he pays the delivered price including West Coast freight, less a small discount. (Finding 121.) In the case of western plywood, the *Crow's* or *Random Lengths* prices are an F.O.B. price in the sense that actual freight (except for inland mills) is added to obtain delivered cost, but the amount of freight paid is inflated because of "underweights". (See Finding 85.)

⁵¹ The trade discounts of 5 percent and 3 percent are so prevalent that *Random Lengths* reports its prices as "subject to wholesale discounts of 5 percent and 3 percent on plywood and particle board" (RX's 424A-426Z6; Tr. 402-03) and *Crow's* reports "Plywood and particle board less 5% and 3%." (CX's 879A-U; see also CX 559D; Tr. 354, 402-03, 584-86, 712.) There is, however, evidence of some negotiation of discounts which vary from the industry standard. (CX 90; Tr. 672-73, 714, 719, 1783-84.) A discount of "5 + 5" is given to Georgia-Pacific distribution outlets (Finding 97) and it also appears in inter-manufacturer purchases. (CX 553.) Also widely used in the plywood industry is a 2 percent cash discount for prompt payment. (Tr. 584-86, 811.) The 5 percent and 3 percent discount means, for example, that on a *Crow's* price of \$100, first, \$5 (5 percent) is deducted; then from the balance of \$95, the 3 percent is deducted (\$2.85) producing a total discount of \$7.85 and a price of \$92.15. The 2 percent cash discount is then applied for a net price of \$90.31. Note that respondent U.S. Plywood has deducted the 2 percent cash discount *after* first deducting the full amount of West Coast phantom freight from the delivered price. (CX 200.)

⁵² Currently, respondents do not regularly issue external price lists (Tr. 1429, 1603; but see Tr. 1741-42 for use by Willamette of a "market letter which contains plywood prices"). Note also that U.S. Plywood substituted *Random Lengths* for its own price list. (CX 860A.)

⁵³ While prices reported in both *Crow's* and *Random Lengths* are widely used throughout the plywood industry, there can be no question on the basis of a review of all documents in the record, that *Crow's* is the main reference for plywood prices. Although the two publications may not agree on price at all times, the differences are small, and, in fact, may reflect merely different ways of reporting the same information. Thus prior to 1974, *Crow's* often published a "split" or range of prices (hence the industry terminology "low *Crow's*" or "high *Crow's*"). This practice was discontinued in early 1974. (Tr. 354-56.) *Random Lengths*, on the other hand, publishes a straight car price and a higher mixed car price, which in effect shows a discount for heavy volume buyers of straight cars. (Tr. 410; see also Tr. 611; note, however, that when a particular thickness is in short supply (CX 467A), a straight car for that thickness commands a premium over the mixed car price. (CX 466A.)) While the *Crow's* "split" is intended to show a range of

1

Initial Decision

[51] Almost without exception, the price of Pine Sheathing to a good credit risk is the low of Crow's or Random Lengths less 5% and 3%. The Crow and Random Lengths split lists [i.e., where a range of prices is reported] generally allude to the low being the straight car and the high applicable to mixed shipments. (CX 811A.)

Similarly, one Boise official, in referring to Crow's, said it was "frustrating to realize one man sets an entire industries price yield" (CX 342A), while another yearned for the day "When the plywood industry learns to price their own products instead of letting a reporting service do it. . . ." (CX 346H.) A former Georgia-Pacific branch manager testified that it was no secret that prices were obtained by using Crow's (Tr. 956-57, 981), and at Weyerhaeuser "industry price" means the "price appearing in Industry reporters." (CX 882B.)⁵⁴

[52] Despite this proof of the influence of the two publications, the record does not show that the prices reported in Crow's or Random Lengths fix the base price for all levels of the entire industry. If such were the case — that all mills and distribution outlets were *always*

between straight and mixed cars, as in the Random Lengths reporting. (CX 811A.) As it happens, the Crow's "split" often conforms to the Random Lengths straight car-mixed car variation. When there is no split in Crow's, the Crow's price is usually the exact same as the Random Lengths straight car price, and in the few instances of differences, the variance is usually \$1.00. In sum, the two reporters are in substantial agreement most of the time. Note, for example, in 1970, the following comparison of Crow's (C) and Random Lengths (RL) prices for 1/2" 3 ply southern sheathing. The Random Lengths straight car prices appear in parenthesis.

RL:	65(64)	65(64)	64(64)	65(64)	64(63)
C:	64	64	64	64	63
RL:	65(64)	65(64)	64(63)	63(62)	63(62)
C:	64 to 65	64 to 65	63 to 65	62 to 64	62 to 63
RL:	66(65)	68(67)	68(68)	70(69)	72(70)
C:	64 to 66	67	67 to 68	67 to 68	70
RL:	74(73)	76(75)	75(74)	75(73)	72(71)
C:	72 to 73	75 to 76	75	73	70 to 72
RL:	74(73)	74(74)	76(75)	76(74)	76(74)
C:	72 to 74	74 to 75	74 to 75	74	74
RL:	76(76)	79(79)	83(82)	83(82)	85(84)
C:	76	79	82 to 83	82 to 83	84 to 86
RL:	87(85)	87(85)	86(85)	85(84)	85(84)
C:	86 to 88	86 to 87	86 to 88	84 to 85	84 to 86
RL:	85(84)	84(83)	82(80)	75(74)	73(71)
C:	85	84	80 to 82	75 to 76	72 to 73
RL:	70(69)	70(70)	70(70)		
C:	69 to 70	72	72		

(Source: CX's 674A to 674Z17; RX's 425A to 425Z25.)

⁵⁴ The influence of the industry price reporters is such that on Friday, when Random Lengths' prices are released, the publisher may receive over 600 telephone calls from subscribers. About 80 subscribers to Random Lengths receive the Friday report by Telex. (Tr. 379-80.) Crow's has five open telephone lines which are used all day Friday to answer inquiries about the newly published prices. (Tr. 546.) If the Georgia-Pacific's Portland office happens to be closed on Friday, arrangements are made to wire Crow's prices to the regional managers as soon as they are published. (CX 546A.)

The testimony of several employees of respondents to the effect that they do not rely on Crow's or Random Lengths (Tr. 1429, 1672, 2037-39, 2341) is contradicted by other testimony and, more importantly, is contrary to contemporaneous business documents which show overwhelmingly the crucial importance which respondents and the entire plywood industry attach to the prices reported by the two publications. When such a conflict exists, it is the accepted rule in antitrust litigation that contemporaneous business documents not associated with the preparation of litigation are given the most weight. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395-96 (1948). I have followed this rule throughout this initial decision.

selling at *Crow's* or *Random Lengths* — then presumably base prices would never change. But base prices in the plywood industry *do* change, mainly as a result of the volatility of the housing industry.⁵⁵ Accordingly, all that can be properly attributed to the trade reporters is that each week *starts* with the previous Friday's reported prices (or internal price lists derived from the reporters) as the industry's mill direct prices. (See Findings 93-96.) [53]

By the same token, distribution outlets use the weekly mill prices (as reported by *Crow's* or *Random Lengths*) for mill direct sales and as a base for setting their prices for less than carload lots which inevitably are higher than these reported mill prices. (Tr. 785, 916-20 and Findings 97, 98.)⁵⁶

During any given week, however, and particularly when the market is unstable because of volatility in the housing industry, cyclical pressures may operate to move mill prices up or down so that by the end of the week a new mill price may be reported by *Crow's* and *Random Lengths*.⁵⁷

Because of the influence of *Crow's* and *Random Lengths*, the pattern of the industry is that buyers shop in the early part of the week after the preceding Friday publication of *Crow's* and *Random Lengths*, buy on Wednesday, and on Thursday and Friday they await the next edition of *Crow's* and *Random Lengths* to see if the market has been weakened or strengthened. (CX 340A; also see CX's 338C, 572A, 853B for influence of *Crow's* and *Random Lengths* on weekly buying patterns.) [54]

93. The use of *Crow's* or *Random Lengths*⁵⁸ at respondents' mills as a source of southern plywood base prices (to which West Coast freight is *automatically* added) is shown by the following:

(a) *Georgia-Pacific*. In quoting southern softwood plywood prices, Georgia-Pacific mill sales representatives use intra-company "Mill Notes" which are derived from *Crow's*. (Tr. 711-12 and Finding 96(a); see also CX 650A.) Departures from

⁵⁵ See Findings 144-151 and CX's 526A-Z70, 546A, 547A, 550A, 554A, 570A, 577A. Not surprisingly, if the market is stable, *Crow's* and *Random Lengths* do not change (CX's 42, 506) and most plywood will be sold at or near the reported prices for more than a week. (CX 860A.) Several witnesses described the movement of plywood prices with anecdotal references to "hourly" changes. (Tr. 785, 1177-78, 1417, 2932.) While such changes "could" conceivably take place, the pattern as revealed in Boise's daily booking prices, is for a fairly stable price to exist during any given week. (See CX's 685A-T and CX's 686A-Z110.) See also CX's 89A-B, where a Willamette official observes that plywood prices "fluctuate *some times* more than on just a weekly basis" [emphasis added] and CX 581 which shows use of a weekly pricing guide at Georgia-Pacific's Crossett Division which requires that variations "must be documented." See also CX 104A which shows use of a weekly mill direct price at Weyerhaeuser.

⁵⁶ Transfer prices (which are the basis of the distribution outlet's resale prices and are derived from *Crow's*, see Findings 96-98) are not changed at Georgia-Pacific during an entire week. (Tr. 916-20, 1697-98.) In a rising market, however, Georgia-Pacific branch managers are instructed that prices may be raised in mid-week since many customers prefer to buy at a small increase in mid-week, rather than run the risk of having to pay a substantially higher price during the first part of the next week. (CX 576.) In addition, note that the Weyerhaeuser "CSC's" received a *weekly* national price list which contained a "list" price and a "floor" price. (CX's 104A-B.)

⁵⁷ See RX's 69G-Z50 and Findings 144-151.

⁵⁸ In all Findings, whenever there is mention of a *Crow's* or *Random Lengths* price, it should be understood that West Coast freight is always added to the *Crow's* and *Random Lengths* price. (See Finding 91.)

1

Initial Decision

Crow's even in the instance of a single thickness to a particular account calls for an explanation at Georgia-Pacific:

Since this agreement involves pricing in a range below the average of *Crow*, I will offer an explanation for the variation. Weyerhaeuser is our chief competition on this type of business and they elect to be extremely competitive on 1/2". Occasionally, we elect to meet the situation after conferring with the branch and the regional managers. Besides this account, Lester Lumber Company, we have the situation with E. W. Codwin. There is no problem getting the average of *Crow* on other thickness. (CX 540.)

(b) *Boise*. During the hearings, *Boise* witnesses testified that significant changes had been made in the method of doing business at the Moncure, North Carolina mill, and that neither West Coast freight nor *Crow's* are used in the price calculations at this mill. These witnesses claimed that since February [55] 1972,⁵⁹ *Boise* quotes solely on the basis of an F.O.B. mill price, or a net delivered price using actual freight or an approximation thereof from Moncure as depicted in a map (RX 307) showing various zones (zones A to F) radiating from Moncure. (Tr. 2341, 2361-62, 2406, 2460-61, 2483-84, 2486, 2502, 2985, 2988-92.) This testimony must be evaluated in the light of contemporaneous business documents which clearly reveal that *Boise* has not departed from the industry pattern. Notations made on the Moncure sales manager's desk calendar show conclusively that in 1974 *Boise* routinely arrived at its Moncure offering prices by starting with the base prices appearing in *Crow's*, deducting the standard industry discounts of 5% and 3% (a factor of .9215), and adding West Coast freight. (CX's 813A-Z30.)

For example, on Friday, August 30, 1974, *Crow's* (CX 928Z13) reported the following prices for Southern pine plywood:

3/8"	1/2"(3 ply)	1/2"(4 ply)	5/8"	3/4"
\$91.	\$107	\$116	\$137	\$168

Multiplying each price by the factor of .9215 (for the functional discounts of 5% and 3%) and adding the applicable West Coast rate of freight to the most eastern zone where Moncure is located (\$2.51 multiplied by association weights, CX's 928Z2, Z3) delivered prices based on *Crow's* plus West Coast freight would be:

3/8	1/2(3)	1/2(4)	5/8	3/4
\$112.1065	\$136.9005	\$145.1940	\$172.0455	\$210.6620

[56] The desk calendar of the Moncure mill sales manager for the following week (CX 813Z9) shows these entries in the row entitled "Crow's + frt":

3/8	1/2(3)	1/2(4)	5/8	3/4
\$112.11	\$136.90	\$145.19	\$172.04	\$210.66

Immediately below the "Crow's + frt" notations are the following entries for the so-called "Zone A":

3/8	1/2(3)	1/2(4)	5/8	3/4
\$113	\$140	\$146	\$172	\$211

⁵⁹ For use of *Crow's* plus West Coast freight prior to February 1972, see Tr. 717-18, 754, 788-90.

If the same calculations are made for all the entries in CX's 813A-Z30 (the desk calendar) and CX's 928A-Z31 (*Crow's*), about 40% of the time the Moncure Zone A prices are exactly the same as *Crow's* plus West Coast freight. In the other nearby zones, there are small additions to *Crow's* plus West Coast freight.⁶⁰

In short, while Moncure's prices are not exactly in line with *Crow's* at all times, whatever differences exist usually result in Moncure prices which are higher than *Crow's* plus West Coast freight. (Tr. 2343-44, 2462, 2992.) There is evidence that Moncure's departures from the usual formula (by charging prices higher than *Crow's*) are well-known in the industry and are attributed to its heavy-selling of mixed loads to the local trade. (Tr. 522-23, 898.)

(c) *Champion*. In "PTS" sales (*i.e.*, when price is set at time of shipment, see Finding 94), the selling prices charged by U.S. Plywood branches to their direct mill [57] customers are based on the *Crow's* prices which appear on the Friday prior to shipment. (CX's 265-66, 269, 271D, H, J, 272A, 273.)

(d) *Willamette*. In addition to the use of the reporters in its substantial volume of "PTS" contracts (See Finding 94(d)), Willamette refers to *Crow's* and *Random Lengths* in setting its spot prices, including its non-contract "PTS" sales. (CX's 29A, 67B.)

(e) *Weyerhaeuser*. Weyerhaeuser ties its direct mill pricing strategy to prices appearing in *Crow's* or *Random Lengths*. (CX's 97, 98, 117, 152B.)

94. Contracts for future delivery of southern plywood invariably have an open-ended price term which is usually expressed as the price appearing in *Crow's* or *Random Lengths* (more often *Crow's*) at the time of shipment, plus West Coast freight (calculated on the basis of "association" weights) less the standard industry discounts. These contracts are known in the plywood industry as "PTS" contracts ("Price at Time of Shipment"),⁶¹ in contrast to most spot sales which are made on a "PTO" ("Price at Time of Order") basis. "PTS" transactions are not confined solely to contracts, however; individual orders may be placed subject to a "PTS" term, the price to be determined by referring to *Crow's* or *Random Lengths* on the indicated shipping date. The record shows the following with respect to the use of *Crow's* and *Random Lengths* in "PTS" transactions:

(a) *Georgia-Pacific*. "PTS" contracts for the sale of Georgia-Pacific's southern plywood use *Crow's* or *Random Lengths* as the pricing reference. (CX 650A; Tr. 1469, 1551, 1960-61.) See also CX 133C where a Weyerhaeuser official reported, after a visit with Georgia-Pacific officials, that "most pricing arrangements [in Georgia-Pacific southern plywood contracts] are made based on *Crow's* weekly letter." In [58] 1969, approximately 50% of Georgia-Pacific southern sheathing sales were made to chains or large retail operators pursuant to "PTS" contracts based on *Crow's*. (CX 531.)

(b) *Boise*. "PTS" contracts or orders for the sale of southern pine plywood produced by Boise use *Crow's* as the price reference. (CX's 365Z10 *in camera*, 420F,

⁶⁰ Generally, Moncure's production is sold very close to the mill. (CX 356C; Tr. 722-23, 898, 2459, 2500, 3002, 3020-21.)

⁶¹ "PTS" contracts cover a period of six months to a year. (Tr. 1836, 2289, 2291, 2384.)

1

Initial Decision

Z21, Z36, Z39, Z48, Z51, Z60, Z63, Z66, Z75, Z78, Z81; see also CX 326D *in camera*; Tr. 719-21, 3000.)⁶²

(c) *Weyerhaeuser*. It is common practice for Weyerhaeuser to use *Crow's* or *Random Lengths* in "PTS" contracts. (Tr. 1191-92, 2281.) In 1975, 42% of Weyerhaeuser's production was sold on a "PTS" basis. (Tr. 2221-22.)

(d) *Willamette*. Willamette's "PTS" contracts for sale of southern pine plywood are based on *Crow's* or *Random Lengths*. (CX's 29A-B, 67B, 79A-F, 90; Tr. 852, 1783-84, 1835, 1838-39.) Between 1970 and 1974, approximately 40% of Willamette's southern plywood production was sold pursuant to such "PTS" contracts. (CX 29A; Tr. 1835, 1844-47.)⁶³

[59] (e) *Champion*. U.S. Plywood's "PTS" contracts (or its proposals for "PTS" contracts) often refer to prices appearing in *Crow's* or *Random Lengths*. (CX's 209A, 215A-B, 216A-B, 219A-C, 227A; Tr. 853-54.)

95. *Crow's* or *Random Lengths* prices are used as the base price (West Coast freight is *automatically* added) in inter-manufacturer sales and purchases of southern plywood. The record shows the following:

(a) *Georgia-Pacific*. Georgia-Pacific's purchase contracts for the future delivery of southern pine plywood are keyed to prices appearing in *Crow's* or *Random Lengths*. (CX's 548, 551, 553, 601A, 609A, 613A-B, 628A-B; Tr. 2132-35.)

(b) *Boise*. Purchase contracts entered into by Boise for its Kingsberry Homes division refer to prices published in *Crow's* or *Random Lengths*. (CX's 336A-C, 353, 361, 366A-B, 397, 404A, 586A, B, F-H; Tr. 2392-93.)

(c) *Weyerhaeuser*. Weyerhaeuser purchases plywood from Willamette at "low *Crow's*" less certain discounts. (CX's 41, 58, 82; see also Tr. 2302.)

(d) *Champion*. The price terms in purchase agreements negotiated by U.S. Plywood often refer to *Crow's* or *Random Lengths*. (CX's 214A, 228A-D, 264, 595A-C; Tr. 2651-52, 2671.)

96. In addition to common use of *Crow's* or *Random Lengths* as base prices in "PTS" contracts or orders, mill sales, and inter-manufacturer sales and purchases of southern plywood (Findings 93-95), the record shows that respondents (with the exception of Willamette which is [60] not vertically integrated) generally transfer⁶⁴ southern plywood from their mills to their distribution outlets at

⁶² Approximately 30 percent of Moncure's total 1971 southern pine plywood production was sold pursuant to a "PTS" contract with Wickes in which the price was *Crow's*, less functional discounts, plus West Coast freight. (Tr. 719-21, 786-87.)

⁶³ Although Willamette sold as much as 55 percent of its total production on the basis of "PTS" contracts tied to *Crow's* or *Random Lengths* (CX 29A; Tr. 1835), this apparently did not deter the vice-president of the company from testifying that he did not rely on *Crow's* or *Random Lengths* as the basis for his prices. (Tr. 1811.)

⁶⁴ By use of the term "transfer" I do not mean to imply that these intra-corporate sales are somehow less binding than strict commercial transactions between buyer and seller. At Georgia-Pacific:

We don't allow the branches to dictate the prices to the mills and we long ago set up that the mills' prices shall be established at the going market prices similar to any outside supplier. (CX 605.)

Note also the following condition imposed by a Georgia-Pacific mill in connection with the proposed sale of plywood to certain distribution centers:

Failure to perform by either party will be excused only by lack of cars for shipping, fire, strikes, flood, or other major force beyond the control of either party. Market conditions, inventories, price levels, order files, etc., in no way provide either party with a reason for non-performance. (CX 638B.)

(Continued)

prices which are derived from *Crow's* or *Random Lengths*. West Coast freight to the distribution outlets, calculated on the basis of association weights, is added to these reporter-derived base prices. The record shows the following with respect to these intra-corporate transfers: [61]

(a) *Georgia-Pacific*. About 80% of the plywood transferred to the Georgia-Pacific distribution centers from Georgia-Pacific's Building Products Division (the manufacturing arm of the company) is done on an "allocated basis."⁶⁵ (Tr. 1573-74.) The transfer prices for allocated sales are communicated to the centers through so-called "Mill Notes". (Tr. 1387-88, 1574.) The Mill Note base prices are taken from *Crow's*. (CX's 526A-Z64, 528, 592A, 602B-603, 607B, 617A, 637-641, 645A, 646A, 647A, 648A; Tr. 934-35, 937.)⁶⁶ Note in CX 617A a Mill Note was revised because the published *Crow's* price was different from an earlier, orally communicated transfer price.

The delivered prices in transfers of southern plywood to the Georgia-Pacific distribution centers, whether "allocated" or not, include West Coast freight. (CX's 537, 544A, 600A, 614A, 637, 645A, 646A, 647A, 648A; Tr. 921-22, 934, 1390-91, 1545-47, 1948.)⁶⁷

[62] (b) *Boise*. Boise's Moncure mill contracted with the Boise "BM & S" Division for the transfer of a fixed amount of southern plywood to certain "BM & S's". The transfer price for this contract, which was entered into in 1971, was determined by deducting functional discounts from the price reported in *Crow's* two Fridays prior to shipment. (CX 387; Tr. 2477-78; see also CX 322B *in camera*.)

In this Moncure-"BM & S" contract there was a variation from the usual industry formula of using West Coast rate less actual freight. Under this contract, the Boise "BM & S's" paid a freight charge of \$1.80 per hundred-weight (derived from the West Coast rate of \$2.07, less 27¢ per hundred-weight, the average freight cost to the destinations normally shipped by Moncure), plus actual freight from the mill to each "BM & S". (CX's 387A-B; Tr. 2477-78.) While this departure from the standard industry formula resulted in some differences in the prices to each "BM & S" within the same West Coast freight zone, nevertheless, in this instance, too, a transfer price was used which included freight derived from the West Coast rate rather than the sharply lower actual freight rate. (CX's 387A-C, 390.)

(c) *Weyerhaeuser*. Since 1971, plywood produced at Weyerhaeuser mills has been transferred to the Weyerhaeuser "CSC's" at the average of prices reported in *Crow's* and *Random Lengths* plus West Coast freight. (CX 131; Tr. 1142, 2227-29, 2267-68.)

(d) *Champion*. Plywood produced by U.S. Plywood's mills is transferred to the

See also CX 647A ("These are firm and non-cancellable orders on the part of either party except for force majeure") and Tr. 1554 where the Georgia-Pacific official in charge of mill sales testified "We stand at arm's length with the Distribution Division [branches], so to speak."

Specifically, I do not find credible the testimony of Georgia-Pacific officials that transfers are simply an internal method of dividing up the "pie". (Tr. 1578, *et seq.*) Contemporaneous documents and other testimony prove that transfer prices have a far more pervasive influence on the plywood market. (See Findings 97, 98.)

⁶⁵ Under the allocation system, each Distribution Division region agrees with the Building Products Division that a fixed amount of softwood plywood will be transferred each week to each region. The regional manager then sets an allocation to be shipped weekly to each branch within his region. (CX's 559M, N, 645A-648B; Tr. 960, 1573-74.)

⁶⁶ The record proof showing reliance on *Crow's* is not diminished, and, in fact, is supported by the equivocation of the Georgia-Pacific vice-president in charge of the distribution centers who testified that the company uses "some sort of market report service transfer cost." (Tr. 1574.)

⁶⁷ Note that in all transfers where the base price is "*Crow's*" (*i.e.*, CX's 526A-Z64) West Coast freight is added automatically. (See Finding 91.)

branches at transfer prices established on [63] Friday of each week. These prices are intended to reflect the current mill prices. (CX 177B; Tr. 2581-85.) Usually these prices are identical to the *Crow's* prices. (Tr. 1021-22, 2689.) Moreover, the transfer price charged a U.S. Plywood branch for a direct mill shipment to the branch's customer is tied to the *Crow's* price Friday prior to shipment. (CX's 252, 253A, 256-260, 271D, 272A.)

On all transfer sales, U.S. Plywood charges its branches transfer prices which include West Coast rail freight. (CX's 203A, 232A, 233B, 234A, 235A, 236A, 237A, 239A, 240A, 241A, 242B, 243A, 244A, 245A, 246B, 247A, 248B, 249A, 250A, 251A, 263, 274-78; Tr. 1000, 1006-07, 2613-14, 2713.)

97. As for use of the trade reporters at the distributional outlet level once the plywood is transferred, the record evidence indicates that the distribution outlets set their basic offering prices by relating them directly to transfer prices, which, in turn, are derived from *Crow's* or *Random Lengths*. As indicated earlier, all of these outlets are profit centers. (Findings 38, 42, 47, 51.) This means, for example, that Georgia-Pacific distribution centers, which buy straight carload quantities from the Georgia-Pacific mills at *Crow's* less a discount of 5 percent and 5 percent plus West Coast freight (CX 325B; Tr. 925-26, 934),⁶⁸ must then set their carload prices for mill [64] direct shipments (*i.e.*, when the branch makes the sale, but the wood is shipped directly from the mill) at *Crow's* less a discount of 5 percent and 3 percent plus West Coast freight. (Tr. 927, 931, 934.)⁶⁹ For inventory sales or for sales of smaller or mixed quantities, additions are made to this basic price at the Georgia-Pacific branches. (CX's 566A, 580B, 610A-i; Tr. 783, 919-20, 928, 931, 934, 977-78, 4386-87; see also Finding 98.)

Similarly, the Weyerhaeuser "CSC's" are told to "price at mill direct levels [*i.e.*, carload price] plus a distribution margin." (CX 896; Tr. 1150-51, 1168-71, 1173-75, 2262-63, 2266-67.)⁷⁰ The U.S. Plywood branches buy on a carload basis which includes West Coast freight (CX 811A; Tr. 1006-11, 2613-14); to this transfer price the branches add a markup based on the number of pieces ordered by their customers. (Tr. 1016.)

