

Complaint

75 F.T.C.

IN THE MATTER OF

GREATER UNITED STEEL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-1532. Complaint, May 14, 1969—Decision, May 14, 1969*

Consent order requiring two affiliated Kansas City, Mo., home improvement companies to cease falsely representing that prospective purchasers' homes have been selected as "model homes" and after installation of their products such homes will be used for demonstration purposes and purchasers will receive a reduced price or discount, misrepresenting that their products are reduced in price, indestructible, and fully guaranteed, and falsely claiming business connections with United States Steel Co.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Greater United Steel, Inc., a corporation, and Interstate Aluminum, Inc., a corporation, and Joseph P. Simon, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Greater United Steel, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at Suite 220, 424 Nichols Road, Kansas City, Missouri 64112.

Respondent Interstate Aluminum, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at Suite 220, 424 Nichols Road, Kansas City, Missouri 64112.

Respondent Joseph P. Simon is an officer of each of the corporate respondents. He formulates, directs and controls the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondents.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various items of home improvements, including residential siding products to the general public and the installation thereof.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Missouri to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, respondents and their salesmen or representatives have represented and now represent directly or by implication, in advertising and promotional material and in direct oral solicitations to prospective purchasers, that:

1. Homes of prospective purchasers have been specially selected as model homes for the installation of respondents' products; that after installation such homes will be used for demonstration and advertising purposes by respondents; and, that as a result of allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances, discounts or commissions.

2. Respondents' products are being offered for sale at special or reduced prices, and that savings are thereby afforded purchasers from respondents' regular selling prices.

3. Respondents or their salesmen are connected or affiliated with the United States Steel Company.

4. Products sold by respondents will never require repainting or repairing.

5. Respondents' products are everlasting and are made of indestructible materials, being impervious to storm, hail, fire and other elements.

6. Respondents' products and installations are fully guaranteed in every respect, without condition or limitation, for the lifetime of the house on which they are installed.

PAR. 5. In truth and in fact:

1. Homes of prospective purchasers are not specially selected as model homes for the installation of respondents' products; after installations such homes are not used for demonstration and advertising purposes by respondents; and purchasers as a result of allowing or agreeing to allow their homes to be used as models are not granted reduced prices nor do they receive allowances, discounts or commissions.

2. Respondents' products are not being offered for sale at special or reduced prices, and savings are not thereby afforded respondents' customers because of a reduction from respondents' regular selling prices. In fact, respondents do not have a regular selling price but the prices at which respondents' said products are sold vary from customer to customer depending on the resistance of the prospective purchasers.

3. Neither respondents nor their salesmen are connected or affiliated with the United States Steel Company.

4. Products sold by respondents will require repainting or repairing.

5. Respondents' products are not everlasting and can be destroyed. They are not impervious to storm, hail, fire and other elements.

6. Respondents' siding materials and installations are not unconditionally guaranteed in every respect without condition or limitation for an unlimited period of time or for any other period of time. Such guarantee as may be provided is subject to numerous terms, conditions and limitations, and fails to set forth the nature and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder.

Therefore, the statements and representations as set forth in Paragraph Four hereof were and are false, misleading and deceptive.

PAR. 6. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of siding materials and other products of the same general kind and nature as that sold by respondents.

PAR. 7. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are

true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents 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 aforesaid draft of 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Greater United Steel, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at Suite 220, 424 Nichols Road, Kansas City, Missouri 64112.

Respondent Interstate Aluminum, Inc., is a corporation orga-

nized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at Suite 220, 424 Nichols Road, Kansas City, Missouri 64112.

Respondent Joseph P. Simon is an individual and an officer of said corporations and his address is the same as that of said corporations.

2. 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.

ORDER

It is ordered, That respondents Greater United Steel, Inc., a corporation, and Interstate Aluminum, Inc., a corporation, and their officers, and Joseph P. Simon, individually and as an officer of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution or installation, of residential siding, or other home improvement products or service or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the home of any of respondents' customers or prospective customers has been selected to be used or will be used as a model home, or otherwise, for advertising purposes.