98. As shown in Finding 97, branches use the transfer prices of carload lots, that is, the current replacement cost of a carload, as reported in *Crow's* or *Random Lengths*, as the basis for their mill direct

⁶⁸ The two "5's" discount was also used at U.S. Plywood. (CX's 182A, 325B, 352A; Tr. 811.) Larger discounts are given on certain items for the very purpose of encouraging the distribution outlets to be more aggressively competitive in securing a greater share of a particular market. These "deals," see, *e.g.*, CX 533, 580C, show the direct connection between transfer prices and resale prices. See also CX's 104A-B, 106A-B, 111A, 114A, 182A-D, 212, 509, 510, 517A-B, 527, 531, 535, 537, 541, 559H-i, 574, 811A and Tr. 1426 for additional proof of the relationship between transfer prices and branch resale prices.

⁶⁹ See also CX's 603-04 which refer to a "Customary Initial Percentage Markup" of the Georgia-Pacific distribution centers. This markup is added to *Crow's*, the mill direct price.

⁷⁰ Prior to 1971, plywood was transferred to the "CSC's" at the Weyerhaeuser mill direct carload price. (Tr. 2266; but see CX 109C for use of *Random Lengths*.) After 1971, the average of *Crow's* and *Random Lengths*, *i.e.*, the industry's direct mill price, was used. (See Finding 96(c).)

prices as well as their out-of-inventory less-than-carload prices. Clearly the managers of these distribution outlets must ordinarily sell less-than-carload lots at [65] prices above the mill replacement cost of a carload.⁷¹ As a former Georgia-Pacific branch manager put it, "Down at the branch level, we knew our cost, and we couldn't play with it too much because the percentage of profit was too low." (Tr. 954.)⁷² In fact, the only reason for having branches is that they provide a package of services to local customers which enable them to sell out of inventory in smaller (break bulk)⁷³ quantities above [66] the *Crow's* or mill direct carload prices. (See Finding 97 and Tr. 1151, 2194, 2199, 2256-57.) Note in this connection, that a spokesman for the Georgia-Pacific distribution outlets wrote that unless the outlets are able to buy from the Georgia-Pacific mills at "low *Crow's*" rather than "mid *Crow's*" (when *Crow's* reported a split price) they could not warehouse and redistribute to chains and other large operators which buy on the basis of the average of *Crow's*. (CX 531.)

A record of losses — in other words, sales below replacement costs (*i.e.*, the mill direct or "*Crow's*" price) — affects the profitability of the branch as well as the compensation and job security of the distribution outlet manager.⁷⁴ [67]

⁷¹ Georgia-Pacific personnel are specifically instructed not to set their plywood prices on the basis of average cost, but rather on replacement cost. (CX 576; see also CX 644A.) At U.S. Plywood, where sales out of the branch are "all based on the transfer cost" (Tr. 1032), actual average cost is not used; instead, branch prices are based on current mill prices. (Tr. 1033.) Specific transactions at respondents' branches may be negotiated at prices below the average transfer prices. (Tr. 973-74, 1034, 1577, 1581.)

⁷² Plywood is sold by a branch in a quantity known as a "bunk" or "unit" which, typically, consists of a stack of plywood 30 inches to 33 inches high, the surface measure volume of which depends on the thickness of the plywood (*e.g.*, a "unit" of 3/8 inch plywood contains 2,816 square feet, surface measure). A truckload varies between 12 to 16 units. A full carload consists of approximately 36 units. (CX 581; Tr. 1956, 1968.) Distribution outlets rarely sell full carloads from inventory (Tr. 1017, 1719) but they do arrange for direct mill shipments of such quantities. (CX 549; see also CX 814; Tr. 971, 2572.)

⁷³ There is evidence, however, that in a severely depressed market, such as the recession of 1974-75, the usual pattern of the industry may not always prevail, and wholesale prices below mill direct prices do occur. (RX's 69G.) See also RX 312 and CX 661 where sales out of warehouse at prices lower than *Crow's* in 1970 and 1973 are newsworthy items.

⁷⁴ Tr. 814, 937-39, 954, 1711, 1945, 1969-70, 2000, 2027-28, 4386-87. Several officials of respondents testified in sweeping generalities that transfer costs have "no" effect on distribution outlet prices. For example, one high official of Georgia-Pacific said the transfer price has "nothing to do with what they can get for the plywood, but if we are transferring at a higher price than they can resell it for, why they are going to yell." (Tr. 1560.) They "yell" because "They have to make a profit." (Tr. 1561.) A similar pattern prevails throughout the record — first, an unequivocal (and unbelievable) statement that transfer costs have nothing or little to do with resale prices, followed later by a retraction saying that transfer prices happen to impact very directly in several crucial areas, namely, the profitability of the distribution center as well as the compensation and employment security of branch managers. Compare, for example, Tr. 2008 (no relationship between transfer cost and prices) with Tr. 1998-99, 2000, 2027-29 (the object of a distribution center is to show a profit) and Tr. 2265 (distribution outlets should worry if they do not cover costs). See also Tr. 4213-14 which shows that transfer prices are used to determine the profitability of the producing mill.

While the record shows that branch managers have discretion in setting their prices and that these prices respond to market conditions (Tr. 771, 810, 928, 931, 934, 1014, 1172, 1586, 1596, 1601-02, 1891-93, 2224), the economic realities of the plywood industry, as indicated in the text of this Finding, dictate that this discretion be limited by the requirement that branch prices be above the direct mill level. As the record plainly shows, the distribution outlets are economically justified only if they are able to provide services which produce a higher than direct mill price. Moreover, as profit centers, they have every incentive to sell above the direct mill price since the inevitable result of prices lower

1

Initial Decision

99. In sum, at all levels of distribution southern pine plywood is sold on the basis of a formula — well known to the entire industry — that the basic prices are *Crow's* or *Random Lengths* prices or within a narrow range of *Crow's* or *Random Lengths* prices, that certain standard discounts are usually taken from those prices, and that West Coast rail freight multiplied by "association" weights is added to these base prices. (Findings 72-98.)⁷⁵ Thus shortly [68] after the Georgia-Pacific's Russelville, South Carolina mill opened, a local competitor could confidently report:

They [Georgia-Pacific] have adopted the following price basis. Low *Crow's* less 5% less 3% plus West Coast freight. (CX 886.)

And *Crow's* is obviously reflecting industry custom when it says routinely week after week that a 5 percent and 3 percent functional discount is taken off its reported prices and

Addition of Portland freight to Southern Pine prices will provide approximate delivered costs. (CX's 928C-Z31.)

100. The weight of the evidence is that in sales from respondents' southern mills to southern branches, at any given point in time, respondents use a single base price for southern pine, but not necessarily the same price.⁷⁶ With the addition of West Coast freight, this results in the same delivered price to each respondent's southern distribution centers within the same West Coast zone. Similarly each respondent's direct mill customers, who are located within the same West Coast zone in the South, are charged the same delivered prices though these direct mill customers (including customers with multiple outlets) may be located at unequal distances from the mills. (CX's 2A,

⁷⁵ The exact calculations are easily made. Using the price appearing in *Random Lengths* dated November 14, 1975 (CX 680A) as a "mill price," the delivered price of a shipment of 1,000 square feet of 1/2 inch CD - Exterior Glue 3-ply southern pine plywood to a customer in the most easterly West Coast freight zone is as follows:

Reported price	\$115.00	
Less discounts of 5% and 3%		
(\$115 x .9215)		105.97
Freight Calculation		
Freight rate: \$2.79 per 100 lbs.		
Association Weight of 1/2 inch equals 1525 lbs.		
Freight Cost equals 1525 divided by 100 x 2.79 equals		42.55*
Total delivered price		\$148.52

(CX's 680A-B; Tr. 403, 1933-34)
 *Note: Freight computation is made by *Random Lengths*, e.g., freight for 1/2 inch, 1525# in 2.79 zone is \$42.55. (CX 680B.)

⁷⁶ It should be emphasized that the evidence discussed in this Finding relates solely to the question of price uniformity in sales to distribution centers and customers of each respondent. Complaint counsel failed to prove that respondent's practices result in exactly matching prices to all customers or to all branches (see Finding 143) even though *Crow's* and *Random Lengths* are widely used as the industry's base price.

10, 11, 112B, 212, 884H, 886Z29; Tr. 713-14, 720-21, 847-48, 857-58, 1017, 1142, 1157-58, 1163-64, 1189, 1200, 1546, 1559, 1839, 2131, 2253-54, 2713-16, 2719.) See, however, Finding 142 for evidence that respondents attempt to impose add-ons or "upcharges" to more distant northern customers [69] within the same West Coast freight zones who are located outside of the primary southern marketing area. In addition, see Finding 96(b) for evidence that Boise, in dealing with its southern distribution centers, adopted a slightly different formula which added actual freight to a phantom freight figure to arrive at different delivered prices to each Boise "BM & S."

While distribution outlets of a particular respondent usually use a single delivered price in their assigned territories (Tr. 813, 1016, 2041), local market conditions may result in variations in the delivered prices to particular localities within the same West Coast freight zone. (Tr. 735-36, 811, 1181, 1196-97, 2238-39.)

101. Respondents' officials and ex-employees testified generally that they are not able to predict the future plywood prices of their competitors in a given market. (See Tr. 1489, 1681, 1813, 1944, 2238, 2483, 3004.) This testimony must be evaluated in the light of what respondents actually did; namely, they removed a large element of uncertainty which would have existed in the southern plywood industry but for the adoption of a uniform and predictable West Coast freight rate that is predictably added to base prices derived from the industry reporters. On the subject of predictability, it must be emphasized that when a Champion sales manager writes that "almost without exception the price of Pine Sheathing to a good credit risk is the low of *Crow's* or *Random Lengths* less 5% and 3%" (CX 811A), it is understood in the industry and it is completely predictable that West Coast freight will be added to the *Crow's* or *Random Lengths* prices, as plainly indicated in the publications themselves. (See Findings 88, 91, 99.)

On the other hand, the record shows that uncertainty still exists in the plywood industry because of the volatility of the housing market and, as indicated earlier, the *Crow's* and *Random Lengths* prices respond to cyclical pressures. (Finding 92.) But all cyclical pressures are duly reported by *Crow's* and *Random Lengths* (RX's 69E-85), and whatever the new price level may be, the new week in the southern plywood industry invariably begins with *Crow's* or *Random Lengths* plus West Coast freight. (Findings 92-98.) [70]

West Coast Freight as a Focal Point of Southern Plywood Pricing

102. Not only did use of the West Coast rate and "association"

weights eliminate a large measure of uncertainty which would have resulted from the use of the southern freight rates but the West Coast freight factor also served as a focal point for an industry-wide plan to resist passing on locational advantages to purchasers, and to add phantom freight to gross margins, as originally contemplated by Georgia-Pacific. (Findings 103-112.)

103. The significance of West Coast freight as a focal point for resistance to price cutting is shown in contemporaneous documents. Freight "pick-up" or freight "gain" — the industry's euphemisms for phantom freight — is considered to be so pivotal to pricing in the southern pine industry that respondent Champion admonishes its field personnel,

We have had reports on pine prices that caused the conjecture that someone was playing with the freight pick-up, but we have had no evidence that this is true and the base price has been the culprit. This is a very delicate area and all loose talk on this subject by our branch managers and salesmen should be curtailed. We should not, in any way, endanger this necessary source of income by getting involved in any tale carrying or rumor spreading, as this would be a fatal blow to the southern pine industry, which is in no great shape with the freight pick up, let alone without it. (CX's 181A-B.)⁷⁷

[71] 104. In 1966, a Georgia-Pacific official observed "Freight appreciation has been remarkably stable during the entire year." (CX 502B.) Five years later, the policy of preserving freight "pick-up" or "gain" is still so central to its southern pine plywood business that Georgia-Pacific personnel are advised,

Since we have made a strong commitment to protect freight gain, I feel that we should guard it closely and make any necessary market adjustments in the mill price. (CX 564.)

105. At Weyerhaeuser,

. . . the key to the SYP [Southern Yellow Pine] Plywood business is freight return, the dollar difference between the West Coast freight rate and the actual freight rate. Our target is 1.25/CWT. This target is an arbitrary figure but past experience indicates it is a fairly realistic figure. (CX 187A.)

106. That phantom freight is a focal point of southern plywood pricing is further shown by respondents' practice of constructing elaborate tables showing the amount of freight "pick-up" (phantom freight) which is available depending upon the location of the

⁷⁷ The attempt of Mr. Kelley, Vice President of Champion, to explain away this document on the witness stand in terms of a special situation relating to uneconomical shipments to the Chicago area or upper Midwest is not credible. His recollection on the witness stand was hazy at best (compare Tr. 2648-50 with Tr. 2749-51), and nothing he said changes the plain meaning of the document itself which shows a *general* concern for preservation of phantom freight. (See Tr. 27, 33-35.)

customer. Respondents' marketing strategy is then directed toward either preserving this freight "pick-up" or minimizing freight "loss."⁷⁸ (CX's 17A-J, 26A-Z25, 40A-B, 41, 88A-L, 91A-Z74, 92A-Z72, 137A-B, 142A, 181A-B, 182A-D, 183A-B, 188, 324A-J, 350F *in camera*, 356C-D, 364i-J *in camera* 422A-E *in camera*, 488A, F, 490A-B, 491A, F, 492A, C, 493A, C, E, 495A, D, 501A, D, 522A, H, 556A, 559A-Z45, 563A-B, 564, 565A-B, 566A-B, 573A-B, 574, 580A-P, 883A-C; see also a 1965 survey by a non-respondent producer which comments on "how all-important this comparative rate structure is [the difference between actual and West Coast freight].") (CX's 665D-E.) [72]

107. So well-accepted is the notion of freight "pick-up" in the southern plywood industry that one respondent informs another about its progress in preserving this locational advantage. The vice-president of Willamette apparently told a Boise Cascade official of the amount of 1968 freight "pick-up" which accrued to Willamette as a result of the difference between West Coast and actual freight. (CX 333D.)

108. Because of the importance assigned to phantom freight by respondents, a freight rate *increase* is considered an "advantage." Just such an increase inspired the following reaction by a Willamette official:

Advantages - Plywood

Using as an example 1/2 inch plywood on 1525 lbs. per thousand square feet the Ruston, Louisiana to Washington, D.C. rate has increased from \$.75 to \$.79 and the coast rate from \$1.75 to \$1.84 per cwt changing the southwestern rate advantage from \$15.25 per thousand square feet to \$16.00 per thousand square feet (up \$.75 per thousand square feet). This, of course, gives us an advantage in Louisiana in that we market our products from that location at the coast rate thusly taking advantage of an additional freight pickup or at least allowing us to reach further marketing areas at the same freight rate pickup. (CX 862A.)

109. The concept of freight pick-up is included in plywood contracts. For example, there is the following language in a Willamette — Weyerhaeuser agreement:

Sales are restricted to our normal sales area of the Southeast and surrounding states as outlined on the attached map. We will accept an occasional car in the close perimeter, outside this area such as Chicago, Cleveland, or Detroit; but, in turn, Weyerhaeuser will give us a car close to our mills so we can maintain our freight pickup. [73]

The final approval of such a destination is for us to say. (CX 41.)⁷⁹

110. In the southern pine plywood industry, the use of West Coast

⁷⁸ Also sometimes called freight "return," freight "premium," freight "advantage," freight "allowance," and freight "gain."

⁷⁹ See also Tr. 1784 and CX 628A for additional proof that southern pine contracts are negotiated in order to realize an average or minimum amount of freight advantage.

freight rate and the association weights are not subject to negotiation: bargaining, therefore, is confined to dickering over the "base" or "Crow's" price. This is shown by the fact that a substantial volume of southern plywood is sold on a "PTS" contract basis where the only price term negotiated is whether or not a small discount or premium is to be taken from or added to the mill base price appearing in *Crow's* (or *Random Lengths*) at the time the order is shipped. (Tr. 582, 698-99, 719-20, 1191-92, 1469, 1558, 1783-84, 2219, 2384-85.)⁸⁰ West Coast freight, multiplied by association weights is automatically added to these base *Crow's* or *Random Lengths* prices. (See Finding 76.)

It is particularly noteworthy that "PTS" contracts are negotiated with respondents' "best customers" and unless the prices to these buyers are "reasonable" or "equitable," this large volume business could not be retained. (Tr. 2220, 2280-81; see also CX's 78A-B.) It is unlikely that knowledgeable and important "PTS" buyers (say, a large chain like Lowe's, see Tr. 2719-20) would agree to buy at "Crow's" (a typical "PTS" price term) if there is a pattern in the industry, at any given time, of a large volume of production being sold under *Crow's* plus West Coast freight.⁸¹

[74] 111. In spot sales, too, competition in the basic plywood price — the mill price for a carload (whether sales are made by the mill itself or by the branch and then shipped mill direct) — is kept within a narrow range. As U.S. Plywood's Southeast Regional Sales manager put it, "Almost without exception, the price of Pine Sheathing to a good credit risk is the low of *Crow's* or *Random Lengths* less 5 and 3%." (CX 811A.)⁸² See also, Tr. 981 ("Everybody knew the formula [*i.e.*, *Crow's* plus West Coast freight]. So if you were out of line you didn't get the order") and Tr. 977 ("normally your customer [for a full carload] knew the cost of that plywood before he ever even called you up, because he

⁸⁰ The size of the discount depends on volume and specifications. (CX 326D *in camera*.) Another factor in "PTS" negotiations is the mix of the contract. (Tr. 2278-79.) For indication of how slight the variations are in "PTS" contracts, see CX's 79A-F.

⁸¹ Note, however, that a plywood producer may decide not to enter into a "PTS" contract for the reason that he anticipates selling *above Crow's*. (See Tr. 3000.)

⁸² See, however, CX 210A, B where in response to CX 811A a U.S. Plywood official observed "There are a good many reasons for . . . spreads in a given items prices such as the mix in the order, the freight pickup involved in the South and the underweights involved in the West and whether shipment is via truck or rail and the discounts." When this official, however, described prices as "all over the map depending on who wants to buy what and how much and who wants to sell what and how much" he relates this to a dollar or two off current list prices. Note also that the *Random Lengths'* plywood prices are published subject to the following caveat explaining price variations:

For sheathing slightly higher prices are applicable to assortments of several items or when combined with sanded. (CX 680A.)

In addition, see Tr. 343 for indication of quantity discounts to particularly large buyers and CX 326C *in camera* for higher prices to customers "who need quick shipment and will pay a premium for a particular car." Still another explanation for price differences is that in the period of price controls, between August 1971 and mid-1973 (Tr. 1726-26), when demand was particularly heavy, different ceiling prices prevailed among producers. But for this unusual situation, a Georgia-Pacific official recognized that "these variations would melt away." (CX 602A.)

also had access to the same costing information that everybody else had"). [75]

Should one mill's price be substantially different from the others, this is usually a sign that the variant mill does not want to sell its plywood. (Tr. 2126-29.) See also Tr. 422 ("Maybe they [Boise-Cascade] want to just pull off the market so they just stick a price up there and say, 'Well, this ought to keep the customers away for a while, while I consolidate my shipping file' "), and Tr. 2783 where an unusual mill price ("considerably below the market") is characterized as a sign of a temporary loss leader which quickly evaporates.⁸³ In contrast to these anecdotal differences, there are genuine cyclical pressures, essentially related to the housing industry, which require mills to sell above or below the previous week's *Crow's* or *Random Lengths* with the result that price differences develop. From these price differences, the price reporters make a judgment call as to where most mills are priced and this becomes the reporters' prices for the next week. (Tr. 421.)

112. At the distribution outlet level, branches attempt to price above the direct mill carload level ("whatever the traffic would bear," Tr. 934 and Findings 97-98) for a truckload, a bundle, or a single sheet of plywood. The quantity purchased, the urgency of the delivery, and the attractiveness of the "mix"⁸⁴ of the order (whether [76] other profitable lumber products are being purchased besides plywood) result in price variations. (CX's 104A-B; Tr. 783, 919-20, 1016, 1591, 1893, 1902, 1955-58, 2036, 2766, 2784, 2960.) The extent and intensity of these price variations — that is, different prices *above* the direct mill prices with differences reflecting quantity, delivery, and mix — depend on local market and competitive conditions. (CX's 104A-B; Tr. 928, 931, 934, 2036, 2849.) In a market with some weakness, the range in an inquiry involving a mixed purchase of 1/2 inch CDX and 5/8 inch CDX was from \$149 to \$153 for the 1/2 inch. (Tr. 2776.) When the market is stable or strong, the price quotes are within 50¢ of each other. (Tr. 2779.) On the downside or in a rapidly rising market "exceptionally " large spreads in prices appear such as \$7 to \$8. (Tr. 2780-82.) See also Tr. 2892, where a dealer called by respondents testified that 30 to 40 percent of the time, price quotes differ by less than one dollar, and the usual range was between \$1 to \$3. The record shows, moreover, that price variations quickly evaporate. Thus a sudden increase or decrease in distribution outlet sales is a signal to a

⁸³ While the industry reporters have on occasion reported sharp price differences (see, e.g., RX's 69o, P-Q, Z42, Z43), it is significant that *every* week the reporters are able to announce *one* price for each item. The publisher of *Random Lengths* testified:

We can get a range of prices from the individual sources that we contact, I suppose an average would be a range of \$5 to \$7. But then, as you narrow, or, as you look at this range, you take all of the prices, their [sic] emerges a more common price at which most people are priced. (Tr. 421.)

⁸⁴ For the significance of "mix" in plywood sales, see Tr. 2257-58.

branch manager that his price is too low or too high and an adjustment is made. (Tr. 1892.)

Effect of West Coast Freight on Locational Decisions

113. Operators of southern plywood mills prefer to ship east of the mill where the West Coast freight rate increases, rather than to the west, where it decreases. This preference appears, for example, in this early policy statement of Willamette officials respecting their Ruston, Louisiana, mill:

Frankly, Bill, we can move it to much better advantage pricewise, east of us, rather than going into Texas, Oklahoma, Kansas or Missouri. In fact, we are at a great disadvantage in going into Oklahoma or Kansas particularly.

At the present time in Texas we have been offering our stock only into the Fort Worth - Dallas area. We do not have any one in the [77] Houston area, but have quoted a few cars for this area. The only other areas you have yards in that we have been quoting to is around St. Louis, and, again, around Kansas City there is a disadvantage to us.

As you have outlined in your letter, if we are going to sell in the Texas area, we are going to have to sell it on the basis of competing with the \$1.19 coast rate. Then if we add the cost of trucking, it makes it a disadvantage over what we can get into such areas as Georgia, Florida, or other Southern States. For instance, we have a trucking rate into Fort Worth of .40¢. If we deduct this from the \$1.19 coast rate, this gives us only a .79¢ advantage where if we can sell this same material into Georgia or Florida on a \$1.54 rate with only about a .50¢ or .60¢ rail and truck rate, it gives us a net .90¢ to \$1.00 advantage, which dollar and centwise is better than we can do into the Texas area.

Of course, if we had a tremendous production we could not pick and choose like we are doing at the present time, but unless this company puts up another mill some place I do not think we will have over 5 million feet a month, and that could be a year away. At the present time, we are only looking for 3 or 4 million feet a month total production. (CX 9A.)⁸⁵

114. Since the freight "pick-up" is a function of West Coast freight less actual freight, respondents not only prefer to sell east of the southern mill (thereby increasing West Coast freight), but they also prefer to distribute close to the plant, thereby decreasing actual [78] freight. (CX's 99X-Z, 573A, 665D; Tr. 514-15, 1198-99, 2612, 2737.)

115. Complaint counsel failed to prove that the two locational influences described in Findings 113, 114 — the preference for shipment east and the desire to reduce actual freight — have operated to create disincentives to the most efficient geographic location of producing points or disincentives for customers to locate close to producing mills, as alleged in the complaint. (Complaint ¶'s 18(c), (d).) In the absence of any direct evidence on how sites are chosen, I believe

⁸⁵ See also CX's 1A, 2A, 10, 11, 17A-J, 26B-C, 91A-92Z72, 861.

it is fair to conclude that both sellers and buyers may choose to locate in a particular location for reasons of availability of raw material or proximity to consuming markets which have nothing to do with the denial, or for that matter the receipt, of a geographic advantage due to use of the West Coast freight rate.

116. While the systematic use of West Coast freight less actual freight, means that respondents' mill net returns may differ depending on consumer location, complaint counsel failed to prove that this results in economically meaningful "discrimination in prices between customers" as alleged in Complaint ¶ 18(b). To the contrary, the weight of the evidence is that *all* southern pine plywood customers of respondents are disfavored since they all pay phantom freight based on a distant West Coast base.

Cost of Phantom Freight

117. The West Coast freight rate used in the sales of southern pine plywood is recognized by respondent Champion as phantom freight. (CX 200.)

118. Because plywood is a relatively heavy product, shipping costs are an extremely important part of the total delivered price. Depending on the buyer's proximity to the mill of origin and the base price, the freight [79] cost may amount to as much as 30 percent of the total delivered price.⁸⁶

119. Actual freight from respondents' southern mills is substantially less than the West Coast phantom freight which is included in southern plywood delivered prices. To illustrate, in 1972 actual freight from Georgia-Pacific's Chiefland, Florida mill to markets in Tampa, Orlando, Tallahassee, and West Palm Beach, Florida, ranged between 14¢ and 21¢. The West Coast rate to these cities was \$2.01, resulting in an average freight pick-up of \$20.8575 per thousand square feet. (CX 580E.)⁸⁷ For references to detailed tables showing the enormous freight "pick-up" which accrued to respondents from use of West Coast freight, see Finding 106.

⁸⁶ See, e.g., CX's 928Z28, Z29, which show a *Crow's* price for 1/2 inch 3 ply (southern) of \$87.00, and a West Coast rate to the most easterly zone of \$38.30 for a weight of 1525 lbs., the "association" weight for 1/2 inch 3 ply. In this example, the freight is 33 percent of the total delivered price of \$125.30. For actual invoices showing similar freight charges, see CX's 867-72, 875-76.