2. Representing, directly or by implication, that any reduced price, allowance, discount, commission or other compensation is granted by respondents to purchasers in return for permitting or agreeing to allow the premises on which respondents' products are installed to be used for model homes or demonstration purposes.

3. Representing, directly or by implication, that any price for respondents' products is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

4. Representing, directly or by implication, that respondents or their salesmen are connected or affiliated with the United States Steel Company; or misrepresenting, in any

manner, the identity of the manufacturer or the source of any of respondents' products or the business connections or affiliations of respondents or their salesmen.

5. Representing, directly or by implication, that respondents' products will never require painting or repair; or misrepresenting, in any manner, the efficacy, durability, efficiency, composition, or quality of respondents' products.

6. Representing, directly or by implication, that respondents' products are everlasting or are made of indestructible materials.

7. Representing, directly or by implication, that storms, hail, fire or other elements will not damage respondents' products.

8. Representing, directly or by implication, that any of respondents' products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

9. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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

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

IN THE MATTER OF

SEYMOUR FELDMAN, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1533. Complaint, May 14, 1969—Decision, May 14, 1969

Consent order requiring a New York City manufacturing furrier to cease misbranding and falsely invoicing its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Seymour Feldman, Inc., a corporation and Seymour Feldman, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Seymour Feldman, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Seymour Feldman is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are manufacturers of fur products with their office and principal place of business located at 350 Seventh Avenue, New York, New York.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

1. To disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

2. To show the country of origin of the imported furs contained in the fur product.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

2. To show the country of origin of imported furs used in fur products.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 7. Respondents furnished false guaranties that certain of their fur products were not misbranded, falsely invoiced or falsely advertised when respondents in furnishing such guaranties had reason to believe that fur products so falsely guaranteed would be introduced, sold, transported or distributed in commerce, in violation of Section 10(b) of the Fur Products Labeling Act.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished

thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The respondents 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 aforesaid draft of 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Seymour Feldman, Inc., is a corporation organized, 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 at 350 Seventh Avenue, New York, New York.

Respondent Seymour Feldman is an officer of said corporation and his address is the same as that of said corporation.

2. 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.

ORDER

It is ordered, That respondents Seymour Feldman, Inc. a corporation, and its officers, and Seymour Feldman, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in

commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing, directly or by implication, on labels that the fur contained in any fur product is natural when the fur contained therein is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

2. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Representing, directly or by implication, on invoices that the fur contained in the fur products is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

It is further ordered, That respondents Seymour Feldman, Inc., a corporation, and its officers, and Seymour Feldman, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondents have reason to believe that such fur product may be introduced, sold, transported, or distributed in commerce.

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

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

Complaint

75 F.T.C.

IN THE MATTER OF

MAGID MFG. CO., INC., TRADING AS
MAGID GLOVE MFG. CO., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS
IDENTIFICATION ACTS

Docket C-1534. Complaint, May 16, 1969—Decision, May 16, 1969

Consent order requiring a Chicago, Ill., manufacturer of industrial work gloves to cease misbranding its textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Magid Mfg. Co. Inc., a corporation, also trading as Magid Glove Mfg. Co. Inc., and Abe Cohen, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Magid Mfg. Co. Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. Its office and principal place of business is located at 2201 West Wabansia, Chicago, Illinois. Respondent corporation also trades as Magid Glove Mfg. Co. Inc.

Respondent Abe Cohen is an officer of said corporate respondent. He formulates, directs and controls the acts, practices and policies of said corporate respondent. His address is the same of that of said corporation.

Respondents are manufacturers of industrial work gloves.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale,

advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified to show each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act, in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such textile fiber products were numerous industrial work gloves without labels or with labels which failed to disclose the percentage of fibers present.

PAR. 4. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in that all parts of the required information were not set out conspicuously and separately on the same side of the label in such a manner as to be clearly legible and readily accessible to the prospective purchaser, and all parts of the fiber content did not appear in type or lettering of equal size and conspicuousness in violation of Rule 16(b) of the aforesaid Rules and Regulations.

PAR. 5. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair and deceptive acts and practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commis-

sion Act and the Textile Fiber Products Identification Act; and

The respondents 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 aforesaid draft of 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 Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Magid Mfg. Co. Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 2201 West Wabansia, Chicago, Illinois. Respondent corporation also trades as Magid Glove Mfg. Co. Inc.

Respondent Abe Cohen is an officer of said corporation and his address is the same as that of said corporation.

2. 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.

ORDER

It is ordered, That respondents Magid Mfg. Co. Inc., a corporation, also trading as Magid Glove Mfg. Co. Inc., or under any other name or names and its officers, and Abe Cohen, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery,

transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce, or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by failing to affix a stamp, tag, label, or other means of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

B. Failing to set out all parts of the required information on the same side of the label in such a manner as to be clearly legible and readily accessible to the prospective purchaser and in type or lettering of equal size and conspicuousness.

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

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

IN THE MATTER OF

BRILLO MANUFACTURING CO., INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE
CLAYTON ACT

Docket 6557. Complaint, May 22, 1956—Decision, May 20, 1969

Order adopting tentatively modified order of March 27, 1969, which reopened proceeding and modified final order dated January 17, 1964, 64 F.T.C. 245, by vacating the fourth paragraph that required respondent to cease manufacturing industrial steel wool, with certain exceptions, on the premises of an acquired company.

ORDER REOPENING PROCEEDING AND MODIFYING FINAL ORDER

This matter is before the Commission upon letters dated September 20, 1968, October 10, 1968, and December 20, 1968, from Purex Corporation, Ltd., successor to the Brillo Manufacturing Company, Inc., wherein it requests permission to consolidate all of its steel wool production on the premises which the Brillo Manufacturing Company, Inc., acquired from The Williams Company. The letters are treated as a petition for reopening the proceeding and modification of the final order, which issued on January 17, 1964 [64 F.T.C. 245].

The fourth ordering paragraph of the final order reads as follows:

It is further ordered, That from and after the effective date of such divestiture, respondent shall cease and desist from manufacturing industrial steel wool on the premises acquired from The Williams Company, except such amount of industrial steel wool as may be incidental or a by-product of the manufacture of household steel wool products on such premises, and which are not suitable for conversion into household form.

At the time this order issued, and at all times subsequent thereto, respondent has manufactured industrial steel wool only at its plant in Brooklyn, New York. It has produced only consumer soap pads at the plant Brillo acquired from The Williams Company.

As grounds for its request, respondent asserts that its sales of steel wool products have declined so that a two-plant operation is not efficient. Respondent has furnished sales information in support of this assertion as well as data showing that all of its steel wool products cannot be produced economically in its Brooklyn, New York, plant. Therefore, respondent asserts that it will close down its Brooklyn, New York, plant on July 1, 1969, and that plans to do so have been finalized.

In considering this request, which is not opposed, the Commission notes that the principal purpose of the fourth ordering paragraph of the final order is to prevent the competitive freight advantage that would inure to respondent resulting from being able to ship industrial steel wool from two plants, one in the mid-west and the other in the east. Respondent will not achieve the freight advantage of a two-plant operation by consolidating all of its steel wool production on the premises acquired from The Williams Company.

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On the basis of the foregoing, the Commission has determined that respondent's request should be granted. Accordingly:

It is ordered, That this proceeding be, and it hereby is reopened.

It is further ordered, That the fourth ordering paragraph of the final order, as set forth herein, be, and it hereby is, vacated and set aside.

ORDER ADOPTING TENTATIVELY MODIFIED ORDER

The Commission, on March 27, 1969, having issued its tentative order modifying the final order in this matter, and having placed said tentative order on the public record for a period of thirty days for the filing of comments or views of interested members of the public; and

The thirty-day period having expired without receipt of any comments or views; and

The Commission having determined that said modified order is appropriate in all respects:

It is ordered, That the tentatively modified order of the Commission, issued on March 27, 1969, be, and it hereby is, adopted as the modified order of the Commission.