⁸⁷ See CX's 205A-B which shows a customer in Savannah, Georgia, buying from a U.S. Plywood warehouse in Savannah, Georgia, and paying freight costs ranging from \$12.15 to \$34.25 per 1,000 square feet for this intra-city shipment, depending on weight of plywood purchased. See also RX 87 which shows current actual freight from Georgia-Pacific's Savannah, Georgia mill to Miami, Florida of 57¢. The current West Coast rate to this zone is \$2.79. (Tr. 1392.) On a shipment of 1,000 square feet of 1/2 inch plywood (1525 lbs. according to "association" weights), the

Effect on Choice of Means of Transportation

120. Southern pine plywood cannot be picked up by a customer's truck at a true F.O.B. mill price in order to save the cost of West Coast freight. (CX's 113B, 880.) [80]

121. Instead of allowing mill pick-ups in the customer's own truck at a true F.O.B. price, the practice followed by all respondents, should the customer (including distribution outlets in intra-company transfers) elect to pick-up in his own truck, is to take the delivered price, which includes West Coast rail freight, and allow a small discount (usually \$2 to \$4 per thousand feet) or in the case of Willamette the actual truck freight cost, as a pick-up "allowance." (CX's 5A, 9B, 15A, 487B, 511, 515, 520A-B, 557A-558B, 562, 580C, 583B, 596A-C, 885Z1, 886Z26; Tr. 717-18, 741-44, 1009, 1030, 1184-85, 1632, 1691, 2592-93.)

122. Truck pick-ups by customers of respondents are at a minimal level. At Georgia-Pacific, it is 1 percent of plant production. (CX 487B.)⁸⁸ There are relatively few truck pick-ups at Weyerhaeuser "CSC's" (Tr. 1183, 1185) or Champion mills. (Tr. 2701.) Mill pick-ups at Boise's Moncure mill were 4.6 percent of 1971 shipments and 1.3 percent of 1972 shipments. (CX's 441L, 442S.) The Moncure mill had no pick-ups in 1973 (CX 401; Tr. 2502-03), but in 1974 customer truck pick-ups increased. (RX 347A; see also Tr. 2376.)

Exchange of Information

123. There is no charge in the complaint and no proof was presented by complaint counsel that respondents met and formally conspired to add West Coast freight, or to adopt "association" weights, or to use *Crow's* and *Random Lengths* as a handy base price reference. But there can be no doubt that as customers of each other, and as members of the same trade association (American Plywood Association),⁸⁹ there are ample opportunities [81] for each respondent to familiarize itself with all the basic policies of the other respondents, including the use of West Coast freight. (See Findings 79 and 95 and CX's 34, 325B, 327, 333D, 352A; Tr. 2703-04.) Moreover, the record contains direct evidence of the exchange of information among respondents which relates to the southern plywood pricing formula discussed in earlier Findings. For example, a Weyerhaeuser representative could infer from a discussion with Georgia-Pacific's mill sales manager that Georgia-Pacific did most of its "PTS" contract pricing based on *Crow's*. (CX 133C; see also CX 142.) Willamette's senior vice-

⁸⁸ In March 1971, Georgia-Pacific did not allow customer truck pick-ups at their mills. (CX 559E.)

⁸⁹ At a meeting of the American Plywood Association, Weyerhaeuser and Georgia-Pacific representatives had "conversations which ranged from customer commitments to plywood marketing practices." (CX 133A.)

president apparently furnished Boise Cascade with the amount of freight "pick-up" realized by Willamette in 1968. (CX 333D.) And a Georgia-Pacific official reported:

Incidentally, Jimmy Schmidt, Sales Manager for Boise's Southern Pine Mill in North Carolina, was in the office last week and indicated that they are making all their 1/2 inch in 3-Ply construction and are selling it all at not to exceed \$1.00 under the 4-Ply/5-Ply. (CX 593.)

"Justification" for Use of West Coast Freight

124. According to respondents the only significance of West Coast freight is that it is "backed off" the delivered price to achieve a so-called "index" price which allows ready comparisons between the price of Douglas fir plywood and the price of southern pine plywood. (Tr. 1626-27, 1744-45, 2032, 2201-03, 2276.) While it is true that the use of West Coast freight does allow ready comparisons between southern prices and western prices, as well as between prices of competing southern producers (see Finding 82 and CX 51), the record shows overwhelmingly that West Coast freight is *added* to a base price (not "backed off") for the purpose of arriving at a delivered price which approximates the delivered price of Douglas fir. (Findings 65-79, 89-99, 102-08, 129-30.) [82]

125. Respondents also argue that the use of West Coast freight is justified because their customers *wanted* southern prices which could easily be compared to western prices, particularly at the outset of the southern pine plywood industry. As indicated in Finding 124, the record supports the contention that the industry-wide method of pricing — *Crow's, Random Lengths* or base prices derived from these reporters, plus West Coast freight — results in plywood prices, both western and southern prices, which are easily compared, and that respondents' customers may even favor this method of setting prices. (CX's 51A-B; Tr. 1524-25, 1626-27, 1745, 2276, 2804, 2810.)⁹⁰ But the fact that the system may serve the convenience of some of respondents' customers does not mean that it necessarily serves the interests of the plywood consuming public. The plywood customers of respondents who appeared in these hearings are plywood middlemen (brokers and wholesalers) who, essentially, resell to lumber dealers who, in turn, resell to building contractors. These middlemen are terribly concerned about *small* differences in price among competing sellers at any point in time because they operate on narrow margins. They are not concerned, however, about a *substantial*, though uniform phantom freight charge which can be passed on to *their* customers. Note the

⁹⁰ See, however, CX 68 where Willamette officials say that abandonment of a West Coast basis will "enable us to

1

Initial Decision

following exchange with one of respondents' "customer" witnesses, a plywood middleman:

Q. Mr. Vagos, as I understand your testimony, it would not concern you if part of your delivered price consisted of phantom freight as that term is used in CX 200?

A. What matters is what the competitive price is at the point at which I am quoting it to my customer. What matters is what I am quoting to my customer delivered. What the form is does not matter to me. [83]

Q. So you wouldn't care if phantom freight was a component of that price?

A. No, it does not matter. (Tr. 2892-93.)⁹¹

Moreover, on the subject of "convenience," the experience of non-respondent MacMillan-Bloedel demonstrates that actual freight can readily be used in price calculations. (Tr. 1100.) Besides, even in respondents' formula method of pricing, actual freight must be calculated since it is paid to the carrier, either by the mill (if prepaid) or by the purchaser (if invoiced freight collect). (See Finding 81.) It is apparent also that respondents rely on actual freight computations to determine the amount of phantom freight or "freight pick-up" in each transaction. (Finding 106.)

126. There was testimony by respondents' officials and plywood middlemen that use of an "index" price plus West Coast freight was simply a matter of form and that price quotations in other "forms," such as a single-figure delivered price without reference to West Coast freight or even F.O.B. prices where the customer arranges transportation from the mill, have been used whenever a customer desires one of these other forms of price quotations. (Tr. 1805, 2033, 2276, 2629, 2887.) The record shows, however, that irrespective of the "form" of the quotation, respondents' basic method of doing business is to take a base price and *add* West Coast freight to arrive at a delivered price. (See Finding 124.) In other words, no matter what the *form* of the transaction, a southern plywood customer simply cannot avoid paying West Coast freight. Thus a Weyerhaeuser customer was told, [84]

It is quite true that all of us learn something new everyday but it is hardly news that Southern Pine plywood cannot be picked up on a straight F.O.B. mill base to save the West Cost applied freight. This is an equalizer that has been going on in the market for as long as Southern Pine plywood has been manufactured. (CX 113B.)

Similarly, a U.S. Plywood customer asked that it be shipped as follows:

The material will be shipped F.O.B. mill freight collect. Freight charges are *not* to be added to the invoice, regardless of standard industry practice. (CX 849B.)

⁹¹ This wholesaler (Vagos) simply puts a margin on top of a mill price and "What really is important is what price our competitors have and if we are working off the same price and if we get the price to get the order, that is important." (Tr. 2913.) Contrast this testimony with the complaint of officials of National Homes who "contend that only actual freight should be charged and not the West Coast applicable rate." (CX 579.)

U.S. Plywood's reaction to this request was "With reference to the FOB mill, freight collect, regardless of standard industry practice I'm sure we are not interested. . . ." (CX 849A.)

Respondents argue, based upon testimony elicited from respondents' officials, that the use of the form of pricing in which West Coast freight is added to a base price has been declining since 1970 because comparisons with the delivered price of fir are no longer as imperative as they were previously, now that fir has been withdrawn from the South. According to respondents, the usefulness of this "form" of pricing is currently confined largely to the "gray" area where fir and pine still compete. (Tr. 1606-07, 1853, 2203, 2276.)

This argument nicely confuses "form" and "substance" and is wrong about both. First, as a matter of "form," the record shows that a base price *plus* West Coast freight is still extensively used throughout the plywood industry. Thus, *Crow's* is obviously reflecting industry practice when it continues to use the West Coast freight formula (Tr. 321, 335, 354); the West Coast freight formula is still used in "PTS" contracts (Findings 76, 94); direct mill sales are made in terms of a base price plus West Coast freight (Findings 78, 93); intra-corporate transfers are in the form of a base price [85] plus West Coast freight (Finding 96); and, in general, prices in the form of a base price plus West Coast freight are still widely used throughout the southern plywood industry. (Tr. 847, 869, 1539, 2202, 2277, 2724.)

In 1973 the form of pricing which added West Coast freight to a base price was so prevalent that Georgia-Pacific described a switch from this method to F.O.B. pricing as a "major change." (CX 808A.) In 1974, Boise Cascade speculated about the implications of a "completely different way of pricing and extending freight from the traditional method." (CX 839B.) Also in 1974, Willamette officials contemplated the significance of discontinuing "our practice of quoting on a West Coast basis or referring to a West Coast basis in any of our quotations or price lists." (CX 68.)

As for the so-called F.O.B. "form" in transactions where the customer arranges transportation, a true F.O.B. price is not used; instead, respondents use a delivered price which includes West Coast freight and allow a small discount. (Findings 120, 121.)

Turning to "substance," it is true that a base price plus West Coast freight can be converted into a simple delivered price. But when this is done in the southern plywood industry, the delivered price includes West Coast freight. (CX 202A; Tr. 717-18, 810-11, 956-57.) In January 1973, counsel for the Federal Trade Commission and counsel for Georgia-Pacific had the following exchange which makes *no* reference to the "form" of the transaction:

1. *Question.* Does Georgia-Pacific use and has it used the Coast Rail Freight Rate as the basis for computing delivered prices for shipments of softwood plywood from Southern plants?

Answer. Yes, Georgia-Pacific Corporation does use and has used the Rail Freight Rate from the West Coast to Southern delivery points as one factor in determining prices for softwood plywood shipped from its Southern plants.

[86] 2. *Question.* If so, please describe the history of how Georgia-Pacific came to use its method of freight computation.

Answer. Before the existence of the Southern softwood plywood industry, plywood supplied to Southern purchasers was manufactured and delivered from West Coast fir plywood plants and obviously contained as one of its delivered price factors rail freight from a West Coast fir plywood plant. The Southern pine plywood industry then had and still does have as a competitor West Coast manufactured fir plywood. Thus, in pricing Southern manufactured pine plywood with its higher inplant manufacturing costs, the delivered price of West Coast plywood became a necessary factor to consider in order to price Southern plywood competitively with West Coast plywood. (CX 487A.)

127. There is no dispute between the experts called by either side — Mr. Glassman (FTC staff economist) and Dr. Steiner (the economist called by respondents) — that it was rational, in a profit maximization sense, for respondents, at the outset of the southern pine industry, to attempt to sell southern yellow pine plywood at the same delivered price as western fir plywood. (Tr. 1228-29, 3622, 4535, 4541.) In fact, Mr. Glassman testified that from the producers' standpoint it was a matter of "economic necessity" ("economic necessity" here meaning profit maximization (Tr. 4535, 4541)) for the two products to be priced at the same level because a southern price below the western price would have created a disincentive to ship fir plywood into the South at a time when the southern pine mills could not possibly produce enough plywood to satisfy southern needs. (Tr. 1228-29.) Mr. Glassman's testimony, however, is fairly read as meaning that it is the function of the market to determine whether the objective of price parity between pine and fir is realized, and he specially denied that this objective is an economically acceptable rationale for use of a distant basing point. (Tr. 1228-29.) [87]

Moreover Mr. Glassman did *not* say that more than 13 years after the formation of the southern pine industry, when southern sheathing production now *exceeds* western sheathing production, there is any necessity for southern mills to arrive at their prices by adding on West Coast freight. While it is true, according to Mr. Glassman, that the price relationships of the two products will tend to be in line (Tr. 1230), respondents have not explained why that "line" cannot be drawn at sharply lower plywood prices — *for both southern and western plywood* — which reflects the enormous new capacity and locational cost advantages of southern mills.

Respondents' retained economist, Dr. Steiner, testified that he would have expected Southern plywood to have found its own independent pricing level by this time, and that the level would approximate the costs, allowing for a fair profit, of the most efficient producer. (Tr. 3625-28.)⁹² Instead, southern plywood prices and profits continue to reflect phantom freight from the West Coast (see Findings 132 and 137 for proof of *increasing* southern prices and profits) rather than a trend toward a competitive price as established by the most efficient producer.

Oddly enough, because of phantom freight the most efficient producers in the plywood industry have *lower* profits than the less efficient mills. This is illustrated by the fact that although southern delivered prices are lower than western, the operation of the industry's phantom freight formula, nevertheless, produces higher profits for the southern mills than the more efficient western "sheathing" plywood mills. For example, in 1973 western sheathing was being sold by Georgia-Pacific's [88] western plants producing predominantly sheathing — the most efficient sheathing plants in the industry (Finding 140) — at a net average price of \$89.61 per thousand square feet (calculated on the basis of delivered price less actual freight) while southern plywood was being sold at a net average price of \$100.03 (*i.e.*, including West Coast freight, less actual freight). (RX 452 *in camera*.) The record shows that at a price of \$89.61, Georgia-Pacific was able to realize a substantial profit before taxes on sales of western plywood from its efficient western "sheathing" mills of \$23.77. The record shows, however, that a price of \$100.03 for southern plywood produced a still higher profit of \$26.83. (RX 452 *in camera*.)⁹³

128. The rationality of the objective of the southern pine plywood mills — to achieve a southern pine price at or near a western fir price — was further articulated as follows:

(a) The delivered price of fir plywood (which includes West Coast freight *paid to the railroads*) had established the "value" of the product and respondents were entitled to realize that "value" by use of the West Coast freight factor. (Tr. 1142-44, 1151-52, 1634-35.)

(b) Sale of southern pine plywood at substantially lower prices — say, by using actual freight — would have produced an undesirable result (to the producers), namely, "If we were under the price that somebody else [89] was paying by very

⁹² It is doubtful that further entry into the South will be so significant as to erode prices and profits. The American Plywood Association predicted that "By 1973. . . most really substantial increases in Southern capacity will have been accomplished. From that point on, any additions will be primarily a matter of expanding existing facilities." (RX 10J.) In fact, the prediction has been proven quite accurate. (See RX 11E and CX 133C.)

⁹³ The profits of Georgia-Pacific's southern plywood mills declined in the deep recession years 1974 and 1975 — in addition to the building recession, there were strikes in southern mills (RX 452 *in camera*; Tr. 4220, 4222-23); it should be noted, however, that except for two years, between the period 1964-1975, Georgia-Pacific's southern mills usually had substantially higher profits per thousand square feet than all of Georgia-Pacific's western mills. (RX 456 *in*

1

Initial Decision

much, they would just take all of our plywood and that would be the end of it." (Tr. 1754.)

(c) Although freight costs from the South were substantially less than southern rates, there was no cheaper price realistically available in the market. As a Willamette official explained:

He [the customer in the South] couldn't buy plywood any cheaper from anyone else so there was no reason for us to cut our price. (Tr. 1754.)

(d) As for the substitution of the neatly predictable West Coast rate for the extremely unpredictable southern schedule, it is respondents' view that the plywood business is "competitive enough" without this added complication. (Tr. 2741.)

Price History

129. When southern pine plywood was first sold, respondents used the same base prices as western plywood, and with the addition of West Coast freight arrived at delivered pine prices which were the same as western delivered prices. (CX's 2A-B; Tr. 1003-04, 1421.)⁹⁴

[90] 130. The basic policy of respondents has been to attempt to sell southern plywood at or near the delivered price of western plywood, with the difference between actual freight and West Coast freight, to be taken as an incremental gain for the southern mills. (CX 99V(1); RX's 90A-B; Tr. 1394, 1431, 2203-06, 2210-11, 2216, 2610; Findings 72-73.)

131. Despite the plan of respondents to charge a delivered price for southern plywood which was the same as the delivered price of western plywood, differences in the prices of the two products developed. The record shows the following:

(a) Because southern plywood was perceived at the outset of the industry as inferior in quality to western plywood, southern mills found that it was necessary, shortly after the introduction of pine, to sell the new product at a price which was slightly less than the delivered price of western plywood. (Tr. 953, 1636, 1673, 1753, 1759-60, 2203-04, 2610-11, 2737-40, 2790-91.)

(b) Although southern pine plywood is considered by industry members as equivalent in quality to western fir (Tr. 2832-33), consumer preference for fir has persisted (Tr. 1472, 1676-77, 2873), as have somewhat lower prices for pine plywood during most of the period 1963 to the present. To illustrate, during the period January, 1969 to August, 1971, *Random Lengths* issued 134 reports where a direct comparison can be made between western and southern prices for 1/2 inch 3-ply sheathing. In 13% of the reports, the prices are the same. In 15% of the reports, southern plywood was higher than western (about half the time, a difference of \$2 or less). In 72% of the reports, western was higher than southern, but the differences in these reports were within a narrow range: 21% — a \$1 difference;

⁹⁴ See also a 1965 report prepared for MacMillan-Blodel (Tr. 1073-74) which stated:

Southern Pine Sheathing is sold on a basis of the DELIVERED price of West Coast Sheathing, less actual freight at Southern rail rate to point of destination, less functional discounts of 5/3/2%. (CX 665D.) [Emphasis in original].

Initial Decision

91 F.T.C.

51% — a difference of \$2 or less; 68% — a [91] difference of \$3 or less; 84% — a difference of \$4 or less. (RX's 424A-426Z7.)

During the deep recession year 1974, sharper differences were reported. In none of the 50 *Crow's* for this period were western prices cheaper than southern prices, and in only three reports were the two products priced the same. In over half of the reports, the differences range between \$4 and \$9. (CX's 928A-Z31.)⁹⁵ It is significant, however, that even during 1974, and after the massive increase in southern capacity, the prices of the two products tended to be in parity when prices were rising, reflecting presumably an increase in demand and the fact that more plywood was being bought. For example, in the week of March 15, 1974, the price of western plywood rose to \$145. (CX 928N.) It remained near that level for the next four weeks when the prices of southern and western were reported as:

<i>Western</i>	<i>Southern</i>
150	150
142	140
145	143
145	145

(CX's 928o-Q, 933B)

[92] (c) The prices of western and southern plywood tend to be close in markets where both kinds of plywood are sold in significant quantities. (CX 462D; Tr. 911, 1679-80, 1762-63, 1867, 2212-15.)⁹⁶ And while the *exact* same price for fir and pine is uncommon (Tr. 502), a non-respondent producer observed that currently "there is not that much of a difference in price between fir and pine." (Tr. 1099.)

(d) The long range objective of the plywood industry is to abolish all price differences between pine and fir. In the words of one Georgia-Pacific official:

Certainly, we hope to bring the market together by bringing Pine up rather than Fir down. (CX 571A.)⁹⁷

[93] As for the original reason for the price variation — quality differences — the producers of southern pine plywood have at least attempted to eliminate this source of price differences:

It is important to note that Southern Pine plywood producers have joined the grading and quality control program of the western producers. Consequently, all

⁹⁵ Whatever differences may have existed in southern and western prices did *not* eliminate the phantom freight or freight "pick-up" which resulted from use of West Coast freight. For example, in 1974 the average reported differential between western and southern 1/2 inch CDX 4-5 ply prices was less than \$9.00. (CX's 928A-Z31.) During the same period, the West Coast rates in the most easterly zone ranged between \$2.19 and \$2.51, which means that the freight charge on southern plywood delivered subject to West Coast freight was between \$33.40 and \$38.30. (CX 928B, M, Z2.)

⁹⁶ Testimony respecting sharply higher prices for fir in the South is largely hypothetical since fir sheathing is no longer an important factor in the South where most southern plywood is sold. (Tr. 1761-62, 1867, 2212.) See also CX's 571A, 573A, and Tr. 1475, 1664-65, 1679-80, which show that outside of its primary marketing area in the South southern pine is sold at prices substantially above the southern plywood prices reported in *Crow's*.

⁹⁷ Georgia-Pacific's distribution chief testified, "We may not always hit our objective right but that is our objective, to sell it [Southern Pine] as close to that price of the competitive product." (Tr. 1635; see also Tr. 1679.) The pattern has been that wherever there is an inadequate supply of fir sheathing, the price of pine sheathing approaches the fir price. (Tr. 2886.) Note in this connection that fir production is moving toward the more profitable sanded and

softwood plywoods fly under one flag, as opposed to flags of various competing species. (CX 462i; see also CX 370.)

132. Notwithstanding the massive increase in capacity brought about by the opening of the southern pine industry, there has been no downward trend in plywood prices. In 1974, when the industry "suffered as a consequence of the most severe and prolonged housing depression in history" (RX 11D), the yearly high for 1/2 inch 3-ply sheathing, southern and western, was about \$150. (RX's 458A-459B.) This price was substantially higher than the yearly high for either product reported during the period January 1969 to August 1971. (RX's 436-447.)⁹⁸ [94]

*Entry*⁹⁹

133. The profitability of the southern plywood industry (Finding 137) has attracted new mills. In 1969, 34 southern plywood mills were in operation, producing 21 percent of the total plywood produced in the United States that year. By 1974, there were 55 southern mills which accounted for 32.3 percent of total U.S. Plywood production, and 45.7 percent of total sheathing production. (RX's 11E-F, Q.) The record indicates, however, that since 1973 significant new entry has become unlikely.¹⁰⁰

134. Statistics published by the American Plywood Association indicate that during the period from 1963, when the first southern plywood mills were opened, until 1973, the number of western mills decreased from 157 to 139. During the same time period, the production of softwood plywood, as reported by the American Plywood Association, increased 79 percent from 10.2 billion square feet (3/8 inch basis) to 18.3 billion square feet. Sixty-nine percent of this increase was accounted for by the southern mills which, as indicated above, by 1974 accounted for 32 percent of total industry production. (RX 11E-F.)

135. By the early 1970's southern pine plywood had virtually displaced Douglas fir plywood in the South with some notable exceptions such as sanded plywood which is still made predominantly

⁹⁸ See also CX's 839B, H, and RX 301 for evidence of all-time high plywood prices in 1973 when the early 1970's housing boom was still having an impact. (RX 455B and Tr. 1720, 2247.) For price ranges between 1969 and the first six months of 1974 see RX 301; see also CX 461, p. 48 for price range between 1967 and first six months of 1972.

⁹⁹ There is little in the record about the current cost of entry into the plywood industry except that it has gone up precipitously in the last few years. (Tr. 1531-33, 2697.) In order to build its huge Bonner, Montana plywood operation in 1973, it cost U.S. Plywood \$114 million for land and timber, plant site, and sawmill. The mill, rated at 300 million feet annual capacity, cost \$25 million. (Tr. 2721-22.) A mill in Alabama rated at 120 million feet annual capacity was estimated to cost \$11,642,000 to build in 1974. (CX 844C *in camera*.)

¹⁰⁰ See note 92 *supra*.

in the Pacific Northwest. [95] (CX 110W; Tr. 1088-99, 1383, 1762, 2044, 2212, 2792.)¹⁰¹

136. The record shows that despite the original apprehension about quality, the difference in price between West Coast plywood and southern plywood led to this acceptance of southern pine plywood. (Finding 131 and Tr. 1438-39, 2793.) Respondents, however, producers in the West as well as the South, have accomplished objectives which are advantageous to them in both geographic areas as a result of the realignment of industry production patterns.

To begin with, this realignment did *not* mean a precipitous drop in the profits of respondents' western mills. In the pre-recession year of 1973, Georgia-Pacific's western mills showed a profit which was more than three times higher than the profits of its western mills at the outset of the southern pine industry in 1964. (RX 456 *in camera*.)¹⁰²

What the realignment does mean is that the southern mills have absorbed the increased demand for sheathing in the South while production in the West of sheathing remains static. (CX 178A; RX 11E.) But stable or even decreased production of sheathing in the West is not unwelcome by respondents considering the raw material problem in that area. Much of the timber supply available to western producers is on public land, unlike the South where an adequate timber supply is owned or leased by the mills. In the period 1970-1975, the amount of available public timber had been sharply reduced and with the withdrawal of millions of acres from commercial use the cost of Douglas fir stumpage had increased by 313 percent. [96] (RX 11L; see also Tr. 1376 ("timber on the West Coast was becoming harder to procure at an economic price, there were vast stands of southern-pine timber available at what appeared to be . . . excellent purchases") as well as Tr. 1384 ("our timber base was shrinking on the West Coast") and Tr. 1424 for contrasting impact in the West and South of bids on forest sale timber.)¹⁰³

Against this background of a shortage of timber and increasing prices in the West, the realignment, when combined with the use of West Coast freight, has accomplished the following:

(a) Respondents' western mills are able to concentrate on high price and high

¹⁰¹ To this day, the southern mills have not been able to produce a satisfactory fully sanded product because of the wide grain of pine. (Tr. 1378, 1381.) Sanded and specialty products bring a considerably higher return than sheathing. (Tr. 1381.)

¹⁰² In contrast, a large number of worker-owned plywood mills on the West Coast have either been phased out or been acquired by other companies. (Tr. 2723-24.)

¹⁰³ For additional evidence respecting western and southern timber supply and prices, see CX 495B; Tr. 1376-77, 1527-28. See also RX 69L for indication that even during the housing depression of 1974, producers of plywood bid up federal timber to extremely high levels underscoring "a strong concern over the prospects for a steady and adequate

profit specialty items including fully sanded plywood which is not produced in the South.¹⁰⁴ Weyerhaeuser, in fact, anticipated in 1970 that "Sanded plywood which is primarily western Douglas fir should benefit from a shrinking raw material availability." (CX 110Z8 and see Tr. 2208.) Because of the shrinking timber base, Georgia-Pacific has converted its Coos Bay, Oregon mill from a mix of 30% sanded - 70% sheathing to 100% sanded. (Tr. 1385.) The significance of this conversion is manifest. Even in 1973 before the conversion was completed the net profit before taxes of the Coos Bay mill was \$36.17 per thousand square feet (CX 483B *in camera*), as compared to \$22.83 for all Georgia-Pacific western mills and \$26.83 for all Georgia-Pacific southern mills. (RX 456 *in camera*.)

[97] (b) Western sheathing has been withdrawn from the South, but continues to dominate in many Northeast, Central and North Central markets although these markets are closer to southern mills than they are to western mills. (Compare western sheathing distribution in RX 11U with southern sheathing distribution in RX 11Z1.) The record indicates that in areas outside of the South, where fir sheathing predominates, respondents' policy is to resist any erosion of fir prices which might be caused by pine shipments. Thus in 1970, the Georgia-Pacific Minneapolis branch manager reported on a maverick in his area who bases his prices "on Crow's So Pine, where-as this market can demand Crow's West Coast." (CX 545A; see also Finding 131(c).)¹⁰⁵

(c) Southern sheathing has replaced western sheathing in the South at prices which represent a discount from western base prices to which West Coast freight has been added. This "southern" delivered price, loaded with phantom freight (see note 93, *supra*), produces an impressive level of southern mill profits. (Finding 137.)

137. The entry of new southern mills had led to neither a general downward trend in plywood prices (Finding 132) nor has it affected the profitability of established southern mills. In 1964, Georgia-Pacific's net profit before taxes per thousand square feet of plywood produced in southern mills was \$10.40. In the pre-recession years of 1972 and 1973, Georgia-Pacific's profit margin on southern production had risen to \$28.49 and \$26.83, [98] respectively.¹⁰⁶ A sharp decline of profits in the recession year 1974 (when the building industry collapsed and several southern mills were on strike), was followed by a handsome increase of Georgia-Pacific's southern plywood profits in 1975. (RX 456 *in camera*; Tr. 4220, 4222-23.)

138. Many "entrants" into the southern plywood industry are firms

¹⁰⁴ See note 101, *supra*.

¹⁰⁵ Note that in 1976, Georgia-Pacific's Minneapolis branch is obtaining the same price for fir and pine. (Tr. 1679.)

¹⁰⁶ As late as 1973 Georgia-Pacific anticipated that the construction of a new southern plywood plant would produce a return on investment after taxes of 16.4 percent, a projected capital recovery period of 4.2 years (estimated cost of plant \$11,642,000), net profit before taxes of \$31.92 (per thousand square feet) on average net sales of \$104.19 (per thousand feet). (CX's 844A, C, E *in camera*.)

Weyerhaeuser's southern plywood mills have been significantly more profitable than its western plywood mills in terms of profit contributions as a percentage of sales. (CX's 897A-926 *in camera*.)

Sheathing, in general, and 2 x 4 studs were the most profitable items sold by Champion in 1972 when measured as a percentage of sales return to manufacturing. (CX 859.)

While Boise's Moncure Mill has had losses (CX's 422A-E *in camera*), its management projected a return on investment before taxes of 34.6 percent in 1973, 48.7 percent in 1974, and 50.5 percent in 1975. (CX 364i *in camera*.) Moncure's losses are attributable to fires, excessive down time due to mechanical failures, a shortage of fuel, labor and management problems. (CX's 364D *in camera*, 814 *in camera*, Tr. 2481, 2505, 2508, 2985.)

with investments in West Coast operations. Respondents, all of whom operate western mills, own 33 of the 55 southern plywood mills in existence in 1974. (Findings 35, 40, 44, 50, 54, 133.)

139. New entrants have been encouraged to follow existing practices. One potential new entrant, Owens-Illinois, was told that Georgia-Pacific would distribute [99] the output of the Owens-Illinois plant on the basis of an agreement which used the West Coast freight formula. (CX's 489A, 601A.)

140. On the basis of this record, I cannot make a conclusive finding with regard to the overall comparative production costs of the southern and western mills. At the opening of the southern plywood industry in 1963, Georgia-Pacific found that it cost no more to produce southern plywood than it did to produce western plywood (Finding 65; see also Tr. 2618-19, 2625-26, for similar experience of Champion, but for evidence of higher southern costs, see Tr. 955, 1036-37, 2737-39.) Moreover Georgia-Pacific anticipated that in the long run it would cost less to produce southern plywood. (RX's 90A-B.) There is also evidence that there is a long run trend toward higher stumpage prices in the West because most of the timber there is on public lands. (Finding 136.) On the other hand, because of certain characteristics of the southern pine species, the production process for southern plywood may have produced some higher costs, particularly in the early stages of the industry. (CX 487A; Tr. 955, 1036-37, 1377-78.)

Complaint counsel introduced evidence showing that the costs of producing most thicknesses of sheathing plywood in the South in 1973 were less than the overall costs in the West. For example, for 1/2 inch CD interior 4 ply with exterior glue, the overall western cost was \$114.73 (CX 843, p. 23) as compared to \$111.94 in the South. (CX 842, p. 21.)¹⁰⁷ Respondents, relying on the same sources as complaint counsel (American Plywood Association annual cost reports) showed that overall costs in 1974 in the South — \$134.11 (RX 449, p. 21) — were higher than in the West — \$130.40. (RX 450, p. 13.)¹⁰⁸

[100] Respondents also introduced evidence that the most efficient sheathing-producing plants are the western plants where 80 percent or more of the production is sheathing, and 20 percent or less is sanded or other plywood products. APA 1974 data shows that costs of these so-called western "sheathing" mills — \$119.30 (RX 450, p. 13) — are

¹⁰⁷ Also, during the entire period 1969-1972, average plywood manufacturing costs were lower in the South than in the West. (CX 838C.)

¹⁰⁸ There are no APA data for the years prior to 1974 showing "sheathing" mills.

Initial Decision

substantially lower than the costs of southern mills, all of which produce sheathing mainly.¹⁰⁹ The usefulness of this evidence is diminished, however, because of the exclusion, in the comparison, of all sheathing which is manufactured in the West by so-called "mixed" plants, that is, mills in which production of sheathing is less than 80 percent of the total. As it happens, these so-called mixed mills account for almost half of *total* western production sheathing and therefore the exclusion, according to complaint counsel, makes respondents' comparisons suspect. Respondents, on the other hand, argue that inclusion of the so-called mixed mills (as in the 1973 American Plywood Association data) produces a comparison of western and southern costs which is inherently unreliable because the accounting procedures of the American Plywood Association do not permit proper allocation of certain "green end" and drying costs of mixed mills to sheathing production. (CX's 932A-C.) These conflicting claims of the parties cannot be resolved on the basis of the exhibits and limited testimony respecting comparative costs. Accordingly, I make no general finding on the overall costs of producing western plywood as compared to southern plywood, although there are specific findings relating to costs and profits which are derived from data which does not involve possible discrepancies in APA reporting procedures. (See, for example, Findings 127, 137.) [101]

Other Factors Influencing Plywood Prices

141. The West Coast freight factor has become a focal point for southern yellow pine plywood pricing. (Findings 102-113.) Furthermore, the West Coast rate when combined with "association" weights and common reference to *Crow's* and *Random Lengths* prices has removed a large measure of price uncertainty. (Findings 82, 88, 89-99.) The effects of these practices are to maintain southern prices at an artificially high level reflecting phantom freight, and to keep transactional price variations within a narrow range. (Findings 73-79, 86-99, 110-112, 117-119.)

The record shows, however, that the range of prices, even if it is narrow, is important enough to plywood buyers and sellers, particularly brokers, middlemen, and purchasers for distribution outlets so that they invest time and effort when placing orders in probing the market by telephone for the most favorable transactional price. (Tr. 479-80, 89-90, 871, 1083-84, 1752-53, 1904, 1936-37, 2094-95, 2126-29, 2222-23, 2340, 2482, 2766-67, 2780-81, 2890-92.) Respondents, however, have

¹⁰⁹ One major reason for the change was higher glue costs in the South where pine plywood production requires more expensive adhesives. The cost of phenol-based glues rose dramatically in 1974 because of the oil price increase. (CX 11H.)

exaggerated the intensity and scope of this bargaining process, and specifically reject the notion, advanced by respondents, that plywood sold in an "auction market" in which, at any point in time, wide variations in prices are the rule rather than the exception. Everyone in the plywood industry knows that negotiations are narrowly circumscribed by *Crow's*, West Coast freight, association weights, and standard discounts. (See Findings 74-112.)¹¹⁰

[102] That *some* bargaining takes place is not in dispute and is shown, for example, by the contracts written on a "PTS" basis which may have the price term expressed as either a small addition or reduction from *Crow's* or *Random Lengths*. (CX's 79A-F, 90, 195-9205B, 209A, 219A-C, 227A, 353 and Finding 110.) As indicated in Findings 92, 110-112, the record shows that the mix of the purchases and the quantity involved influence transactional prices in "PTS" contracts as well as spot sales.

142. The formula used by the southern plywood industry — *Crow's* or *Random Lengths* plus West Coast freight multiplied by association weights — results in fairly predictable prices to direct mill customers and distribution outlets in the freight zones radiating from Portland, Oregon to the East. (Finding 100.) This predictability is subject to distortions, however, to the extent that there are "add-ons" or "phantom charges" — amounts which are *added* to the delivered price. There was testimony that while all respondents use West Coast freight zones in their direct mill and distribution outlet pricing, they increase, or attempt to increase, the delivered price for sales outside of the primary marketing area by the amount of extra actual freight to the non-primary area. In effect, the use of "add-ons" may produce small concentric circles originating at the mills and branches, which are superimposed on the West [103] Coast zones, and could result in prices *above* the level established by adding West Coast freight.

Essentially, "add-ons" are designed to compensate the mills and distribution centers for freight "loss" they would incur if more than the primary area actual freight were deducted from the phantom freight as computed from the West Coast. (CX's 112B, 137A-B, 203A-E, 54600A-B, 614A-M, 624A; Tr. 860-61, 1546-47, 2041-43, 2712-16.) The significance of "add-ons" is questionable, however, because there

¹¹⁰ The fact that plywood producers and dealers as well as trade publications have an overblown view of the competitiveness of the plywood industry is consistent with the Commission's experience with "the rarity with which industry witnesses . . . ever acknowledge the absence of vigorous competition in any form." *British Oxygen Company v. CCH Trade Reg. Rep. 1973-76 Transfer Binder*, ¶ 21,063 at p. 20,919 n. 26 (1975) [86 F.T.C. 1241]. Besides, the very testimony cited by respondents in support of the notion of intensive negotiations over price is hedged with caveats. The *Crow's* publisher testified "they will spar *sometimes* between each other" (Tr. 547) and a dealer witness testified "if you have a difference of opinion as to what the prevailing price should be" than a counteroffer is made. (Tr. 293) Contrast this with the unequivocal testimony of the ex-manager of a Georgia-Pacific branch in Florida, one of the key plywood markets. ("normally your customer knew the cost of that plywood before he ever even called you up. because

little evidence indicating that sales are made outside of the primary marketing area of the southern mills. (See CX's 356C, 560A.) What the record does show is that all sellers attempt to sell east of the mill (where the West Coast rate increases) but yet as close to the mill as possible to reduce freight "loss" and realize the highest net mill return. (Finding 114.) In sum, there is little evidence of a substantial volume of sales at different prices either to direct mill customers or to distribution outlets within a single West Coast freight zone.¹¹¹

143. Complaint counsel failed to prove that any of the practices engaged in by respondents — use of West Coast freight, adoption of association weights, and common use of *Crow's* or *Random Lengths* as base prices — has resulted in exactly matching price offers to any customers [104] although, as indicated in Findings 92, 110–112, the record shows that differences are usually kept within a narrow range.

144. In addition to the factors cited in Findings 92, 110–112 which create some variation in transactional prices, there are cyclical pressures which influence plywood price levels. (Findings 145–151.)

145. Conditions beyond the control of respondents, such as a change in the number of housing starts (a volatile factor tied to interest rates and the general state of the economy) affect the level of plywood prices. (CX 110G; RX's 13i, 14A–B, 69Z9, Z47–Z48, 83; Tr. 558–59, 1966, 2338, 2785–87, 2871–72.)¹¹²

146. Weather conditions, boxcar shortages, and strikes also impact on plywood price levels as they affect production and the demand for plywood. (CX's 498, 644A; RX's 69Z1, Z5, 85, 317, 326; Tr. 675, 693, 1422–23, 1425, 2461–62, 2785–87, 2933–34.)

147. As demand changes, the length of the mills' order files (unshipped orders) tends to influence price levels since plywood sellers aim to avoid inventory buildup as well as a situation where there are too many orders. (CX's 326D, E *in camera*, 504B; RX 69R; Tr. 447–48, 1078–79, 1425–26, 1595–97, 2336–37, 2461, 2598.)¹¹³

[105] 148. Several witnesses testified that respondents have a corporate "philosophy" to operate at full capacity and that this, too,

¹¹¹ Witnesses were asked typically a series of hypothetical questions by respondents' counsel which assumed an opportunity to sell to a nearby customer at one price while another, more distant customer (in the same West Coast freight zone) was "competing" for the same wood. Uniformly, the witnesses testified that they would prefer to sell to the nearby customer and would only sell to the more distant customer if a higher delivered price was offered. (See, e.g., Tr. 1447–48, 1666–67.) In the real world, respondents' sales personnel use a single delivered price for primary markets within a particular West Coast freight zone, and sell most of their plywood to these primary customers at the same price. (See Finding 100.)

¹¹² A good building year — over 2,000,000 new housing starts — will drive plywood prices up. (Tr. 1423.)

¹¹³ A Champion official testified as follows with respect to the influence of the order file:

[I]f we have an order for every single quotation that we made, we would shortly have so many orders we wouldn't know what to do with them. So we would have to raise our price to keep the order files from getting into an untenable situation.

Conversely, if we didn't get any orders, we would know our prices are too high and we would have to lower them in search of the market price. (Tr. 2742.)

influences price levels. (Tr. 1387, 1602A, 1761, 2207, 2337, 2481, 2567-68, 3009.) But the record shows that this "philosophy" notwithstanding, in slack periods mills are closed down (Tr. 1862, 2337, 2394, 2481, 2744), or production is cut back. (CX 133C, 326E *in camera*.)¹¹⁴ Weyerhaeuser's overall objective in pricing is —

To conduct our business in a manner as not to contribute to continued severe pricing declines by forcing production into a weakening market, and to eliminate to the extent possible wild price swings. (CX 896.)¹¹⁵

[106] In addition, mills go "off the market" for short periods of time for tactical reasons. (CX's 393, 415o, 853B; RX's 306B, D, E; Tr. 2408.) Moreover, there is other evidence indicating a substantial gap between corporate "philosophy" and practice. For example, in 1974 when a depressed housing market sharply reduced plywood demand, 25 mills closed down and the industry as a whole operated at only 77 percent of capacity. (RX 11K; see also CX 848 for evidence of less than capacity production during part of 1969 and 1970.)¹¹⁶ On the other hand, complaint counsel presented no evidence showing a systematic adjustment of capacity in order to stabilize prices, and there is evidence that at times excess production may result in a willingness of plywood producers to accept lower prices. (CX 570A; RX 69N.)

149. Some western plywood is sold to brokers or other middlemen who then ship the plywood east in anticipation of a future sale although no actual sale had yet been made. When these so-called "unsold rollers" come to rest at a "diversion" point (or "hit the bumper" in the industry jargon) they must be sold quickly because of high demurrage charges. The existence of these "unsold rollers" may depress plywood price levels (CX 678, p. 11; RX's 69Z36, 309A, 317, 334; Tr. 462-65, 687-88, 874), but unsold "rollers" represent a small proportion of total plywood sales (Tr. 3752)¹¹⁷ and there is no evidence that a significant amount of southern plywood is sold on such a basis.

[107]

150. There is no reliable evidence that speculation in plywood

¹¹⁴ The statement of the "philosophy" itself is ambiguous. The Weyerhaeuser official who stated that it was policy to "run it at capacity" immediately added "unless it got too terribly bad we would have to curtail production." (Tr. 2207 and see CX 896 cited in text to this Finding.) By the same token, a U.S. Plywood official who said on direct that his company operates at "optimum production levels" (Tr. 2567) acknowledged on cross that two plants had been recently closed because of the "horrible market." (Tr. 2744.) It is also significant that respondents' overall capacity to produce sheathing, the main product of the southern mills, has been adjusted to the extent that western mills are switching to the production of high-profit sanded and specialty items. (See Finding 136(a).)

¹¹⁵ For similar policy at Georgia-Pacific, see CX 559C.

¹¹⁶ Mill shut downs are not confined to slack periods. Even in rising markets, some mills may refuse to quote prices in anticipation of still higher prices in *Crow's* and *Random Lengths*. (See CX 853B.)

¹¹⁷ See also CX 115, which indicates that the sale of an "isolated distress car" is an exception to the Weyerhaeuser

1

Initial Decision

futures on the Chicago Board of Trade affects transactional prices, or has any relevance whatever to the issues raised in this complaint.¹¹⁸

151. Complaint counsel failed to prove that plywood prices are maintained at a stable level by reason of any of the practices engaged in by respondents. To the contrary, there is uncontroverted evidence of price fluctuations in both western and southern plywood base prices caused by the cyclical factors discussed in Findings 145-147. The record shows, for example, that the base prices — as reported by *Random Lengths* — could not be maintained at a stable level in the face of a severely depressed building market in 1974-1975. (RX's 69Z4, Z19.) For additional proof that price fluctuations occur regularly see CX 96D; RX's 83, 436-447, 458A-459B.¹¹⁹ But however often base prices may change the southern plywood industry inevitably adds West Coast freight to the new base prices as reported in *Crow's* and *Random Lengths*. (Findings 72-80, 89-99.)

III

DISCUSSION

Softwood plywood, an essential building material of the housing industry, was manufactured prior to 1963 by respondents and other producers exclusively from the [108] Douglas fir trees grown in or near the Pacific Northwest.¹²⁰ This western fir plywood, which still accounts for about 60 percent of plywood production, is sold to buyers located throughout the United States¹²¹ at mill prices to which a substantial freight charge is added in order to arrive at delivered prices.¹²² The freight charge from the western mills is the *actual*¹²³ freight from the Pacific Northwest to eastern freight zones, and is taken from the so-called "West Coast" or Portland, Oregon rail freight rate schedule.¹²⁴

Beginning in 1963, the western plywood producers, led by the industry's largest firm, Georgia-Pacific, entered a new geographic area

¹¹⁸ Counsel for respondents informed the administrative law judge that "we don't intend to base our defense in any respect on the existence of the futures contracts." (Tr. 2986.) Notwithstanding this representation, I have examined respondents' proposed findings 179-180 ("The Plywood Futures Market") as well as the material cited therein. Based upon this examination, I have reached the conclusion stated in the text of this Finding.

¹¹⁹ See also CX 462M, for the following assessment by a Georgia-Pacific official: "There have been dedicated efforts made to control price fluctuation, but little, if any, progress can be claimed. Being a commodity, I fear that our product will continue to suffer from price fluctuations."

¹²⁰ Findings 23, 25, 26.

¹²¹ But see Finding 135 with respect to sheathing distribution in the South.

¹²² Findings 27, 63, 64.

¹²³ The freight charge is inflated, however, by the prevalence of "underweights" in western shipments. (Finding 85.) In addition, the "Inland" mills located in Idaho and Montana set their delivered prices on the basis of the higher freight from Portland, Oregon. (See note 30, *supra*.)

¹²⁴ Findings 64, 67.

— the South, where vast stands of yellow pine were available for plywood manufacture.¹²⁵ The pricing policy followed by respondents in the sale of southern plywood from 1963 to the present is the central point of this case.

According to the complaint, Georgia-Pacific and the four other respondents, whose combined production accounts for over 50 percent of all plywood shipped from southern mills, have followed a practice of refusing to sell at true F.O.B. [109] prices; instead, they charge delivered prices for southern plywood which include the West Coast freight rate rather than the actual freight from southern mills to their customers.

Although the complaint at one point describes the challenged practice — the use of West Coast freight in southern shipments — as a “basing point system” (Complaint ¶ 4), in the main charging section (“Nature of the Offense”) the term “basing point system” does not appear. There, the offenses charged are a combination or “parallel courses of business behavior” which allegedly establish and maintain “a system of delivered prices based on computation of rail freight from the Pacific Northwest for shipments from mills located outside of that region” (Complaint ¶ 17(a)). The complaint further charges that among the effects of these practices are (1) that prices are stabilized and certainly is provided in the pricing of softwood plywood among competitors (Complaint ¶ 18(a)) and (2) actual and potential competition are reduced and hindered (Complaint ¶ 18(b)).

By its very terms, then, the complaint can be fairly read as covering both a “basing point system,” and a system of delivered prices based on concurrent use of an arbitrary freight formula which reduces or hinders price competition. That complaint counsel may have decided not to press one of the two alternative theories pleaded is not prejudicial so long as respondents were apprised of the issues at stake and were given an opportunity to litigate those issues. *ITT Continental Baking Co. Inc. v. FTC*, 532 F.2d 207 (2nd Cir. 1976). Clearly respondents were so apprised since at the earliest stage of this proceeding complaint counsel indicated that they would emphasize a price tampering theory, and that absolute price uniformity, the presumed result of a rigid basing point system, was not to be an essential part of complaint counsel’s case.¹²⁶ [110]

Under either theory, however, the main issue raised by the complaint is the same: whether there is a private arrangement arrived at by formal agreement or otherwise, centering around the use of West Coast freight, to affect prices illegally. To put it another way, the

¹²⁵ Finding 26.

¹²⁶ See, e.g., Pre-hearing Trial Brief of Complaint Counsel at p. 38 et seq. (filed October 14, 1975).

ultimate question that must be decided is whether there is a combination or a conspiracy under the Sherman Act to tamper with price by the use of a West Coast freight factor, or if there is no combination, whether the collective, although non-collusive, use of West Coast freight by respondents when shipping from southern mills is a violation of Section 5 of the Federal Trade Commission Act by reason of its impact on prices.

Before turning to the conspiracy issue and the concepts of "agreement" or "meeting of the minds," I believe it is important first to outline the economic effects of the use of the West Coast freight factor. The reason that the usual order of proceeding — that is, starting with the question of "agreement" ("the initial ingredient of a violation of § 1 of the Sherman Act")¹²⁷ — has not been followed, is that this case is brought under Section 5 of the Federal Trade Commission Act, and the legality of conduct under that statute need not turn on the Sherman Act concept of "agreement." Besides, in *Container Corporation*, the most recent Supreme Court analysis of price-fixing combinations, the Court seemed much more concerned with the economic consequences of what was done rather than with its ability to infer a combination from certain conduct. As in *Container Corporation*, therefore, it must be determined whether the challenged conduct — here, the use of a West Coast freight factor in the South — reduces or interferes with the setting of prices by free market forces. If any such effects on price occur then an agreement relating to [111] West Coast freight would be *per se* illegal.¹²⁸ Furthermore, as indicated later the collective adoption of an arbitrary mechanism affecting price may violate Section 5 of the Federal Trade Commission Act, even in the absence of agreement. Respondents, of course, contend that there is neither an agreement nor collective adoption of an arbitrary pricing device, and that the only influences on plywood prices are the "natural" market phenomena, such as new housing starts, the weather, mill capacities, day-to-day bargaining, and other factors having nothing to do with West Coast freight.

¹²⁷ *United States v. Container Corporation*, 393 U.S. 333 at 335 (1968).

¹²⁸ *United States v. Container Corporation*, 393 U.S. 333 at 337. In the now famous footnote 59 to *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 at 225 n. 59 (1940), Mr. Justice Douglas writing for the Court said: "But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. . . [A] conspiracy to fix prices violates Section 1 of the Act though no overt action is shown, though it is not established that the conspirators had the means available for the accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity." This language was clearly dictum since on the facts in *Socony-Vacuum* proof of effect on prices existed. In any event, even assuming a literal reading of footnote 59 may apply to an explicit price-fixing agreement, it is significant that when Mr. Justice Douglas was confronted with the problem of inferring a conspiracy from conduct in *Container Corporation*, he looked to see whether the arrangement operated to limit or reduce price competition. When he found the effects, he said "The limitation or reduction of price competition brings the case within the ban, for as we held in *United States v. Socony-Vacuum Oil Co.*, *** n. 59 interference with the setting of price by free market forces is . . . illegal." 393 U.S. at 337.

The parties are sharply divided on the facts even to the point where there is a dispute as to whether West Coast freight is actually added or not. On this threshold issue, from my reading of the entire record, I have [112] concluded that respondents do indeed arrive at their price quotations for southern pine plywood by routinely adding West Coast freight to certain base prices.¹²⁹

There is disagreement, too, about most other aspects of southern plywood pricing, but there is little room for argument on the basis of this record about what the use of West Coast freight has not accomplished. Certainly from the largely unexplained and hopelessly disconnected mass of documents that complaint counsel poured into the record, I cannot discern a pattern showing that the use of West Coast freight results in a southern plywood industry which operates as a classic basing point system is supposed to operate: there is no proof in the record of exactly matching delivered price quotes to particular customers; there is no proof that price cutters are "punished" by establishing punitive basing points; and most significantly there is no showing that the industry routinely follows an absolutely uniform base price to which West Coast freight is added, although base prices are usually kept within a narrow ambit of prices appearing in *Crow's and Random Lengths*.¹³⁰

It is especially significant that complaint counsel did not call a single customer of respondents or any other plywood producer who could testify about a pattern of matching prices, although complaint counsel were admonished on several occasions that this is the obvious way to prove that the industry operates in such a way that buyers are confronted in the marketplace by identical prices — the presumed result of a traditional basing point system. The total failure to produce evidence on this point, when evidence is readily available, leads to the conclusion that at least on this particular question — exact price uniformity — the evidence would have been adverse to [113] complaint counsel,¹³¹ and consistent with respondents' position that there is no pattern in this industry of precisely matching prices to each customer.

Moreover, not even the economic staff of the Federal Trade Commission could say that the plywood industry functions according to the classic model of a rigid basing point system. The staff economist called by complaint counsel acknowledged that he was not an expert in the plywood industry, and for some unaccountable reason he had not

¹²⁹ Findings 72-80, 96-99, 126.

¹³⁰ Findings 89-99, 101, 110-112, 143. See Kaysen, *Basing Point Pricing and Public Policy*, Q. J. of Econ., Vol. 63, No. 3 at 289 (Aug. 1949) and Malchup, *THE BASING POINT SYSTEM* (1949) for discussion of components of a rigid basing point system.

¹³¹ Cf. *Mammoth Oil Co. v. United States*, 275 U.S. 13, 52 (1927); *Local 167 v. United States*, 291 U.S. 298, 298 (1934).

read the record in this case, although the same economist, in his masters dissertation on basing points, had decried the failure of government prosecutors to rely more heavily upon expert economic analysis.¹³² I would have expected that if the documents which the government put into the record tend to establish the existence of a traditional basing point system, then this material would have been carefully organized as part of a well-structured economic case. Instead, all that the FTC staff economist did was to present an ABC primer on the way in which a traditional rigid basing point system is supposed to operate (which is hardly in dispute), but he had to concede on cross-examination that he had no knowledge of how close the plywood market actually comes to the academic model he had postulated.

It should also be emphasized that at least one of respondents' objectives (in contrast to the means used to achieve that objective) — a desire to obtain a delivered price for southern pine which approximates the delivered price of Douglas fir — is not the issue in this case. [114] To the contrary, the FTC staff economist indicated that it was rational, in a profit maximization sense, at the start of the southern plywood industry for respondents to attempt to obtain a price for the southern product which was at or near the delivered price of the western product. The FTC staff economist testified that a lower delivered price at the outset of the southern yellow pine industry would have created a disincentive to ship Douglas fir plywood into the areas which might ordinarily be expected to be serviced by the southern mills, but which the southern mills could not adequately supply during the initial phase of their operations.¹³³

Respondents' officers offered a more direct explanation for their pricing policy. According to their testimony, the delivered price of Douglas fir plywood had established the market "value" of the product, and therefore, it was proper for the new southern mills to attempt to obtain this "value" although a significant part of the delivered price "value" of western plywood consisted of actual freight from the West Coast which was paid to the railroads and not realized by western mills. That this "freight pick-up" (the industry terminology for excess of phantom over actual freight) could result in an incremental gain in gross margins (while not upsetting the price of western plywood) was undoubtedly a consideration behind the adoption of the West Coast freight formula: obviously, Georgia-Pacific and the other respondents did not go South to depress plywood prices generally or to reduce profits.¹³⁴ Still another rational explanation

¹³² See RX 86, p. 67. Respondents' retained expert, on the other hand, decided not to read most of the documentary evidence although it was apparent that these exhibits were the foundation of complaint counsel's case. (Tr. 3715-17.)

¹³³ Finding 127.

¹³⁴ Findings 65-73, 127, 128, 131(d), 132, 137.

(offered by one officer of a respondent company) was that any sharp cut in southern plywood prices, say, by taking the West Coast base price and simply adding on *actual* freight from southern mills, would have produced an apparently undesirable result (to him), namely, "we would sell it out right away. . . if we were under the price that somebody else was paying very much, they would just take all of our plywood and that would be the end of it."¹³⁵ [115]

What all these explanations come down to, is that it is not irrational in a profit maximization sense for competitors simultaneously to come to the parallel realization that the long run profits of all firms in an oligopoly setting¹³⁶ will suffer if the price for a demand inelastic, undifferentiated product is cut sharply by one firm; therefore, in their own self-interest and in order to maximize profits, all firms attempt to sell the production from a new geographic area at or near the same delivered prices as the old production area, with any saving in freight resulting from locational advantages viewed as a legitimate source of additional profits.¹³⁷

While the objective of the southern policy of the plywood manufacturers is neither obscure nor irrational, this, of course, does not mean that respondents may use any means to accomplish that objective. The assumption of our competitive system is that the market (pressures of supply and demand, including locational advantages of mills), will determine the price at which southern pine plywood is sold, and that *no* aspect of pricing whatever, including the level of prices, or the intensity of price cuts, or the relationship between fir plywood prices and pine plywood prices, or the stability of prices, may be set by a private arrangement among the producers.

As indicated above, from the record I cannot conclude that there was such a private arrangement to maintain a traditional rigid basing point system. Nevertheless, the record shows ample cause for respondents to be motivated toward a price-tampering arrangement aimed at slightly different objectives than precisely matching prices. [116]

In the first place, there was the obvious point that if pine sheathing plywood could be sold in southern markets near the same delivered price as West Coast sheathing, this would be a source of substantial new profits, assuming the price of western sheathing could be maintained outside of the South, or western production was converted

¹³⁵ Finding 128.

¹³⁶ The five respondents control over 50 percent of southern production, with Georgia-Pacific alone having over 30 percent of the market. (Finding 31.) A tight oligopoly has been defined as an industry with a "very small number (eight or fewer) firms supplying 50 percent of the market, with the largest firm having a 20 percent or higher share. . . ." Kaysen and Turner, ANTITRUST POLICY 72 (1959).

¹³⁷ See, e.g., 50 Cal. 2d 207, 210.

Initial Decision

high profit products which could not be readily produced in the South.¹³⁸ Additionally, respondents realized that demand would soon be expected to pass on to buyers the dramatic savings in freight which were at least theoretically possible as a result of the new mill locations.¹³⁹ There was apprehension, too, that if building starts declined, the new mills would create excess capacity pressures, and with their high fixed costs they might become a general price depressant instead of a source of additional profits to be derived from the freight advantage.¹⁴⁰ Finally, the success of the southern venture in generating incremental gains to gross margins might be endangered because there existed a substantial problem relating to widely divergent southern freight rates. Shipments east from the Pacific Northwest mills are made to historically neat and concentric eastern freight zones at the same rail rate irrespective of the western shipping point, with the result that the important freight factor in western shipments is exactly predictable.¹⁴¹ In contrast, the South has a patchwork pattern of widely varied freight rates which differ from mill to mill and from customer location to customer location.¹⁴² Unless doubt about the freight part of southern delivered prices were removed, this, too, might tend to create downward pressure on prices as plywood producers strive to avoid being undersold in a market rife with locational uncertainty. [117]

By using the West Coast freight factor in quoting prices, respondents accomplished several objectives consistent with achieving the goals and resolving the problems outlined above.

First, the West Coast freight factor served as a focal point for an industry-wide plan to fix the price of southern plywood at or near the same level as the delivered price of western plywood, and thereby allow respondents to take the freight "pick-up" as an incremental gain to gross margins, rather than passing on this locational advantage to buyers.¹⁴³ By use of the West Coast freight factor, respondents, in effect, signaled to each other on what to add to base prices and what to cut: they effectively informed each other on where to hold the fort on price competition and thereby keep up the prices of both eastern and southern plywood.¹⁴⁴ This is borne out by record evidence showing that the West Coast freight factor was given a mantle of

¹³⁸ Findings 65-73, 132, 136, 137.

¹³⁹ Finding 69.

¹⁴⁰ Finding 70.

¹⁴¹ Finding 67.

¹⁴² Finding 68.

¹⁴³ Findings 65, 69, 73, 102-112.

¹⁴⁴ For a description of focal points as a basis for tacit agreement among oligopolists see Scherer, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 179 (1971). See also *Wall Products Co. v. Nationalypsum Co.*, 326 F. Supp. 295, 315-16 (N.D. Calif. 1971).

invulnerability ("we should not, in any way, endanger this necessary source of income. . .").¹⁴⁵ With uncertainty as to the possibility of deep price cuts to reflect locational advantages removed, competition was limited to small differences in base prices among respondent firms.¹⁴⁶

Second, by using the West Coast zones in place of the southern freight rate, respondents immediately eliminated the element of uncertainty in their delivered prices which would have resulted from a diverse freight factor. Combined with the use of still another arbitrary pricing element — association weights — all uncertainty about transportation [118] costs was removed.¹⁴⁷ And with the knowledge that each week's bargaining would at least take into account base prices appearing in *Crow's* or *Random Lengths*, a large measure of price predictability was achieved,¹⁴⁸ although it is plain that cyclical pressures which impact on plywood price stability still persist.¹⁴⁹

It should be noted that respondents' own explanation for the adoption of the West Coast device is consistent with the proposition that the use of West Coast freight factor minimally has the effect of reducing pricing uncertainty. According to respondents, by using the West Coast rate, the industry is able to produce southern prices which are easily comparable to the orderly western prices as well as making southern prices, themselves, easily comparable.¹⁵⁰ But the fact that in a relatively concentrated industry, the producers arrange to extend an existing formula, which tends to create price predictability, to a new geographic area hardly argues in its favor. To the extent that western prices are in fact certain and predictable, this results from the happenstance¹⁵¹ of the West Coast freight rate. There is nothing however, inevitable about transferring the predictability of the *actual* West Coast freight factor to the South. As I indicated earlier, *actual* freight from southern mills varies all over the lot and, undoubtedly could have produced a great deal of uncertainty with concomitant downward pressure in pricing. Indeed, the mere fact that respondents take it upon themselves to arrange for the arbitrary transfer of the certainty of West Coast rates to the new southern area is strong evidence of intent to remove what could have been a major source of price competition. [119]

Respondents also say that the price for southern pine is competitive price (presumably set by what the market will bear because at the outset of the southern plywood industry what th

¹⁴⁵ Finding 103 and see Findings 73-80, 96-112.

¹⁴⁶ Findings 110-112.

¹⁴⁷ Findings 82-88.

¹⁴⁸ Findings 89-101, 110-112.

¹⁴⁹ Finding 151.

¹⁵⁰ Finding 125.

market would bear was the delivered price of western plywood which included West Coast freight.¹⁵² However, in a market where almost all of the important sellers are uniformly quoting prices on the basis of West Coast freight, the "market" has no realistic choice as to what it will or will not bear.¹⁵³

Moreover, I am not persuaded by respondents' argument that eventually entry (and increased production) will mean that the freight advantage will be passed on, as prices reach the level of costs of the most efficient producers. There is no sign that this has happened in nearly thirteen years of southern production,¹⁵⁴ or that it ever will happen if the industry is left to its own devices. Since "entry" in this instance largely consists of western producers opening southern mills,¹⁵⁵ they "enter" with a built-in incentive not to undercut the western mills by the full extent of the locational advantage. In fact, this is exactly what happened — the western producers all followed the Georgia-Pacific lead and used the West Coast rate to price southern plywood near the level of the western product. Even new (*i.e.*, non-western) producers who may have been induced to enter the South because of the lure of high profits apparently have found very little cause to challenge a West Coast freight system which produces such favorable results for a standardized, price inelastic product in a concentrated industry.¹⁵⁶ Moreover, as indicated in Finding 133, further entry into the southern plywood industry on a [120] scale significant enough to erode prices is unlikely. As for other market conditions which in the long run may tend to drive the southern price down, it is now clear that the most obvious market influence in the pricing of a product for which the transportation cost forms a substantial part of the delivered price — the proximity of mills to users — has been neutralized by the industry-wide adoption of the very arrangement which is the subject of this proceeding.

To sum up, the West Coast freight formula is simply a convenient private arrangement for maintaining southern plywood prices at a level satisfactory to respondents while facilitating the traditional oligopolistic objectives of containing price cutting and limiting price uncertainty. Such a private arrangement is contrary to the assumption of the antitrust laws that the market should determine all aspects of prices, including at what stage locational advantages are asserted and sharp differences in prices may develop. Here, the respondents have adopted a method by which they can interfere with the operation of

¹⁵² Finding 128.

¹⁵³ Finding 74.

¹⁵⁴ Finding 127.

¹⁵⁵ Finding 138.

¹⁵⁶ Findings 132, 137, 139.

the market mechanism. When competitors adopt such a formula affecting price, this means that a *private* understanding, centering upon an arbitrary device, is playing a key role, rather than the market itself, in determining whether the objectives of obtaining the same (or nearly the same) price for western and southern plywood and limiting price uncertainty are realized or not. I believe an arrangement of this sort is unlawful whether it is considered as either (1) a conspiracy under the Sherman Act, or (2) an unfair method of competition under Section 5 of the Federal Trade Commission Act.

Turning first to the Sherman Act¹⁵⁷ and the conspiracy issue, it has been the rule since *Interstate Circuit v. United States*, 306 U.S. 208 (1939) that when competitors accept (even without previous formal agreement) [121] an invitation to participate in a plan, the necessary consequence of which is restraint of trade, this is enough to establish an unlawful conspiracy or combination.¹⁵⁸ Accordingly, it can be argued that when Georgia-Pacific's West Coast phantom freight formula of quoting prices was assiduously followed by the others, and thereafter all respondents maintained a system of quoting prices which was based on the artificial factor of West Coast phantom freight, this represented a meeting of the minds or, if you will, an illegal tacit agreement in the *Interstate Circuit* sense.

But whatever the ultimate reach of *Interstate Circuit*, clearly it does not mean that *every* action of an industry innovator or leader which is followed in turn by competitors is tantamount to an "invitation" and "acceptance" from which an unlawful *Interstate Circuit* combination can be inferred. In *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954), for example, the Supreme Court held it was not error to deny a directed verdict on a conspiracy charge in circumstances when parallel conduct could readily be explained as the pursuit of individual self-interest without regard to competitor reaction, although it was undisputed that each firm was aware of the action of its competitors. On the other hand, it has been suggested that an *Interstate Circuit* agreement may be inferred if there is evidence of anticompetitive effects flowing from *interdependent* conduct when the action of each firm is made in expectation that others will follow, and the conduct under examination is consistent

¹⁵⁷ Section 1 of the Sherman Act reads as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. . . . 15 U.S.C. § 1 (1964).

¹⁵⁸ See also *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946) ("The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an agreement of competitors.")

Initial Decision

with the self-interest of each firm only if it is certain that all competitors will do the same.¹⁵⁹

[122] Applying the rationale of "interdependence" to this case, it is possible to infer an *Interstate Circuit* agreement or combination from the fact that no one respondent could expect to sell pine plywood at or near the delivered price for fir plywood unless it were certain that another respondent would not take full advantage of its locational edge, cut pine prices so as to reflect actual freight only, and thereby hope to increase its market share. If, however, combinations are to be inferred solely on the basis of such interdependent calculations, it would mean that practically all pricing decisions in relatively concentrated industries would have conspiratorial overtones, given the fact that when the number of sellers is small, and the demand for a standardized product is inelastic, competitors can scarcely avoid full recognition of their mutual dependence upon each other as they seek to maximize profits at the right price.¹⁶⁰ But whether or not such mere interdependence in concentrated markets is an adequate basis for an inference of illegal conspiracy, is a question I do not have to reach on the facts of this case. For here, something extra — a clear signal, a helping hand if you will — was added to the *mechanics* or *process* of interdependent decision-making; namely, by use of the West Coast rate schedule the coordination of oligopolistic decision-making around a convenient focal point was made possible, and the unpredictable element of freight variations inherent in the southern freight rates was removed.

There is ample precedent for the proposition that the use of such private devices to *facilitate* joint profit-maximizing decisions by oligopolists is not permitted under the antitrust laws. In the words of *Cement Institute*, it is the adoption of such "means and measures" and a "handy instrument" to accomplish an otherwise lawful (or at least neutral) result that compels a conclusion that an illegal combination exists.¹⁶¹ It is especially [123] significant that in *Cement Institute*, the Supreme Court noted that an inference of an *Interstate Circuit* "invitational" conspiracy may arise from the fact that all respondents follow a pricing pattern based on an arbitrary freight basing point.¹⁶²

As for its impact on price certainty, the West Coast freight factor has served a purpose similar to the exchange of price information in *Container Corporation*. As in *Container Corporation*, this is an industry dominated by relatively few sellers of a standardized, price

¹⁵⁹ See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal*, 5 Harv. L. Rev. 655, 681 (1962), [hereinafter cited as Turner].

¹⁶⁰ Chamberlain, *THE THEORY OF MONOPOLISTIC COMPETITION* 46-51 (1965).

¹⁶¹ *FTC v. Cement Institute*, 338 U.S. 683 at 713 (1948).

¹⁶² *Id.* at 716, footnote 17, and accompanying text.

inelastic product, in which traditionally a lower price does not mean a larger share of the available business but a sharing of the existing business at a lower return. Knowing this, the rational plywood producer will naturally seek to avoid competitive price cutting. But if he is uncertain about a key element in his competitors' prices, he will be under pressure to edge downward.¹⁶³ The use of the neatly concentric West Coast freight factor in place of the untidy southern rates represents nothing less than an industry arrangement which has been adopted not only as a common rallying point for maintaining southern prices at a level satisfactory to the respondents and for resisting price-cutting pressures, but also to eliminate a large measure of price uncertainty. Even before *Container Corporation*, it was the rule that an inference of conspiracy may be drawn from the use of unnatural pricing formulas involving arbitrary freight rates where nonequidistant sellers were [124] able to match their competitors' prices more easily and "eliminate a kind of uncertainty that is a potent force disrupting stable noncompetitive oligopoly pricing."¹⁶⁴

While I have concluded that a Sherman Act rationale of an illegal implied agreement applies in the circumstances described above, my decision does not rest solely on that basis. I believe that concurrent use by respondents of an arbitrary device which may influence price levels or reduce price uncertainty is an unfair method of competition, whether it comes about from an agreement or otherwise. In reaching this conclusion, I start from the proposition that an "agreement" among competitors is summarily proscribed under the antitrust laws because it is a form of private regulation respecting prices and profits which is contrary to our basic economic assumption that the competitive marketplace will control. See, *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4-5 (1958); *United States v. Trenton Potteries Co.* 273 U.S. 392, 396-398 (1927). This does not mean, however, that the antitrust policy which condemns agreement can be read as allowing other forms of self-serving arrangements which achieve the same result of substituting for the competitive market private decision-making by presumed rivals. The basic policy of favoring the market as the source of pricing decisions is not so limited as to be concerned merely with agreements, tacit or otherwise.

As it happens, the very purpose of Section 5 of the Federal Trade Commission Act was to implement antitrust policy by eliminating

¹⁶³ Chamberlain, *THE THEORY OF MONOPOLISTIC COMPETITION* 51-52 (1965). See also Kaysen and Turner, *ANTITRUST POLICY* 150 (1959) in which the authors describe the function of price uncertainty in concentrated industries as follows:

But in markets where oligopolistic elements are present, some ignorance and uncertainty about the behavior of rivals is an important competitive element in the market, since it prevents "rational" oligopolistic calculation leading to joint maximization of profits.

¹⁶⁴ Turner, *supra* note 159 at 674.

1

Initial Decision

every mechanism which may be devised (including devices for working restraints beyond the traditional method of conspiracy) to frustrate competition. See, *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965); *Fashion Originators Guild of America Inc. v. FTC*, 312 U.S. 457 (1941). In other words, in applying Section 5, there is no necessity for distinguishing between "agreement" and any other form of [125] artificial pricing mechanism including the concurrent, although *arquendo* non-collusive, adoption by competitors of an artificial formula for quoting prices. This is the plain holding in *Triangle Conduit & Cable Co. v. FTC*, 168 F.2d 175 (7th Cir. 1948) *aff'd.* by an equally divided Supreme Court *sub nom. Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949) where the court sustained Count 2 of a complaint which was based on the "concurrent use of a formula method of making delivered price quotations with the knowledge that each did likewise, with the result that price competition between and among them was unreasonably restrained." 168 F.2d at 176. I believe that *Triangle Conduit* is controlling authority on the question of the legality of artificial formula-pricing under Section 5, irrespective of the existence of a Sherman Act conspiracy. The decision in that case is perfectly consistent with the Supreme Court's treatment of the same question in *Cement Institute*:

While we hold that the Commission's findings of combination were supported by evidence, that does not mean that existence of a "combination" is an indispensable ingredient of an "unfair method of competition" under the Federal Trade Commission Act.¹⁶⁵

As for the absence of price uniformity, I do not consider this to be crucial. The mechanism used by the plywood industry is as artificial and as self-serving as an outright agreement in influencing the level of prices, and there is no reason, again, for distinguishing between "agreement" or "device" when it comes to determining the level of uniformity which is required before a violation is found. As indicated earlier, I have concluded that the respondent plywood manufacturers combined to influence the level at which southern plywood was sold by adopting an arbitrary formula which created a pricing focal point and limited price uncertainty. It is of no consequence, [126] therefore, that the practices under consideration did not result in absolute price uniformity, or that certain market factors influencing price levels are beyond respondents' control. The Supreme Court has said that price is

¹⁶⁵ *FTC v. Cement Institute*, 333 U.S. 683, 721, note 19 (1948).

so sensitive a barometer of our market economy ("the central nervous system of the economy")¹⁶⁶ that no aspect of pricing can be left to private regulation; accordingly, concerted activity to influence or tamper with the level of prices, directly or indirectly, is as violative of the antitrust laws as one aimed at absolute uniformity. *United States v. Container Corp.*, 393 U.S. 333 (1969); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). As the Supreme Court noted in *Socony-Vacuum*, it is the interference with the *free play* of the market which is the gravamen of the offense:

Any combination which tampers with price structure is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices, they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. 310 U.S. at 221.¹⁶⁷

[127] There is no reason why a different standard respecting price uniformity should be applied to parallel adoption of an arbitrary West Coast basing point which influences prices in much the same artificial way as an outright agreement respecting price levels.

On the question of factors influencing price, respondents' retained expert, Dr. Peter Steiner, gave extensive testimony in which he reviewed in detail aspects of plywood marketing which contribute to price uncertainty and instability in the plywood industry. This testimony is substantially consistent with my findings that there may indeed be factors which influence plywood prices (whether they be transactional prices, or the level of prices, or the trend in prices) apart from the West Coast freight factor.¹⁶⁸ But I do not understand that the legality of a practice turns on what respondents did not do, or on what respondents could not control, or on what respondents left untouched after adopting the West Coast formula as a means of keeping prices up and reducing uncertainty in the market. That the industry retains some of the hallmarks of a competitive market is irrelevant, as the Court has plainly indicated in *Socony-Vacuum* and

¹⁶⁶ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59 (1940).

¹⁶⁷ If the only issue in this case was whether respondents had conspired to charge exactly matching prices, then I would agree with respondents that the language in *Chain Institute v. FTC*, 246 F.2d 231 at 239 (8th Cir. 1957) ("If there is competition in base prices there cannot possibly be any 'systematic matching' of delivered prices," language cited by the Court from the Commission's supplemental brief) might be controlling. However, I interpret a complaint alleging the stabilization and reduction of competition to be grounded on *Socony-Vacuum* and its progeny which have held that neither the existence of price variations nor the inability of firms to control the market are crucial. See, e.g., *United States v. Gasoline Retailers Ass'n., Inc.*, 285 F.2d 688 (7th Cir. 1961); *Plymouth Dealers' Ass'n. of No. Cal. v. United States*, 279 F.2d 128 (9th Cir. 1960); *United States v. American Smelting and Refining Co.*, 182 F. Supp. 834 (S.D.N.Y. 1960).

¹⁶⁸ Findings 141-151.

Container Corporation if respondents adopt an arbitrary [128] mechanism which tampers with price in any way.¹⁶⁹ Based on the record evidence, I have concluded that this is precisely what respondents have done. Irrespective of what competition remains, it is clearly illegal for competitors to arrange matters so that any aspect of competition is removed with the result that one can never tell how competitive the market would have been but for the restraint. [129]

Furthermore, on the question of price uniformity, the Commission need not ignore the obvious fact that the plywood industry has, in effect, put into place a system which could easily produce absolute uniformity. The elements of such a system — ready availability of a uniform base price (the prices reported in *Crow's or Random Lengths*) plus use of an arbitrary freight factor, as well as so-called "association" weights could produce price uniformity down to the last penny. Moreover, since the record plainly shows that each of these pricing factors has been used by respondents, the dangers inherent in such a threat are very real indeed. Clearly, the Federal Trade Commission has authority to dismantle the illegal parts of this machinery even though absolutely uniform prices have not been obtained. *FTC v. Cement Institute*, 333 U.S. 683, 708 (1948).

Confronted with an industry which has already accumulated all of the means which it needs to fix uniform prices, and especially such a highly suspicious mechanism as an arbitrary West Coast freight rate and "association" weights, the Commission need not sit by until total uniformity comes about.¹⁷⁰ Where the facts indicate that the respondents have followed a parallel course of conduct which creates all that is necessary to carry out the conspiracy, particularly the parallel adoption of an artificial pricing element, this is more than an

¹⁶⁹ The arrangement in *Container Corporation* was stricken down by the Supreme Court although the District Court made findings relating to generally declining prices and the lack of price uniformity as well as the existence of myriad market and competitive factors affecting price. In its decision, the lower court cited the following factors as affecting the prices of each firm: estimates prepared from its internal manual; current plant production load or existence of idle time in its plant, a condition which varies widely in each plant from week to week, season to season, and with the rise and fall of business activity of its customers, suitability of the equipment in its plant for the production of the particular container and the expense of obtaining new equipment when necessary; availability of any special materials needed to produce the order; desirability of adding the particular order to the then scheduled plant production mix and the ability to do so, which varies continuously in the operation of the plant; convenience of customer's plant location for servicing and cost of delivery; size of the order, e.g., carload or less than carload shipment, and customer's prescribed delivery schedule; customer's credit rating; growth prospects of the account and the possibility of substantial future orders; the experimental or developmental character of the particular container and the need to gain manufacturing and marketing experience with respect to it; amount of customer's business represented by the order; general market conditions in the southeastern United States and in the corrugated container industry particularly; prices of its recent sales of the same or other corrugated containers to that customer; customer loyalty; effect of the order on its costs and profits; and prices believed to have been most recently charged or quoted by competitors, when such defendant believes it has sufficient basis for such belief. *United States v. Container Corporation of America*, 273 F. Supp. 18, 26 (M.D.N.C.1967).

¹⁷⁰ In *Allied Paper Mills v. FTC*, 168 F.2d 600, 606 (7th Cir. 1948), the Circuit Court said that where "... the pattern clearly provides a means of fixing uniform prices [respondents'] temporary departure from their system or temporary inability to carry through their purpose does not affect its legality. [Respondents'] degree of success in stifling price competition is not the measure of their liability."

adequate basis for remedial action by the Commission. See, *FTC v. Cement Institute*, 333 U.S. 683, 693 (1948). [130]

In sum, enough anticompetitive mischief has already been accomplished by respondents and no additional proof of wrongdoing, such as uniform prices or a fixed price level, is necessary. With the opening of the vast stands of southern pine, the consuming public had every reason to expect that at least one significant cost included in the price of a new home — plywood sheathing — would be sharply reduced. The West Coast phantom freight formula was a form of private regulation which the industry adopted to prevent this from happening. This plan succeeded in restricting price competition to a narrow range and in keeping the delivered price of the new southern product pegged near the delivered price of western plywood although the southern mills were practically next door to important building markets in the eastern half of the country. The Commission should dismantle this illegal scheme whether it is characterized as (1) a conspiracy, or as (2) an unfair method of competition which is contrary to the policy of the antitrust laws. For the reasons stated above, the use of West Coast freight in shipments from southern mills violates Section 5 of the Federal Trade Commission Act under either rubric.

IV

RELIEF

On the question of relief, the rule is that the agency is allowed wide discretion so long as the remedial order is reasonably related to the unlawful practices found to exist. *FTC v. Mandel Bros., Inc.*, 359 U.S. 385 (1959).

Here, an artificial phantom freight factor not only influences the level of delivered prices but it removes a large degree of price uncertainty. Therefore, an order which eliminates all use of any arbitrary basing point is fully justified. In addition, the order will prohibit reference to "association" weights which are inextricably linked to the use of a West Coast freight factor in arriving at predictable delivered prices. [131]

Under the authority of *FTC v. National Lead Co.*, 352 U.S. 419 (1957), the order will include a provision requiring a bona fide F.O.B. option to buyers. Respondents have manipulated the level of delivered prices and created a large measure of price certainty by use of the mechanism of a West Coast freight factor. While the order will not proscribe the individual use of delivered prices (so long as freight is not calculated from an arbitrary base and actual freight is used) what is needed, in the words of *National Lead* is a "breathing spell during

which independent pricing might be established without the hang-over of the long-existing pattern of collusion." 352 U.S. 419 at 425. True F.O.B. prices, which allow customer pick-ups when they are economically attractive to a buyer are clearly the most effective way of breaking the current industry pattern of adding West Coast freight to arrive at delivered prices and using artificially inflated "F.O.B." prices which inevitably include West Coast freight. A bona fide F.O.B. price "would reintroduce the kind of uncertainties, as to what price will meet or beat the quotations of competitors, that will restore some measure of competitive pricing."¹⁷¹

The order, however, will not prohibit reporting of prices by respondents to *Crow's* and *Random Lengths*, as complaint counsel urge. While it is true that *Crow's* or *Random Lengths* may be used, along with West Coast freight and "association" weights, to arrive at uniform prices, there is no pragmatic way of preventing use of published data. The reporting services have ample industry sources to consult (non-respondent mills, lumber brokers, wholesalers, and other customers of respondents), and nothing of consequence will be accomplished if respondents are foreclosed from reporting prices to those media, except possibly to make it more difficult for these publications to exercise their unchallenged right to report on the facts of plywood marketing. On the basis of this record, where no convincing showing was made by complaint counsel that *Crow's* or *Random Lengths* are manipulated or controlled by respondents, I would not interfere with this right. Besides, neither the transmittal by respondents nor the publication by the reporters of mill [132] prices are the real issues in this case. The heart of the matter is the use of West Coast freight as an inevitable addition to the reported prices.

V

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over respondents Boise Cascade Corporation, Champion International Corporation, Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc.
2. The acts and practices charged in the complaint took place in commerce within the meaning of the Federal Trade Commission Act.
3. While engaged in the sale and distribution of softwood plywood, the respondents, individually, and in combination, are now pursuing and for a number of years have pursued parallel courses of business

¹⁷¹ Turner, *supra* note 159 at 676.

behavior constituting unfair methods of competition and unfair acts in commerce. Specifically, respondents, individually, and in combination, have been and are now engaged in the following unfair methods of competition and unfair acts and practices:

(a) establishing and maintaining a system of delivered prices based on computation of rail freight from the Pacific Northwest for shipments made from mills located outside of that region;

(b) establishing and maintaining a system of delivered prices based on computation of rail freight and applying it to shipments made by other modes of transportation;

(c) refusing to permit customers who purchase from southern plants the option of picking up purchases at the plant at true F.O.B. mill prices; and [133]

(d) using the identical schedule of estimated weights as a basis for quoting delivered prices.

4. The capacity, tendency and effects of these practices of respondents are to:

(a) stabilize prices and provide a large degree of certainty in the pricing of softwood plywood among competitors;

(b) inflate the price of softwood plywood to consumers;

(c) reduce and hinder actual and potential competition among respondents in the sale and distribution of softwood plywood;

(d) discourage use of the cheapest and most efficient mode of transportation.

5. The conduct of respondents described above constitutes unfair methods of competition, and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Section 45), as amended.

Accordingly, the following order will be issued:

ORDER

I

DEFINITIONS

For the purposes of this order, the following definitions shall apply:

[134] "*points of origin price*" — a price set by a respondent for a purchase by a customer at a mill or distribution point from which a delivered price is quoted to that customer. The "point of origin price" shall be no greater than the delivered price offered to the customer less the actual transportation costs which would have been incurred by the seller if the sale were made on a delivered price basis.

"*delivered price*" — a price set by a respondent for a purchase by a

1

Initial Decision

customer which includes the cost of transportation to a designated destination point.

II

It is ordered, That respondents Boise Cascade Corporation, Champion International Corporation, Georgia-Pacific Corporation, Weyerhaeuser Company and Willamette Industries, Inc.; their subsidiaries, any concern controlled by a respondent, including joint ventures; their successors and assigns, and their officers, agents, representatives, and employees, directly or indirectly, through any corporate or other device, individually or in combination, in connection with the sale or distribution of softwood plywood, shall forthwith cease and desist: [135]

1. From using, in any manner whatever, any rate of freight or freight factor other than the actual rate of freight applicable to a given sale or purchase when calculating, negotiating or quoting the delivered price for such sale or purchase.

2. From using, in any manner whatever, any rate of freight or freight factor other than the actual rate of freight applicable to a given intra-corporate transfer when calculating, negotiating or quoting the value to be assigned to such transfer.

3. From using, in any manner whatever, any estimated weights as a basis for arriving at freight charges applicable to a given sale or purchase when calculating, negotiating or quoting the delivered price for such sale or purchase unless such estimates are based upon experience with the actual weight of softwood plywood produced by the mill from which shipment is to be made. Such experience shall be accumulated and updated by representative sampling or by other reasonable methods at least once a year.

4. From using, in any manner whatever, any estimated weights as a basis for arriving at freight charges applicable to a given intra-corporate transfer when calculating, [136] negotiating or quoting the value to be assigned to such transfer unless such estimates are based upon experience with the actual weight of softwood plywood produced by the mill from which shipment is to be made. Such experience shall be accumulated and updated by representative sampling or by other reasonable methods at least once a year.

III

It is further ordered, That when a delivered price is offered by a respondent to a customer for the purchase of softwood plywood in quantities of at least a truckload, that respondent shall also allow such

Opinion

91 F.T.C.

customer the option of obtaining a point of origin price and of arranging or furnishing transportation from the mill from which shipment would have been made had the delivered price been accepted.

IV

It is further ordered, That each respondent shall, when a sale of softwood plywood is made on a delivered price basis and is shipped in truckload or carload quantities by common or contract carriers, state on the invoice the amount of actual freight charged the customer, the common or contract carrier rate from the place of shipment [137] to the customer's destination, the specified estimated weights, if and when used, and the point of origin price.

V

It is further ordered, That each respondent shall notify all persons having sales and policy responsibilities in its organization of the terms of the order and publish same in at least two major trade journals or periodicals twice annually for each of two years from the effective date of this order.

VI

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

VII

It is further ordered, That within sixty (60) days after the effective date of this order, each respondent shall file with the Federal Trade Commission a written [138] report setting forth in detail the manner and form of its compliance with this order.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

This matter comes before us on a spirited appeal by respondents from an initial decision finding them guilty of tampering with the price of softwood plywood. The complaint was issued on April 18, 1974, charging respondents, five manufacturers of softwood plywood, with having individually and in combination pursued parallel ...

business behavior alleged to constitute unfair methods of competition and unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). [2]

In particular the complaint stated that respondents have (a) established and maintained a system of delivered prices for softwood plywood based upon computation of the freight charge from the Pacific Northwest for shipments made from plywood mills located in the South; (b) established and maintained a system of delivered prices based on computation of rail freight and applied these computations to shipments made by other and cheaper modes of transportation; (c) refused to permit customers the option of purchasing at respondents' southern plywood plants at a true F.O.B. price; and (d) used identical and inaccurate estimated shipping weights as the basis for computing the freight component of delivered price quotations.

The alleged effects of these practices have been to (a) stabilize prices and increase certainty in the pricing of plywood among competitors; (b) reduce and hinder actual and potential competition among respondents in the sale and distribution of plywood; (c) create disincentives to the most efficient location of plywood producing points; (d) create disincentives for customers to locate close to plywood producing points; (e) discourage use of the cheapest and most efficient mode of transporting plywood; (f) discriminate in prices between customers; and (g) deceive customers with respect to freight.

A trial was held before Administrative Law Judge (ALJ) Morton Needelman, who found a violation of Section 5 as charged, although he rejected certain particulars of the complaint. Respondents have taken vigorous exception to the ALJ's initial decision, professing to find it riddled with inconsistencies and lacking in support for the conclusions reached. In our view the initial decision embodies a good deal of thoughtful and independent analysis of a voluminous and not altogether unambiguous trial record. Its alleged inconsistencies, we think, are rather the reflection of a generally successful attempt to characterize a complex pattern of behavior which does not conform neatly to traditional models of guilty, or innocent, commercial conduct. Such nonconformity doubtless accounts for the vehemence with which the opposing parties have been able to insist on the correctness of their respective positions and the illogic of the opposition's. This is a genuinely close and unusual case. [3]

Nevertheless, certain preliminary observations may be ventured without fear of substantial contradiction, subject, of course, to the much more extensive exposition in the initial decision. Plywood is manufactured from Douglas fir (grown mainly in the Pacific

Northwest) and various yellow pine species grown in the South. (I.D. 11).¹ Until 1947 all plywood was produced in the States of Washington and Oregon. Thereafter production began in Idaho, Montana, and Northern California. (I.D. 25) By 1963 technological advances had made possible fabrication of plywood from southern pine, and expansion into the South occurred apace. (I.D. 26) The southern region now includes Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Arkansas, Louisiana, Texas, and Oklahoma. (I.D. 27) In 1974 the West accounted for 61.4 percent of plywood production and the South for 32.3 percent. (I.D. 27) The South, however, produced 45.7 percent of plywood sheathing, (I.D. 27) the product of concern here, and respondents accounted for more than 50 percent of southern production. (60.09 percent in 1971; 54.22 percent in 1973; I.D. 31)

Plywood has traditionally been purchased on the basis of a "delivered price," consisting of a so-called "mill price" (or "base" or "index" price, See n. 2 *infra.*) plus a freight factor, with deduction of various uniform wholesale discounts as appropriate. (I.D. 63)

Interstate Commerce Commission rail freight rates applicable to western plywood shipments are based upon concentric bands or freight zones running from North to South and radiating eastward. The zones originate with the Portland, Oregon zone, which includes most of the western plywood producing region. As a shipment of plywood travels from West to East it enters progressively higher West Coast freight zones, and applicable freight costs rise correspondingly. Within any given western freight zone, however, freight rates are identical. (I.D. 67) [4]

Freight charges from the West are calculated on the basis of weight, with the same rate per pound applicable regardless of shipment size. When plywood was produced entirely in the West the freight factor added to obtain the delivered price was, roughly speaking, actual rail freight from point of origin. (I.D. 64) The qualification results from the fact that in computing and quoting the freight cost, respondents used a set of uniform "association weights" or "estimated weights" to determine shipment weight. The actual weight of a particular shipment of plywood varies with the amount of moisture retained in the wood, so that identical orders may have different weights and incur different actual shipping costs. Association weights resulted in

¹ The following abbreviations are used herein:

I.D.	Initial Decision (Finding No.)
I.D. p.	Initial Decision (Page No.)
Tr.	Transcript of Testimony, Page No.
CX	Complaint Counsel's Exhibit No.
RY	Respondents' Exhibit No.

1

Opinion

uniform quotation of shipping costs irrespective of the costs actually incurred. (I.D. 84, 85)

When plywood production expanded into the South, southern manufacturers continued to compute delivered prices by adding West Coast freight to a base price², although the resulting freight factor obviously diverged sharply from the freight actually applicable to a particular sale.³ The record indicates that the base price to which West Coast freight was added might, at any given time, vary slightly among competing firms, but it generally fell within a narrow range of the Southern pine plywood price reported by industry reporters *Crow's* and *Random Lengths*. In addition, the record indicates that base prices varied substantially over time, on occasion changing from one hour to the next, though more often persisting for much longer periods. (I.D. p. 52 n. 55; 141-2; 144-151) [5]

When southern pine plywood production began it was viewed as a source of substantial added profits for the plywood companies, owing to the large freight cost savings resulting from greater proximity of southern mills to their customers. The logic of southern expansion as viewed at the time is summarized in a magazine article introduced by respondents describing the reasoning of the President of the earliest and largest entrant, Georgia-Pacific:

Why was Cheatham so anxious to get into plywood in the South? G-P has found that southern pine plywood for rough uses (e.g., siding) costs no more to produce than its Douglas fir equivalent, and as time passes may cost less. But the big advantage is the saving on freight. It costs \$15 to \$18 to ship 1000 square feet of standard plywood from the Pacific coast to southeastern cities like Memphis and Atlanta. Freight costs for southern pine plywood, even allowing for its slightly heavier weight per square foot, range from perhaps a third of that down to practically nothing, depending on mill and market location. By pricing its pine plywood competitively with the *delivered* price of Douglas fir plywood, G-P can add the freight saving to its margin. . . . (RX 90; I.D. 65)

Economists testifying for both sides in this case agreed that in its early stages of development, it was consistent with the operation of a competitive market for southern plywood to sell at a price largely determined by the price at which western plywood was sold. (I.D. 127) Western plywood comprised the main part of supply, even within the South, and southern mills were thus able to reap the full pecuniary

² Respondents contest this characterization, arguing that quotation of West Coast freight was purely a matter of form, and that West Coast freight was simply "backed out of" (subtracted from) a previously determined delivered price to arrive at an "index" price that was comparable to the mill price quoted for western plywood (i.e., buyers trying to decide whether to buy from a western or a southern mill could determine which was cheaper by comparing the western mill price with the southern "index" price, since identical western freight would be added to both). We believe, however, that these contentions are adequately dealt with in the detailed findings of the ALJ and that the textual characterization is consistent with the preponderance of the evidence. (I.D. 72-80; 96-99, 126)

³ Southern freight rates, unlike western rates, are established on a point to point basis, with freight charges varying from mill to mill and customer to customer. Southern rates also include an incentive structure whereby per-

for that portion of a shipment exceeding a specified weight. (I.D. 68)

rewards of their favorable location. From the beginning, however, it was recognized that "[a]s southern plywood output grows, so will the pressure for producers to share at least some of the freight savings with purchasers." (RX 90)

As southern production expanded, one would indeed have expected above normal profits resulting from lower freight costs to have been transferred in ever greater proportions from producers to consumers, with southern plywood manufacturers competing more intensely with each other (rather than West Coast mills) for business. The ALJ concluded, however, that respondents' continued use of West Coast freight and association weights in calculating the prices they sought to charge has had the effect of retarding the [6] natural operation of competitive forces, resulting in the stabilization of southern pine plywood prices at higher levels than would otherwise have existed. The ALJ held that this practice could be condemned as an unfair method of competition, violative of Section 5, a practice with the tendency and effect of stabilizing prices, along the lines of the Seventh Circuit's alternative holding in *Triangle Conduit and Cable Co., Inc. v. FTC*, 168 F. 2d 175 (7th Cir. 1948), *aff'd. per curiam by an equally divided Court, sub nom., Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949). Alternatively, the ALJ held that the practice could be characterized as a combination on the part of respondents to tamper with one element of price, the freight component, illegal under traditional Sherman Act theory regardless of its effect, see e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n. 59 (1940); *Plymouth Dealers Association of Northern California v. United States*, 279 F. 2d 1281 (9th Cir. 1960). Respondents contest these conclusions and our own review of the issues follows.

Evidence of Effects on Prices

Respondents contend that the record lacks evidence to support the ALJ's conclusion that their practices stabilized southern plywood prices. In respondents' view, southern prices are fully competitive and have not been artificially maintained by respondents' common use of West Coast freight. While conceding that some measure of competition may exist in the industry, complaint counsel submit that the challenged practices have nevertheless placed substantial limitations upon it.

The underlying question to which we would, ideally, like to know the response is one which the ALJ not unreasonably refused to allow several witnesses to answer, *i.e.*, "but for respondents' practice of computing prices by means of a formula that included the addition of West Coast freight (based on association weights), would southern

plywood prices at any given time have been lower than in fact they were?"⁴ Obviously the query is one that by its [7] very nature cannot be answered with total assurance, and the ALJ properly refused to allow non-expert witnesses to tender what would have been no more than sheer speculation. (*e.g.*, Tr. 2820-2821) Nevertheless, if the competitive consequences of the challenged practices are to be evaluated, the question cannot be avoided, or at least we must acknowledge that we are ultimately trying to answer this question no matter what more manageable inquiries we may substitute in its place.⁵

Several sorts of observations may be relevant. Among others are the following: (1) By what method are prices set—can we plausibly infer from the way in which prices are established, including the parties' understanding of what they are doing, that prices are not likely to reach competitive levels?⁶ [8] (2) What prices were actually quoted? Can one infer from particular prices quoted, their magnitude, variations, differences between customers or locations that such prices were not competitive? (3) Did the industry realize above-normal profits? Competition should lead to the dissipation of excess profits. Their persistence over time may signal anticompetitive behavior.

The ALJ concluded that the use of West Coast freight exercised a stabilizing influence on southern prices because it eliminated a large measure of the uncertainty facing a plywood seller when quoting prices. (I.D. pp. 117-118) The ALJ further concluded that the use of West Coast freight provided a means by which at least part of the freight advantage enjoyed by southern mills over western mills could be preserved as profit for the southern mills even after the West Coast was no longer a significant source of competition.

As noted earlier the evidence indicates that southern plywood delivered prices were customarily calculated by the addition of West Coast freight to a base price. This base price might vary slightly at any particular time as between different sellers and buyers, and was in some instances the subject of negotiation, but as the ALJ found it would be generally set within a narrow range of the quotations

⁴ By "lower" we do not mean simply lower for all customers. Elimination of restraints of trade may result in raising prices to some purchasers (perhaps those whom it is costlier to supply) while lowering them to others. In a freight intensive industry the reallocation might occur roughly along lines of relative actual freight costs.

⁵ Complaint counsel perceive in this line of questioning a "Catch 22" situation in which it cannot be proven that prices would have been lower absent the use of West Coast freight because the very use of West Coast freight precludes the existence of data from a market not using West Coast freight. The point is well taken. The question involved here is, by its nature, not susceptible of definitive proof. That does not mean the inquiry cannot be attempted, and that schemes alleged to stabilize prices are immune from scrutiny. Rather, as with any alleged trade restraint, we must simply decide what were the likely tendency and effect of the practices involved.

⁶ The best illustration would be overt conspiracy between competitors, which may or may not raise prices, but is so likely to produce such an effect and constitutes such an extreme departure from the competitive norm that the law prohibits it without further inquiry, *e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

appearing in the industry price reporters, *Crow's* and *Random Lengths*. In the ALJ's view, then, when a particular mill or distribution outlet quoted a price it was aware that competitors might be making slight departures from reported base prices (a source of some uncertainty) but could also be entirely sure that the freight factor being applied by those competitors would be identical, rather than varying in proportion to the substantial differences in actual freight costs which might exist. This assurance would arguably incline sellers throughout the industry to quote higher prices to buyers (and prices which varied with the buyers' distance from the West Coast) than they would have were the possibility open that competitors might be making concessions based upon the actual freight advantages available to them, without reference to a formula price including West Coast freight. The collective result of these individual decisions would be, at any specified time, higher and different price levels than would exist absent use of the uniform freight factor.

Several respondents dismiss this position as "nonsense." (Champion-Georgia Pacific-Weyerhaeuser Appeal Brief at 33). In their view, the fact that base prices were not identical at any given time indicates that the use of West [9] Coast freight was simply a competitively inconsequential matter of form. Whether bargaining and price concessions occurred with respect to the size of the base price or the size of the freight factor was irrelevant as long as bargaining with respect to the ultimate delivered prices resulted. In respondents' view, presumably, the normal bargaining and variation in pricing which might be expected to result from the fact that different sellers enjoy varying and substantial freight advantages to particular customers did in fact occur, but was reflected in the form of variations in the base (and resulting delivered) price, rather than variations in the nominal freight factor.

Of course, where offering prices are universally established pursuant to a formula which discriminates against buyers based upon their distance from a fixed location far from the actual point(s) of shipment, the fact that random discounts from the formula price are given to some buyers as the result of bargaining and market conditions does not mean that the full discriminatory effect of the formula and its industrywide use is thereby dissipated. Similarly, the fact that at any given time quoted prices vary slightly, or that over time quoted prices vary substantially, does not mean that the general level of those prices is a competitive one. The post-complaint explanations of respondents' counsel are not lightly dismissed, but they are somewhat at variance with documentary and some testimonial evidence as to how respon-

(a) *How Is Price Setting Understood; What Prices Are Quoted*

As the law judge recognized, respondents viewed the West Coast freight factor as more than a matter of form. It was, in practice, added to the base price to arrive at a delivered price for plywood (I.D. 75-76, 78-80), and it was seen by respondents as a source of substantial profit, such profit varying to the extent that West Coast freight differed from freight costs actually incurred by the southern mill. Thus, the record contains numerous detailed discussions and analyses by various sales personnel of so-called "freight pick-up," the difference between western freight and actual freight which would accrue as "an incremental gain for the mill." (CX 99v(1)) Elaborate charts were prepared to show the difference between western freight to numerous points in the South and actual freight from the mill to those points. (I.D. 106)

A 1965 marketing study prepared for prospective entrant MacMillan-Blodel explains the role of West Coast freight:

There is no such thing as a fixed FOB Mill Pricelist as we know it. Southern Pine Sheathing is sold on a basis of the DELIVERED price of West Coast Sheathing, [10] less actual freight at Southern rail rate to point of destination, less functional discounts of 5/3/2%. *This means your FOB mill net varies with each of the different rate combinations used to various Market points.* Obviously, the closer you can sell your Sheathing to the producing plant, the greater your freight advantage and net mill value.

The sample average freight rate grid attached gives some idea of how all-important this comparative rate structure is. This grid serves the immediate purpose, but a detailed study, by some reputable Rail Transportation Consultant, should be undertaken as part of our eventual Marketing Plan. (See Appendices II and III for specific rates and \$freight advantage/disadvantage.) CX 665D [emphasis added]

Why this concern with western freight and freight pick-up? Why should the difference between western and southern freight have been viewed as in any way a meaningful measure of potential profitability if in fact the inclusion of West Coast freight in southern delivered prices was merely a matter of form?

Respondents argue, and the ALJ agreed, that in the infancy of the southern plywood industry it was reasonable to expect that southern prices would in large measure be determined by prices for western production, which until southern production reached a certain level continued to constitute the major source of supply to the South. Thus, variations in western freight might indeed have represented a reasonable measure of expected variations in price and profit realizations by southern plants.⁷

⁷ Note, however, that the record reflects an early small disparity between southern and western base prices due to the belief of some buyers that western plywood was a superior product. (I.D. 131(a))

[11] The concern for West Coast freight rates and preservation of the inviolability of the freight pick-up, however, persists well after southern producers came to account for the bulk of supply in the South and after one would have expected competition among *southern* producers to have become the overwhelming if not sole determinant of southern plywood prices (*e.g.*, I.D. 135, 126; CX 40B; 41; 91A-Z74; 92A-Z72; 137; 142A; 556, 559A-Z45; 563; 564; 565; 566; 580). If respondents' counsel's explanation of how competition in the southern plywood industry worked is correct, the concern of southern plywood firms for freight pick-up should soon have been abandoned as a futile and time-consuming exercise. If actually realized delivered prices bore no relation to western freight costs, freight pick-up would be an arbitrary and inaccurate measure of profit, because the profit ostensibly realized on freight advantage would presumably be dissipated in competitive bidding against other *southern* mills enjoying similar actual freight advantages, such competition being expressed, however, according to respondent's view in variations in the *base* price.

The seriousness with which freight pick-up was treated, however, suggests strongly that it was viewed by respondents as an indicator of profit potential or at least relative profit potential as between various alternative shipping destinations.⁸ Such a perception could only make sense were respondents able to rely in some measure upon the practice of each other and non-respondent competitors to calculate delivered prices by adding West Coast freight to a base price that would vary within a small range. [12]

It is no answer, we believe, to contend that in calculating freight pick-up southern mills were merely indulging the customary propensity of businesspersons to maximize their profit by charging whatever the market will bear. As the ALJ observed, there existed no realistic choice as to what the market would bear, because the market was determined by the sum of the actions of many sellers relying upon an artificial formula to establish the prices they hoped to realize. To be sure, a seller acting independently is entitled to charge whatever customers will pay, irrespective of the seller's costs. However, but for the common use of West Coast freight by southern producers, there would be no conceivable business reason for any one of them to attempt to measure profit potential in shipping to various destinations

⁸ Some references to freight pick-up suggest that it was viewed as an *absolute* measure of the added profit to be realized by the southern mill (compared to its western counterpart) by virtue of the southern mill's lower shipping costs. This would seem to make little sense if southern mills were incurring different costs of production.

Freight pick-up would constitute a more realistic *relative* measure of the profit to be realized from shipment by a southern plant to one location as opposed to another, assuming, of course, that delivered prices in the South could be

by reference to costs of shipping incurred by essentially noncompeting sellers located thousands of miles away.

An illustration of the departures from the competitive model wrought by the use of West Coast freight is seen in the sometimes expressed preference of southern mills to ship in an easterly direction, since easterly shipments would go to areas with higher West Coast freight, albeit actual shipping costs were based on distance rather than direction (*e.g.*, CX 9A, 17I, 26B, 561, 566A, 861; Tr. 827-29, 841-42, 861-63). For example, in a 1971 memorandum an official of Georgia-Pacific observed with respect to the southern plywood industry:

All of our competitors truck to job site or to the dealer at no upcharge over the regular carload price, less the usual discounts. The range over which they will truck depends on market conditions, but appears to be roughly up to 500 miles when there is a freight gain. As you know—this gain can sometimes amount to a considerable sum of money when they run into the most westerly part of the highest freight zone. (CX 566A)

Again we must wonder, why among southern competitors should there be any advantage in shipping into a more expensive West Coast freight zone? The answer as perceived by respondents is that reaching a higher West Coast freight zone meant the opportunity to realize a higher delivered price (and by shipping into the westerly part of the highest [13] freight zone one would incur the minimal actual shipping cost necessary to take advantage of such a price). This could only be the case if in fact the use of western freight in southern pine pricing was more than simply a matter of form.

Similarly, a 1974 freight rate book distributed by Willamette to its mills computes the freight pick-up to be realized from shipments to numerous destinations. The book indicates, for example, a greater mill return to be realized by selling from Willamette's Ruston, Louisiana mill into Atlanta than into Corpus Christi, notwithstanding that actual shipping costs from Ruston were greater to Atlanta. (CX 92P, Z-59) A further corollary of these observations is that changes in West Coast shipping rates relative to southern rates were sometimes viewed as a source of added profit by southern mills (*e.g.*, CX 862A). Again, it does not make sense for a southern mill to view an increase in western freight as a source of added profits when there has been no change in the mill's cost structure relative to southern competitors, unless of course it is believed and understood that use of a formula price will allow the increase in western rates to be passed along in the form of higher delivered prices to the customers of southern mills.

Another indication of anticompetitive effects relied upon by the ALJ was the tendency of a given respondent to quote identical delivered prices to direct mill customers in the southern portions of the same western freight zones (I.D. 100), even though the actual costs of

delivering to such customers might vary considerably. Once again, one would not expect in a competitive industry in which western freight played only the formalistic role ascribed to it by respondents that the delivered prices quoted to southern purchasers, should depend upon the western freight zone in which they were located.

Respondents contest the ALJ's finding as to uniformity by manufacturer of quoted prices within the southern portions of West Coast freight zones, but we believe it is amply supported by the preponderance of the evidence. This evidence consists of price lists instructing sales agents as to how to set their prices (*e.g.*, CX 2A, 7, 10, 11, 13, 14, 16, 17, 18, 20, 22, 23, 24, 25, 36B, 88B, 112B, 884H, 114, [14] 886Z-29), invoices evidencing actual identical price realizations within the same West Coast freight zone (*e.g.*, CX 419) as well as testimony of witnesses (*e.g.*, Tr. 711-12, 841, 857; *see* I.D. 100 for additional citations). A similar pattern appears in quotations made for long-term contracts which generally were based upon some variation on the *Crow's* price plus West Coast freight. (I.D. 94)

West Coast freight was also added to a reported base price or a slight variant to determine the price at which plywood was transferred from the mill to sales outlets of respondents (excluding Willamette which was not vertically integrated and Boise Cascade's Moncure mill which used a slight variant of the formula). These outlets were operated as separate profit centers, and the evidence thus indicates that transfer prices charged these profit centers by each company varied according to the West Coast freight zone in which the profit center was located. (I.D. 96) Respondents question the relevance of intra-corporate transfer prices, contending that they bear little relationship to the prices which the transferee sales outlets ultimately charge to purchasers. While it is true, if not a truism, to say that sales outlets would seek to sell their plywood at the market price prevailing at the time of sale, it is no less true that this market price was in some measure a function of the quotations being simultaneously rendered by southern sales outlets. And in pricing their products these sales outlets were trying to recoup the cost of acquiring or replacing their inventory, which in turn varied in relation to the West Coast freight zone in which the outlets were located. (I.D. 98)

(b) *Profit Data*

Complaint counsel did not introduce evidence as to the comparative profitability of southern plywood production versus western plywood production as part of their case in chief, but some data with respect to comparative cost structures and profitability was introduced by respondents in their defense and by complaint counsel in rebuttal. Our

own detailed analysis of cost data submitted by the parties is contained in the Appendix to this opinion, supplementing I.D. 140. Our analysis indicates that margins on southern plywood have consistently exceeded those on western plywood, and lends support to the ALJ's conclusion that profitability of southern plywood production has generally exceeded that of western. [15]

The persistence of supra-normal profits over some period of time may signal the existence of anticompetitive conduct, although the existence of such profits is hardly proof positive of unlawful behavior. Increases in demand in a particular region of the country may render production in that area highly profitable, notwithstanding the existence of vigorous competition. However, one would expect the persistence of above-normal profits to act as a signal to others to enter the market, with the eventual result that profits would subside to more normal levels.

Recognizing the uncertainties that are likely to attend the use of profit data as evidence of anticompetitive conduct, and the additional uncertainties as to the particular data introduced in this case, we have placed little reliance upon such data in our disposition of the appeal, although we conclude that the available evidence in no way detracts from, and if anything lends modest support to, our conclusion reached on independent grounds that respondents' challenged conduct has affected plywood prices.

(c) *Other Factors*

Factors in addition to those discussed hereinabove might also be cited in analyzing the likelihood that an industry has been pricing at supra-competitive levels. For example, high concentration (I.D. 33), a wide range of customers (I.D. 34), a fungible product (I.D. 59) and relatively price inelastic demand (I.D. 60), all present here, are conditions conducive to the occurrence of joint, interdependent price stabilizing conduct, *e.g.*, Posner, *Antitrust Law: An Economic Perspective*, pp. 62ff. By themselves they signify little; in combination with the more direct evidence regarding industry pricing practices cited above they also lend modest support to the conclusion that the conduct challenged has affected competition.

(d) *Summary*

For the foregoing reasons we conclude that the preponderance of the evidence in this case supports the ALJ's determination that the joint use by respondents and others of West Coast freight in calculating the delivered price of plywood sold in the South has had the effect of

stabilizing southern plywood prices at levels they would not otherwise have achieved. [16]

In reaching this conclusion we hasten to note that the practice of including West Coast freight in delivered price quotations is only one of many factors affecting the price of southern plywood. Others noted by the ALJ include housing starts (a volatile factor affected by interest rates and the general state of the economy, I.D. 145), weather conditions, boxcar shortages, and strikes (I.D. 146) all of which affect the demand for or supply of plywood and thereby its price. In the face of such formidable and volatile determinants of supply and demand it is not surprising that plywood prices have fluctuated substantially over time. Not even a monopolist would necessarily maintain a fixed price in the face of such extreme shifts in demand.

These considerations do not, however, derogate from the role of West Coast freight as one factor influencing the price of southern plywood and in an anticompetitive fashion. Granting fully respondents' contention that the southern plywood market exhibits some indicia of competitive performance, with numerous buyers soliciting quotations from a variety of sellers and choosing the best, the fact remains that the prices actually realized in this market, as in all markets, are a complex function of the myriad desires not only of buyers, reflected in the prices they offer, but of sellers, reflected in the prices they seek. When firms act in a unified fashion, when they seek to pass on costs imposed uniformly upon all of them, or when they seek to obtain prices established pursuant to an arbitrary pricing formula, it defies common sense to suppose that the sum of these collective actions has no effect on price.⁹ In this case the evidence indicates that respondents viewed the [17] difference between West Coast and southern freight as an appropriate measure of the relative profitability of making sales to various destinations. (pp. 9-12 *supra*) As a corollary of this, sales of southern plywood to locations in higher *West Coast* freight zones were viewed as being more profitable than sales to lower freight zones, notwithstanding that actual freight in both instances might be the same. (pp. 12-13 *supra*) Respondents have sought to charge prices reflecting the addition of West Coast freight to a base price, and within the South at least have transferred plywood to their distribu-

⁹ An analog to the situation involved here is that in which a regulatory action (*e.g.*, imposition of stringent occupational and health or environmental requirements) imposes added costs throughout an industry. If it believed such action to be unwarranted an industry would no doubt be quick to argue that one of its inevitable effects would be to increase costs to consumers, notwithstanding that the industry might be unconcentrated and demand would remain the same after the regulatory action as before. While a single firm faced with increased costs peculiar to itself cannot pass them on absent monopoly power, where all members of an industry face such increased costs the sum of their efforts to pass on these costs will likely result in some increase in price. This is so even though it may appear to any individual firm (and its agents may so testify under oath in administrative proceedings) that it can and does do no more than meet the prevailing market price.

Opinion

ion outlets at transfer prices which vary depending upon the West Coast freight zone in which the distribution outlet is located. Such outlets in turn are operated as profit centers, whose sales must bear some relationship to their costs. (p. 14 *supra*)

In light of the foregoing we cannot accept respondents' contention that the southern plywood industry's practice of using West Coast freight was no more than an inconsequential matter of form. The obvious inference to be drawn from the fact that the members of an industry use a formula for computing prices which disfavors particular buyers (in this case those in higher West Coast freight zones) for reasons wholly unrelated to the costs of supplying them, is that customers will end up paying prices inconsistent with a competitive regime.

Characterized in terms of the burden of proof, which respondents protest they are being unjustly forced to shoulder, we believe that evidence produced by complaint counsel, summarized *supra* and in the initial decision, was sufficient to support a *prima facie* inference that the use of West Coast freight affected southern plywood price levels. It was thereafter incumbent upon respondents to adduce evidence that this inference was misguided. With respect to the earliest years of the southern pine plywood industry we think respondents have refuted the inference of anticompetitive pricing, with the argument that the price of *western* plywood (it being the dominant source of southern supply) should naturally have been expected to determine the price for southern production. However, this justification will not wash after the earliest years of the industry, when southern plywood became first the dominant, and later, for some sorts of plywood products, the sole source of southern supply. No longer could southern prices, if set at competitive levels, be expected to vary depending upon the West Coast freight zone of the buyer, as the manner in which they were set by individual firms suggests they did. Respondents [18] have not undermined the force of evidence of non-competitive pricing by showing that in some cases bargaining occurs, price concessions are made, and actually realized prices depart from formula prices, because there is no evidence that such bargaining has led to *systematic* dissipation of the effects of using formula prices which include West Coast freight.¹⁰ Accordingly we believe that complaint counsel have

¹⁰ Even a price-fixing cartel (which respondents were obviously not) may experience periodic or frequent "cheating" by its members, deviations in realized prices from those which the cartel attempts to set. And many of the basing point cases cited by the parties in their briefs have involved some measure of deviation in realized prices from those that would be expected to result from uniform adherence to the basing point formula, e.g., *Rigid Steel Conduit Ass'n. et al.*, 38 F.T.C. 534, 487 (1944), *aff'd. sub nom. Triangle Conduit and Cable Co., Inc. v. FTC* 168 F. 2d 175 (7th Cir. 1948), *aff'd per curiam by an equally divided Court, sub nom. Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949). But evidence of random variations in realized prices from those that would result by rigid adherence to the formula by which offering prices are set is not proof that the formula is economically meaningless, exerting no impact upon prices

(Continued)

met their burden of demonstrating that the use of West Coast freight did indeed exert an anticompetitive impact upon southern plywood pricing.

Legal Analysis

Although the ALJ found no substantial evidence of overt collusion among the parties with respect to price, he concluded that the presence of a combination could nevertheless be inferred from their pursuit of a common course of conduct involving the inclusion of a uniform freight charge based on West Coast freight for plywood shipments from southern mills. [19]

Respondents acknowledge that an agreement by competitors to fix or stabilize even one element of the price of any product would be illegal, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n. 59 (1940), but they contend that here there was no express agreement and that the inference of agreement drawn by the ALJ is without support. In respondents' view, their common course of conduct represented merely the continuation of a method of doing business concededly proper while they operated in the West, and found as well by the ALJ to have been justifiable during their earliest years in the South. Citing the Commission's recent decision in *Great Atlantic & Pacific Tea Company Inc.*, 87 F.T.C. 962, *aff'd.* 557 F. 2d 971 (2d Cir. 1977), respondents contend that an inference of conspiracy may be drawn from parallel business conduct only ". . . if it appeared more to the interest of competitors to adopt different practices." *Independent Iron Works, Inc. v. United States Steel Corp.*, 177 F. Supp. 743, 747 (N.D. Cal. 1959), *aff'd.*, 322 F. 2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963), *cited with approval* at 87 F.T.C. 1068.

This statement, cited by the Commission in the context of an alleged conspiracy between a supplier and its customer, stands in need of substantial clarification in the context [20] of an alleged combination between competing oligopolists. In a perfectly competitive industry, in which competitors expect little advantage from attempting to anticipate the reactions of their rivals to their competitive initiatives the *Independent Iron Works* formulation may be adequate. The perceived self-interest of the atomistic competitor lies in reducing its prices in the direction of its costs, assuming that others will not follow and hoping thereby to secure a larger share of the market and greater

ultimately realized. The inference that respondents ask us to draw from their defense evidence would necessitate that we disregard contemporaneous documentary evidence as to how they viewed the significance of West Coast freight and conclude instead that they behaved irrationally and unknowledgeably in supposing that West Coast freight and freight pick-up were economically meaningful concepts. We believe such an inference would be unwarranted. Cf.

profits. The fact that over the "long run" such initiatives may be matched by others, sometimes leaving the innovator with the same unsatisfying slice of a smaller pie, is thought not to lead the price-cutting competitor to reconsider its definition of self-interest.

Firms in more concentrated industries are able at times to proceed with greater foresight. Is it truly in the interest of a firm to lower prices if its action will surely be matched by others? Often it is not, and thus it may well not be in the firm's "self-interest," as the term is used in common parlance, to initiate a price cut or refrain from imitating a competitor's price rise. But such *interdependent* self-interested action is obviously not the sort which negates the inference of a conspiracy; to the contrary it may well be evidence of one. As Professor Turner has stated:

. . . conscious parallelism is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were *interdependent*, that the decisions were consistent with the individual self-interest of those concerned only if they all decided the same way. Turner, *The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962).

And courts in confronting this problem have similarly implied that the inference of agreement may be drawn if the actions of the defendants would be in their own economic interest only if taken in concert with others. *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp., 1251, 1278 (S.D.N.Y. 1976); *North Penn Oil & Tire Co. v. Phillips Petroleum Co.*, 358 F. Supp. 908, 923 (E.D. Pa. 1973). [21]

That test is surely met in this case¹¹ but it arguably proves too much, as Judge Needelman recognizes (I.D. p. 122) because it would seem to condemn all interdependent pricing that leads to prices that diverge from competitive levels.¹² In Judge Needelman's view, however, it is unnecessary to embrace such an extreme proposition because there is here the presence of an additional factor, the

¹¹ Why have the respondents in this case sought to charge prices for southern plywood which reflect the inclusion of West Coast freight? Why would a seller of southern plywood, competing with other southern sellers, transfer plywood to its distribution outlets on the basis of transfer prices which include West Coast freight, thereby impelling those profit centers to seek higher prices the farther East they are? Why would a seller of southern plywood have believed that West Coast freight could be at all relevant to the price which might be received for plywood manufactured and shipped from the South? Such behavior could be thought self-interested only upon the assumption that all or most other competitors would engage in it.

¹² It is likely to be the case that anytime a competitor charges prices that differ from those that would result in a competitive market such pricing can be rational only if others are behaving the same way. What seemingly dissuades Professor Turner from finding an unlawful conspiracy under such circumstances is the impossibility of any remedy addressed to conduct short of regulating the prices at which the violators will be allowed to sell. Turner, *supra* at pp. 670-671. While intimating no view on that issue, which is not presented here, we note that the same consideration does not obtain where the basis of the alleged conspiracy is not simply the exaction of non-competitive prices, but the use of an artificial formula to set such prices. In the latter case a remedy may be formulated (excision of the artificial pricing system) which does not do violence to traditional notions of the proper role of government in a free economy. cf. Turner *supra* at pp. 676-677.

adherence by respondents to a highly *artificial* formula for establishing their prices. [22]

Judge Needelman's point is well taken¹³ but we cannot ignore the force of respondents' counter that the conduct challenged here did evolve in a justifiable way, and the alleged conspiracy thus results from the *continuation* of such conduct after its original justification had passed. In seeking to infer the reasons for this, some credence must be given respondents' alternative explanation—force of habit.¹⁴

To be sure, this habit was one which various respondents perceived to serve a useful purpose, hence the scattered documentary references by respondents' agents to the necessity of preserving the freight factor at all costs (*e.g.*, I.D. 103–105), to say nothing of the ubiquitous tables of freight pick-up. (I.D. 106) And respondents' recognition of its advantages has no doubt contributed to the maintenance of their habit as much as the propensity of humankind to do things as they have always been done. Nevertheless, it would constitute something of an extension of the common understanding to infer that a "conspiracy" or an "agreement" was the "most likely" cause of the perpetuation of a commercial habit that arose "innocently" and was not excessively difficult to maintain. [23]

While this extension may well be warranted as a matter of Sherman Act doctrine,¹⁵ we need not reach it for our purposes, because Section Five, with its proscription of "unfair methods of competition," permits a more direct approach to the problem of harmful commercial behavior. Force of habit may explain conduct, and soften the attitude of society toward the actor, but it cannot provide a defense for conduct which loses commercial justification and produces anticompetitive results. The Supreme Court has frequently acknowledged the Commission's authority to proscribe anticompetitive conduct which may not fit within the confines of the Sherman Act, *e.g.*, *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *FTC v. Motion Picture Advertising Serv. Co.*, 344

¹³ Respondents contend that Judge Needelman's "something extra" (I.D. p. 122) is no more than the allegedly collusive activity itself, *i.e.*, the use of West Coast freight in quoting southern prices. In our view the artificiality of the system is appropriately viewed as the "extra" factor, above and beyond simple joint conduct leading to non-competitive pricing patterns. We think it eminently reasonable as a matter of law to suppose that an agreement can be more readily inferred from joint use of an artificial formula pricing system than simply from joint quotation of prices that depart from competitive expectations, *e.g.*, *Fort Howard Paper Co., et al. v. Federal Trade Commission*, 156 F. 2d 899, 907 (7th Cir. 1946).

¹⁴ An argument no doubt calculated by counsel to appeal to a panel of bureaucrats.

¹⁵ Arguing in favor of the finding of a conspiracy are price-fixing cases which arose out of conduct begun during the New Deal under the imprimatur of the National Industrial Recovery Act. When the NRA was declared unconstitutional the joint activity it had previously condoned was not sufficiently modified to escape antitrust condemnation. *e.g.*, *Fort Howard Paper Co., et al. v. Federal Trade Commission*, 156 F. 2d 899, 906 (7th Cir. 1946). This case, however, is slightly more difficult, because it is not clear that what is involved is the *continuation* of an *agreement* after its legal justification has been abruptly terminated. Rather we are asked to conclude that the continuation of conduct while its commercial justification gradually vanishes and disappears itself constitutes an agreement. Given the availability of an alternative and more direct means of dealing with the problem under Section 5

U.S. 392, 394-95 (1953); *FTC v. Cement Institute*, 333 U.S. 683, 689-93 (1948), and the Seventh Circuit has previously held that the concurrent although non-collusive adoption by competitors of an artificial method of pricing which restrains competition is unlawful. *Triangle Conduit & Cable Co. v. FTC*, 168 F. 2d 175 (7th Cir. 1948), *affd. by an equally divided Supreme Court sub nom. Clayton Mark & Co. v. FTC*, 336 U.S. 956 (1949). [24]

The same conclusion is warranted in this case. Respondents' joint use of a system of artificial formula pricing has exerted an anticompetitive effect upon pricing in the market for southern plywood. Respondents originally sought to reap as profit the full freight advantage resulting from location of their plants in the South at a time when the bulk of plywood sold in the South continued to be supplied from the West. To accomplish this they sold the plywood they manufactured in the South on the basis of a base price to which West Coast freight was added, a system which persisted even as southern mills became the principal sources of competition with other southern mills. While disparities between the base prices of southern and western plywood suggest that full freight advantage is not realized as profit for southern mills (as opposed to cost savings for consumers), the fact that southern producers have sought to obtain prices that depend upon the West Coast freight zone in which their purchaser is located in reliance upon the industry-wide practice, compels the inference that at least some measure of the freight advantage has been preserved for the industry (rather than returned to consumers) by its use of this system, (pp. 6-17 *supra*).

We must note that our conclusion that Section Five prohibits such conduct depends importantly upon the extreme artificiality of the formula pricing involved in this case. The artificiality of a pricing system is what at once suggests that its results are likely to depart from competitive norms and on the other hand that its use has little redeeming commercial justification, assumptions that are borne out by the record before us. A system of zone delivered pricing involving industry-wide use of freight zones designed to approximate, though not in all instances precisely identifying, actual freight costs would obviously present different problems. There is no occasion here, however, for us to decide how much artificiality is too much, for aside from depending upon the circumstances, it is clear that computation of prices pursuant to a formula which involves addition of a freight factor based upon freight rates from a location thousands of miles distant from the point from which the product is actually shipped is highly artificial within any sense of the word. [25]

Respondents have not objected to the form of order proposed by the

ALJ, assuming, *arguendo*, that a violation is found. The order entered herein will proscribe the use of artificial freight factors in calculating plywood prices for outside sales [Par. II(1)] or intra-corporate transfers [II(2)] and require respondents to offer customers the option of furnishing their own transportation for quantities of plywood in excess of a truckload, at a bona fide point of shipment f.o.b. price (Par. III). As the law judge observed, "[t]rue F.O.B. prices, which allow customer pick-ups when they are economically attractive to a buyer are clearly the most effective way of breaking the current industry pattern of using artificially inflated 'F.O.B.' prices which inevitably include West Coast freight." (I.D. p. 131)

In addition, the order will prohibit use of artificial association weights, [Par. II(3,4)] which were part and parcel of the illegal practice and permitted the standardization of artificial freight factors. (I.D. 88) However, the order will permit use of estimated weights based upon experience with the actual weight of softwood plywood produced by the mill from which a particular plywood shipment is to be made.

Appeal of Boise Cascade

Respondent Boise Cascade, while joining generally the arguments raised by other respondents, has filed a separate appeal contending in addition that at least as of February 1972 it discontinued the use of West Coast freight in computing the price of plywood sold from its Moncure, North Carolina mill. The administrative law judge rejected this contention. Boise's liability was alternatively predicated upon the fact that the DeQuincy, Louisiana mill, operated by Boise and Southern Natural Gas Co. as a joint venture (with each having 50 percent ownership) engaged in the challenged method of pricing. Boise denies liability for the actions of its joint venture.

Assuming *arguendo* that discontinuance of the use of West Coast freight as of 1972 would have warranted dismissal of these proceedings as to Boise, we nevertheless believe that the preponderance of the evidence supports the conclusion that the use of West Coast freight was not in substance abandoned at the Moncure plant. The ALJ concluded that contemporaneous documentary evidence (the desk calendar of the Moncure sales manager, CX 813) indicated that offering [26] prices were arrived at by a process of adding West Coast freight to the price reported in industry reporter *Crow's*. The ALJ's analysis of the desk calendar is contained at I.D. 93(b). In some instances the calendar contains entries reflecting a computation of "Crow's" plus "freight" corresponding to the *Crow's* price plus West Coast freight for the applicable date and wood size (e.g., CX 813 Z11).

Cascade made its sales. The ALJ found that prices for Zone A, that nearest to the Moncure plant, were identical to the corresponding "Crow's plus freight" around 40 percent of the time, and within a close range of the rest. Boise suggests that the coincidence of its Zone A prices with the formula price, as well as its sales manager's evident concern with the formula price in formulating Boise zone prices reflects at most consideration of the *competition* rather than any independent use of West Coast freight in arriving at Boise's own prices.¹⁶ Further support for the significance of the calendar entries, however, is supplied by CX 839B, in which Boise officials characterized the effect of a possible consent settlement of the pending charges: [27]

We will have to comply with an FTC order that dictates a completely different way of pricing and extending freight from the traditional method. (CX 839B)¹⁷

On balance we believe that the preponderance of the evidence supports the conclusion that the Moncure plant continued to use the challenged method of pricing following 1972.

In addition, there can be little doubt that Boise Southern, Boise's 50 percent owned joint venture continuously engaged in the challenged practice of calculating the price of southern plywood by means of the addition of West Coast freight. (I.D. 78(b)) We believe that for the reasons set forth by the ALJ at I.D. 41 Boise is properly held liable for the plywood pricing practices of this joint venture. Accordingly we must deny its separate appeal.

Except as noted herein, the initial decision of the administrative law judge is sustained and adopted as that of the Commission,¹⁸ and an appropriate order is appended.

APPENDIX

Costs and Profitability of Southern vs. Western Plywood Production

Economic theory suggests that in a competitive industry prices will be driven toward

¹⁶ While on balance we must reject this contention, we note that it is not inherently unreasonable. And what it suggests is that it was hardly necessary for every producer in the southern plywood industry to include West Coast freight in its delivered prices in order for the challenged system to have effect, (although the ALJ found that with one major exception respondents' practice was followed by their smaller non-respondent competitors, I.D. 74). So long as the major producers used the system it obviously behooved others to take account of it, or go along with it, in making their own competitive decisions. Boise's evident degree of concern, however, appears a bit too great for us to conclude that it was doing no more than gathering information about the way in which everyone, except for itself, was behaving.

¹⁷ Boise objects to the use of "settlement related" documents where no settlement was reached. It would certainly be improper to use the fact that a settlement was attempted as evidence of any sort that a violation occurred. That is not our purpose in citing CX 839. Rather the document is cited as wholly proper evidence of how Boise understood and characterized its own system of pricing in effect as of 1974. Were Boise's description of its post 1971 system in this appeal an accurate one it is hard to see how it could have viewed any settlement of these charges as imposing "a completely different way of pricing and extending freight" in 1974.

¹⁸ Complaint counsel urged at oral argument that we change "pounds" to "square feet" in I.D. 88, and "delivered price" to "price" in subparagraphs II(1) and II(3) of the order. We hereby accede to these requests.

the level of costs, with costs defined to include a return on capital just sufficient to ensure that capital is not diverted to alternative uses. Southern plywood producers initially realized substantial cost advantages by virtue of their greater proximity to sources of demand. While western plywood continued to comprise the bulk of supply it was reasonable for the freight cost savings achieved by southern mills to accrue as profit. As southern production expanded, however, one would expect this profit to be dissipated by the forces of competition, with the freight cost savings resulting from southern production being transferred in ever greater proportions from consumers to producers.

One way to approach the problem of whether the expected competitive effects have occurred is to compare the relative profitability of presumptively competitive western mills with southern mills, a task well begun by considering relative production costs in the two regions. It is apparent that when they entered the South, plywood companies believed that production costs in the new region would be roughly comparable to those in the old, and that they could thus realize additional profits corresponding to the advantage in freight available from the new location. A magazine article introduced into evidence by respondents (RX 90) described the reasoning of Georgia-Pacific's President:

"Why was Cheatham so anxious to get into plywood in the South? G-P has found that southern pine plywood for rough uses (*e.g.*, siding) costs no more to produce than its Douglas fir equivalent, and as time passes may cost less. But the big advantage is the saving on freight. It costs \$15 to \$18 to ship 1000 square feet of standard plywood from the Pacific coast to southeastern cities like Memphis and Atlanta. Freight costs for southern pine plywood, even allowing for its slightly heavier weight per square foot, range from perhaps a third of that down to practically nothing, depending on mill and market location. By pricing its pine plywood [2] competitively with the *delivered* price of Douglas fir plywood, G-P can add the freight saving to its margin. . . ."¹

The parties are at odds as to whether Georgia-Pacific's original assumption regarding equivalence of production costs was correct, and the Administrative Law Judge declined to make a firm finding on this point. (I.D. 140) Our own review of the record, however, suggests the conclusion that production costs of southern and western sheathing have generally fallen within close range of each other.

The most comprehensive cost statistics available are those published by the American Plywood Association (APA). The record contains APA's annual cost reports for the Southern and Western plywood industries for 1973 and 1974, as well as a chart prepared by Boise Cascade reflecting APA survey data for 1968-1972 (CX 838c) The 1973 reports reveal the following costs for so-called "CDX" plywood (a panel of C and D grade veneers with exterior glue line), the most common form of sheathing plywood:

Thickness	Costs per 1000 Sq. Ft.	
	South	West Coast
5/16"	\$ 75.80	\$ 72.61
3/8"	83.52	85.75
1/2" (4 ply)	111.94	114.73
5/8"	140.08	143.30
3/4"	169.77	168.31

(CX 842, p. 21; CX 843, p. 23) [3]

¹ The article later notes, in keeping with traditional theory, that "As southern plywood output grows, so will the pressure for producers to share at least some of the freight savings with purchasers." The real issue in this case is whether or not an industry practice, whether maintained by design or habit, has impeded the natural operation of competitive pressures.

1

Appendix

The 1974 reports reveal the following costs for the same products:

5/16"	\$ 89.18	\$ 85.83
3/8"	100.00	96.97
1/2" (4 ply)	134.11	130.40
5/8"	166.94	162.17
3/4"	197.41	191.63

(RX 449, p. 21; RX 450, p. 24)

The Boise summary of APA cost data reflects southern costs on average lower than western for 1969-72, and slightly higher in 1968 (CX 838c).

Respondents object to citation of the above western figures, contending that a more appropriate comparison is between the southern mills surveyed by APA and so-called western sheathing mills, *i.e.*, western mills whose production consists almost entirely of sheathing. The southern mills surveyed by APA consist entirely of sheathing mills, while the western mills surveyed included both sheathing mills and so-called "mixed" mills, those producing both sanded and sheathing products. In 1974, however, APA for the first time included figures for western sheathing mills in addition to figures for the entire sample. The record does reflect that these western sheathing mills are somewhat more efficient than southern mills² but like the law judge we believe the comparison is of only limited utility. The APA surveys are designed to determine the cost of producing sheathing by region, *regardless of the type of plant producing the sheathing*. Most southern sheathing [4] production occurs in sheathing plants; in the West, however, perhaps half of all sheathing is produced by mixed plants, (*e.g.*, Tr. 4126 "over 50 per cent") and it is, therefore, entirely proper for a cost survey to include a sampling of such mixed plants. (See also Tr. 4119 ff.)³

While recognizing the propriety of including both mixed mill and sheathing mill costs in a sampling of western sheathing costs, the ALJ appears to have stopped short of drawing any conclusion on comparative costs because in calculating the cost of sheathing produced by mixed mills "the accounting procedures of the American Plywood Association do not permit proper allocation of certain 'green end' and drying costs to sheathing production. (CX's 932A-C)" This results because industry-wide average green end and drying costs for particular products are figured on the basis of average costs incurred by the reporting plants for all veneers processed, regardless of their end use. Since so-called "A" veneers are not used in sheathing, inclusion of green end and drying costs for these veneers in the averages may distort the overall figures. (I.D. p. 100) [5]

From our review of the relevant figures, however, it appears that even if misallocations of green end and drying costs have occurred, they could not be of a magnitude sufficient to disturb the conclusion of substantial similarity of inter-regional sheathing costs. Thus, the 1974 APA Western Report (RX 450) indicates that for 1/2"

² For example, the cost of producing 1/2" CDX 4 ply incurred by western sheathing plants in the sample was \$119.30 (RX 450, p. 13) vs. the above-mentioned southern cost of \$130.40. We observe, however, that the figures for 1974 may overstate the disparity between southern and western sheathing plants. Compare RX 452 (*in camera*) covering Georgia-Pacific sheathing plants, which reflects a western sheathing plant cost advantage of \$12.81 in 1974 but only \$7.18 in 1973 and \$5.74 in 1975.

³ The ALJ made this point we think quite convincingly in an extended colloquy with respondents' counsel during voir dire of an APA representative called to authenticate the APA cost studies. (Tr. 4103ff). The bottom line from respondents' point of view was apparently not so much that APA figures are inaccurate measures of average sheathing costs within the South and West, but that these averages were not relevant to complaint counsel's effort to utilize the testimony of respondents' expert, Dr. Steiner, to the government's advantage. Dr. Steiner had testified that over time one would expect prices to approach the marginal costs of the *most efficient* producers. (Tr. 4108)

CDX, 4 ply sheathing the average drying cost assigned to all sheathing is \$8.56 while at the more efficient sheathing plants it is \$8.28.⁴ For green end costs the average for sheathing plants actually exceeds the quoted industry average (\$9.80 vs. \$9.48). In either event it is hard to see how a more precise allocation of these cost components for mixed plants would have significantly altered the observed relation between total western and southern producing costs cited above.

With respect to wood costs, which are a major component of total cost and a major source of the cost difference observed between sheathing and mixed mills in the West, the APA survey in fact does distinguish between costs of so-called "A" veneers and costs of the less expensive B, C, and D veneers used in sheathing. (CX 932B; Tr. 4255, 4099). The assignment of higher wood costs to sheathing production at mixed mills than to sheathing production at sheathing mills thus appears to reflect actual cost differences incurred in producing sheathing by the mills.⁵ For these reasons then, we conclude that the APA studies may properly be used to compare relative production costs for sheathing in the South and West, and those studies indicate that production costs have fallen within a close range of each other during the several years preceding issuance of the complaint in this matter (a few dollars per thousand square feet). [6]

While southern and western sheathing costs have fallen within close range of each other, the record indicates that the mill net return per unit of plywood has been significantly higher for southern mills than for their western counterparts. Reported base prices for southern plywood have generally fallen below base prices for western plywood (I.D. 131), but the addition of western freight to those southern base prices, when only southern freight is being paid, results in a substantially higher return to the southern mill. (The western mill pays actual western freight, so the return to the western mill is measured simply by its base price.)

The ALJ's findings with respect to pricing patterns are contained in I.D. 131. He notes that from January 1969, to August 1971, *Random Lengths* issued 134 reports in which a direct comparison can be made between western and southern prices for 1/2 inch 3-ply sheathing. In 28 percent of the reports southern prices were the same as or lower than western. In the remaining 72 percent of reports wherein western base prices exceeded southern, the reported differences were \$4 or less in 84 percent of the cases. \$4 would, of course, be far less than the "freight pick-up" or differential between western freight which was added to those southern base prices, and southern freight actually paid. (e.g., CX 91; see n. 6 *infra*)

For 1974 the ALJ found more significant differentials between southern and western base prices, but even in this year, the average reported differential between western and southern 1/2 inch CDX 4-5 ply prices was less than \$9. (I.D. p. 91, n. 95) This compares with average freight pick-ups for southern mills in the vicinity of \$19 or more.⁶

[7] The foregoing suggests that southern mills have generally realized higher net returns per unit of sales than their western counterparts, which is consistent with evidence to the same effect cited by the ALJ, as well as with evidence of generally, though not uniformly, higher profit margins for southern producers. (CX 127, 137)

Having made the foregoing observations we hasten to add that in our view they constitute no more than modest support for the conclusions that we believe are justified

⁴ This figure presumably is properly allocated.

⁵ Reasons why wood costs for sheathing are higher at mixed mills than at sheathing mills are suggested by the testimony of Mr. Ridgway at pp. 4097-4098.

⁶ The association weight of CDX 1/2 inch 4-5 ply is 1525 pounds (CX 928). Assuming an average freight pick-up of \$1.25 per hundred pounds which the record indicates is a reasonable estimate (e.g., CX 137A; 92) the freight pick-up for 1000 square feet of CDX 1/2 inch 4-5 ply would be \$19.06. This \$19 freight pick-up accruing to the southern mill far more than offsets the average of less than \$9 by which western base prices exceeded southern base prices in 1974, to say nothing of the much lower amounts by which western base prices exceeded southern base prices in the 1969-71 period surveyed by the ALJ.

1

Final Order

independently by the discussion in the body of our opinion and the initial decision. Aside from numerous uncertainties and inadequacies in the cost and profit information available in this record, it is obvious that supra-normal profitability can readily result from factors other than anticompetitive conduct, for example, unusual growth in a region in which the profits are realized and resultant supra-normal demand. As respondents point out, the issue is not so much whether profits at any given time are above average as whether such above-average profits attract new entry in response, though, of course, such new entry would be expected at some point to result in dissipation of the profits that induced it.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondents' counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, has denied the appeal.

It is ordered, That pages 1-132 of the initial decision of the administrative law judge are hereby adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the accompanying Opinion. Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion. [2]

It is further ordered, That the following order to cease and desist be hereby entered:

ORDER

I

DEFINITIONS

For the purposes of this order, the following definitions shall apply:

"point of origin price" — a price set by a respondent for a purchase by a customer at a mill or distribution point from which a delivered price is quoted to that customer. The "point of origin price" shall be no greater than the delivered price offered to the customer less the actual transportation costs which would have been incurred by the seller if the sale were made on a delivered price basis.

"delivered price" — a price set by a respondent for a purchase by a customer which includes the cost of transportation to a designated destination point.

II

It is ordered, That respondents Boise Cascade Corporation, Champion International Corporation, Georgia-Pacific Corporation, Weyer-

haeuser Company and Willamette Industries, Inc.; their subsidiaries, any concern controlled by a respondent, including joint ventures; their successors and assigns, and their officers, agents, representatives, and employees, directly or indirectly, through any corporate or other device, individually or in combination, in connection with the sale or distribution of softwood plywood, shall forthwith cease and desist:

1. From using, in any manner whatever, any rate of freight or freight factor other than the actual rate of freight applicable to a given sale or purchase when calculating, negotiating or quoting the price for such sale or purchase.

2. From using, in any manner whatever, any rate of freight or freight factor other than the actual rate of freight applicable to a given intra-corporate transfer when calculating, negotiating or quoting the value to be assigned to such transfer. [3]

3. From using, in any manner whatever, any estimated weights as a basis for arriving at freight charges applicable to a given sale or purchase when calculating, negotiating or quoting the price for such sale or purchase unless such estimates are based upon experience with the actual weight of softwood plywood produced by the mill from which shipment is to be made. Such experience shall be accumulated and updated by representative sampling or by other reasonable methods at least once a year.

4. From using, in any manner whatever, any estimated weights as a basis for arriving at freight charges applicable to a given intra-corporate transfer when calculating, negotiating or quoting the value to be assigned to such transfer unless such estimates are based upon experience with the actual weight of softwood plywood produced by the mill from which shipment is to be made. Such experience shall be accumulated and updated by representative sampling or by other reasonable methods at least once a year.

III

It is further ordered, That when a delivered price is offered by a respondent to a customer for the purchase of softwood plywood in quantities of at least a truckload, that respondent shall also allow such customer the option of obtaining a point of origin price and of arranging or furnishing transportation from the mill from which shipment would have been made had the delivered price been accepted.

IV

It is further ordered, That each respondent shall, when a sale of

1

Final Order

truckload or carload quantities by common or contract carriers, state on the invoice the amount of actual freight charged the customer, the common or contract carrier rate from the place of shipment to the customer's destination, the specified estimated weights, if and when used, and the point of origin price. [4]

V

It is further ordered, That each respondent shall notify all persons having sales and policy responsibilities in its organization of the terms of the order and publish same in at least two major trade journals or periodicals twice annually for each of two years from the effective date of this order.

VI

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

VII

It is further ordered, That within sixty (60) days after the effective date of this order, each respondent shall file with the Federal Trade Commission a written report setting forth in detail the manner and form of its compliance with this order.

Modifying Order

91 F.T.C.

IN THE MATTER OF

NORLIC IMPORT COMPANY, INC., ET AL.

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2583. Complaint, Oct. 22, 1974 — Modifying Order, Jan. 25, 1978.

This order modifying order to cease and desist issued October 22, 1974, 40 FR 6777, 84 F.T.C. 1173, substitutes for subparagraph 2 of the first "IT IS ORDERED" paragraph one that inserts the words "reprocessed or reused" before the first usage of the term "wool product."

ORDER MODIFYING ORDER TO CEASE AND DESIST

On March 28, 1977, respondents petitioned to reopen and modify the decision and order in this matter. Addenda to the petition were filed on April 7, 1977 and on May 25, 1977. The Bureau of Consumer Protection has filed an answer wherein it advises that it does not oppose respondents' request, as modified by respondents' filing of May 25, 1977.

The Commission has duly considered respondents' request and has determined that it should be granted.

It is ordered, That the proceeding be, and it hereby is, reopened;

It is further ordered, That the order to cease and desist be, and it hereby is, modified by striking subparagraph 2 of the first "IT IS FURTHER ORDERED" paragraph and substituting therefor the following:

Importing or participating in the importation of reprocessed or reused wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

IN THE MATTER OF

LANCASTER COLONY CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE
CLAYTON ACT

Docket 9101. Complaint, June 17, 1977 — Decision, Feb. 1, 1978

This consent order, among other things, requires a Columbus, Ohio manufacturer of machine-made glassware, and a Montvale, N.J. firm, similarly engaged, to present the Commission with evidence that their acquisition agreement has been terminated, and to return to each other all exchanged confidential documents. Further, during periods set forth in the order, these firms are required to provide the Commission with prescribed advance notice of any intention to acquire a machine-made glassware business, and refrain from consummating any such transaction, pending final Commission decision.

Appearances

For the Commission: *Peter E. Greene, Brian H. Siegel, Edward S. Atkinson, Jr., David J. Saylor and Alfred F. Dougherty.*

For the respondents: *Richard R. Murphey, Jr., Dunbar, Kiengle & Murphey, Columbus, Ohio and Ralph W. Brenner, Montgomery, McCracken, Walker & Rhoads, Philadelphia, Pa. for Lancaster Colony Corp. Edward Wolfe, White & Case, New York City for Federal Paper Board Company Inc.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into an acquisition agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreement already constitutes a violation of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I

DEFINITION

1. For the purpose of this complaint, the following definition

shall apply: "Machine-made glassware" means all moderately priced soda-lime glass beverageware, tableware, food preparation glassware and novelty and ornamental glassware items produced by machine and employed in everyday use.

II

Federal Paper Board Company, Inc.

2. Federal Paper Board Company, Inc. (Federal Paper) is a corporation organized and existing under the laws of the State of New York, with a principal place of business at 75 Chestnut Ridge Road, Montvale, New Jersey.

3. Federal Paper through its unincorporated Federal Glass Company division (F.G.D.) produces machine-made glassware and sells said machine-made glassware throughout the United States.

4. In its fiscal year ended January 1, 1977, Federal Paper had net sales of approximately \$393,580,000, and net income of approximately \$22,589,000; F.G.D. had net sales of approximately \$50,000,000 and income before allocation for taxes and corporate overhead of approximately \$4,000,000.

5. F.G.D. is the third largest manufacturer of machine-made glassware in the United States.

6. F.G.D. is now and for many years has been a member of the American Glassware Association, which is a trade association made up of the major domestic manufacturers of machine-made glassware.

III

LANCASTER COLONY CORPORATION

7. Lancaster Colony Corporation (Lancaster Colony) is a corporation organized and existing under the laws of the State of Delaware, with a principal place of business at 37 West Broad St., Columbus, Ohio.

8. Lancaster Colony, through its subsidiary Indiana Glass Company, an Indiana corporation, produces machine-made glassware, and sells said machine-made glassware throughout the United States. Lancaster Colony also produces machine-made glassware through its subsidiary Lancaster Glass Corporation, and sells said machine-made glassware throughout the United States.

9. In its fiscal year ended June 30, 1976, Lancaster Colony had sales of approximately \$174,500,000 and net income of approximately \$8,236,000. Indiana Glass Company had sales of machine-made

113

Complaint

glassware of approximately \$36,488,445, and Lancaster Glass Company had sales of machine-made glassware of approximately \$382,000.

10. Indiana Glass Company is the fifth largest manufacturer of machine-made glassware in the United States.

11. Indiana Glass Company is and for many years has been a member of the American Glassware Association, which is a trade association made up of the major domestic manufacturers of machine-made glassware.

IV

JURISDICTION

12. At all times relevant herein Federal Paper and Lancaster Colony have been engaged in the manufacture and sale of machine-made glassware in interstate commerce and are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V

THE ACQUISITION AGREEMENT

13. On or about March 4, 1977 Federal Paper and Lancaster Colony agreed in principle to the acquisition by Lancaster Colony of all F.G.D. assets of Federal Paper. The proposed purchase agreement provides, *inter alia*, for the sale of the F.G.D. assets of Federal Paper in exchange for approximately \$45,000,000.

VI

TRADE AND COMMERCE

14. Relevant lines of commerce are the manufacture and sale of machine-made glassware and submarkets thereof.

15. A relevant section of the country or geographic market is the entire United States.

16. The United States machine-made glassware market is highly concentrated with the combined market share of the four largest manufacturers estimated to be approximately 70 percent.

17. Barriers to entry into the manufacture of machine-made glassware and submarkets thereof are substantial.

VII

ACTUAL COMPETITION

18. Federal Paper and Lancaster Colony are and have been for many years actual competitors of each other in the manufacture and sale of machine-made glassware and submarkets thereof, and actual competitors of others engaged in the manufacture and sale of machine-made glassware and submarkets thereof throughout the United States.

VIII

EFFECTS

19. The effect of the proposed acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, or Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Federal Paper and Lancaster Colony in the manufacture and sale of machine-made glassware and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the manufacture and sale of machine-made glassware and submarkets thereof may be lessened;

(c) Federal Paper will be eliminated as an actual substantial independent competitor in the manufacture and sale of machine-made glassware and submarkets thereof;

(d) concentration in the manufacture and sale of machine-made glassware and submarkets thereof will be increased and possibilities for eventual deconcentration may be diminished;

(e) mergers or acquisitions between other machine-made glassware manufacturers may be fostered, thus causing a further substantial lessening of competition and tendency toward monopoly in the relevant markets.

IX

VIOLATIONS CHARGED

20. The proposed acquisition by Lancaster Colony of the F.G.D. assets of Federal Paper (if consummated), the proposed Purchase Agreement between Lancaster Colony and Federal Paper (if executed), and the agreement in principle between Lancaster Colony and Federal Paper, constitute violations of Section 7 of the Clayton

Act, as amended, 15 U.S.C. 18, and are or would be unfair acts, practices or methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Lancaster Colony Corporation is a corporation, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located in the City of Columbus, State of Ohio.

2. Respondent Federal Paper Board Company, Inc. is a corporation, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located in the City of Montvale, State of New Jersey.

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

Decision and Order

91 F.T.C.

ORDER

Definition

For the purposes of this order the following definition shall apply: "Machine-made glassware" means all moderately priced soda-lime glass beverage ware, tableware, food preparation glassware and novelty and ornamental glassware items produced by machine and employed in everyday use.

I

It is ordered, That Lancaster Colony Corporation (Lancaster Colony) and Federal Paper Board Company, Inc. (Federal Paper) do forthwith provide evidence that the agreement (acquisition agreement) whereby Lancaster Colony agreed to purchase all or substantially all of the assets of Federal Paper used by it in its business of the manufacture and sale of machine-made glassware which is conducted through its unincorporated Federal Glass Company Division has been terminated and each shall use its best efforts to forthwith return any confidential documents provided by either Lancaster Colony or Federal Paper to the other in connection with the acquisition agreement. Nothing herein contained shall relieve any party from any obligations of confidentiality imposed by agreement between them or by operation of law.

II

It is further ordered, That until December 31, 1980 neither Lancaster Colony nor Federal Paper shall acquire either directly or indirectly any part of the machine-made glassware business of the other, whether represented by securities or assets (other than products and securities acquired in the regular course of business) until sixty (60) days following receipt by the Director of the Bureau of Competition of the Federal Trade Commission of written notice of the proposed acquisition, which notice shall specifically refer to this order. If within sixty (60) days of receipt by the Director of said notice the Commission issues an administrative complaint challenging the proposed acquisition such proposed acquisition shall not be consummated nor shall any steps be taken to effectuate such proposed acquisition until the administrative complaint issued by the Commission is dismissed by the Commission, or until a final order as defined in 15 U.S.C. 21 and 45 is entered, or until a consent order is entered and served upon the respondents in that administrative proceeding. If within the aforesaid sixty (60) days the

Competition receives any additional written position papers from either Lancaster Colony or Federal Paper and the Bureau recommends the issuance of a complaint, the Bureau shall promptly forward to the Commission such papers together with the written notice submitted to the Bureau Director. In the event that within sixty (60) days of the Director's receipt of the said notice the Commission issues an administrative complaint challenging the proposed acquisition the Bureau of Competition shall exert its best efforts to complete the administrative proceeding in an expedited manner.

III

It is further ordered, That until December 31, 1978 Lancaster Colony and Federal Paper each shall notify the Director of the Bureau of Competition of the Federal Trade Commission thirty (30) days prior to the consummation of any acquisition, merger, or sale of any of its machine-made glassware business, whether direct or indirect, (other than products and securities acquired or sold in the regular course of business) if (a) such transaction is with any company engaged in the business of manufacture and domestic sale of machine-made glassware; and (b) such company for the year preceding such transaction had total domestic sales of such machine-made glassware of \$10,000,000 or more. Such notice shall contain all information requested by the Commission's pre-merger notification program (39 F.R. 35717-8, Oct. 3, 1974) on the forms as found in 1 CCH Trade Reg. Rep. ¶ 4540. If, during the period in which this paragraph is in effect the rules and notification report forms to implement Section 7A of the Clayton Act become effective, this paragraph shall from that date forward have no further effect.

IV

It is further ordered, That Lancaster Colony and Federal Paper each shall notify the Commission at least thirty (30) days prior to any proposed corporate change such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change, which may affect compliance obligations arising out of this order.

V

It is further ordered, That Lancaster Colony and Federal Paper each shall, within sixty (60) days after service upon it of this order

file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
AMERICAN CREDIT BUREAU, INC., ET AL.

Docket C-2608. Interlocutory Order, Feb. 3, 1978

Petition to vacate or modify consent order denied on grounds that respondents' allegations were insufficient because of public interest or changed conditions of law.

ORDER DENYING PETITION TO VACATE OR MODIFY CONSENT
ORDER

Respondents, by petition filed pursuant to Rule 3.72(b)(2) on November 17, 1977, request that the Commission vacate or modify the consent order to cease and desist entered herein on December 4, 1974 (84 F.T.C. 1582), on the ground that changed conditions of law require such action.

The specific change of law underlying respondents' petition is the enactment of Pub. Law 95-109, the "Fair Debt Collection Practices Act," 15 U.S.C. 1601, *et seq.* (1977). The Act becomes effective on March 20, 1978.

Respondents allege that the Act regulates the same practices as are covered by the order, that the order differs substantially in terms from the Act, and that since the Act imposes severe penalties for violation, it would be in the public interest to vacate the order. Respondents further contend that certain sections of the Act are less restrictive than comparable sections of the order, that respondents would be competitively disadvantaged if they were subject to the order while their competitors were subject to the Act, and that, in the alternative, the order should be modified to bring it into conformity with the Act. The Director of the Bureau of Consumer Protection has filed an answer in opposition to respondents' petition.

The Commission, having carefully considered the petition and answer thereto, is of the opinion that (1) it would be premature and contrary to the public interest to grant respondents' request inasmuch as the Commission is currently conducting an investigation to determine whether or not respondents are in compliance with the cease and desist order, (2) the Fair Debt Collection Practices Act as a whole is more restrictive than the cease and desist order, and that those few instances in which the order may be more restrictive are necessary and proper as remedies fashioned by the Commission to redress abusive practices engaged in by respondents in violation of the Federal Trade Commission Act. There is nothing in the Fair Debt Collection Practices Act to prohibit the imposition of similar

Interlocutory Order

91 F.T.C.

remedies in future cases brought under that Act if the circumstances so warrant, and (3) it would be premature to reopen the proceeding to modify or set aside the order since the Act has not yet taken effect.

Accordingly, the Commission having concluded that the allegations in respondents' petition are not sufficient to require that the order to cease and desist be modified or set aside because of the public interest or because of changed conditions of law:

It is ordered, That respondents' petition be, and it hereby is, denied.