IN THE MATTER OF

MISSISSIPPI RIVER FUEL CORPORATION*

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC.
7 OF THE CLAYTON ACT

Docket 8657. Complaint, Jan. 22, 1965—Decision, May 20, 1969

Order requiring a St. Louis, Mo., firm primarily engaged in oil and gas explorations and drilling, to divest itself of two acquired producers of ready-mixed concrete, and refrain from acquiring any such company for a period of 10 years without prior Commission approval.

COMPLAINT

The Federal Trade Commission has reason to believe that Mississippi River Fuel Corporation has acquired the stock and assets of Stewart Sand & Material Co., a corporation, Richter Concrete Corporation, a corporation, and Richter Transfer Co., a corporation, and in excess of 50% of the outstanding stock of

*Now known as Mississippi River Corporation.

John A. Denies' Sons Co., a corporation, in violation of Section 7 of the Clayton Act, as amended, (U.S.C., Title 15, Section 18); and therefore, pursuant to Section 11 of said Act, it issues its complaint, stating its charges in that respect as follows:

I

Definitions

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

a. "Portland cement"—includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. "Ready-mixed concrete"—includes all portland cement concrete manufactured and delivered to a purchaser in a plastic and unhardened state. Ready-mixed concrete includes central mixed concrete, shrink mixed concrete and transit mixed concrete.

c. "Concrete products"—includes all masonry products, concrete pipe, precast and prestressed concrete products, precast architectural products and packaged premixed concrete.

d. "The Kansas City area" consists of the counties of Clay, Jackson, Platte and Cass in the State of Missouri, and the counties of Johnson and Wyandotte in the State of Kansas.

e. "The Memphis area" consists of the county of Shelby in the State of Tennessee and the county of Crittendon in the State of Arkansas.

f. "The Cincinnati area" consists of the counties of Warren, Clermont and Hamilton in the State of Ohio, the county of Dearborn in the State of Indiana, and the counties of Campbell, Kenton and Boone in the State of Kentucky.

II

Mississippi River Fuel Corporation

2. Mississippi River Fuel Corporation, respondent herein, is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 9900 Clayton Road, St. Louis, Missouri.

3. Respondent is principally engaged in the exploration for, drilling, production, transportation and sale of gas and oil. In addition, Mississippi River Fuel Corporation owns a 58% stock interest in the Missouri Pacific Railroad Company. In 1963, Mississippi River Fuel Corporation had total revenues of \$72,328,315, assets of \$151,902,924, and net earnings of \$9,063,991.

4. In October of 1963, respondent began construction of a portland cement plant in Jefferson County, Missouri, near St. Louis, which, when completed, will have an annual capacity to produce 3,000,000 barrels of portland cement. This plant will cost approximately \$25,000,000 and is being designed for ready adaptation to an eventual 6,000,000 barrel annual capacity. The cement plant, which will be operated by River Cement Co. Division of respondent, is expected to be completed in the spring of 1965.

5. At all times relevant herein, Mississippi River Fuel Corporation was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

III

Stewart Sand & Material Co.

6. Prior to October 18, 1963, Stewart Sand & Material Co. (Stewart), was a corporation organized and existing under the laws of the State of Missouri with its principal office located in Kansas City, Missouri.

7. At the time of its acquisition, Stewart was, and for many years had been, engaged in the production and sale of ready-mixed concrete and mineral aggregates in the Kansas City metropolitan area. For the calendar year 1962, Stewart had sales of \$6,874,869, assets of \$5,552,618, and net profits before taxes of \$544,094.

8. Stewart operated seven ready-mixed concrete plants in the Kansas City metropolitan area. Stewart was the largest producer of ready-mixed concrete and the largest consumer of portland cement in the Kansas City metropolitan area. During 1962, Stewart consumed 469,904 barrels of portland cement and sold 346,108 cubic yards of ready-mixed concrete. Ready-mixed concrete accounted for approximately 65% of Stewart's total sales in 1962.

9. At all times relevant herein, Stewart was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

IV

Acquisition

10. On or about October 18, 1963, Mississippi River Fuel Corporation acquired all the outstanding stock of Stewart, exchanging therefor 154,343 shares of its common stock.

V

John A. Denies' Sons Co.

11. Prior to September 6, 1963, John A. Denies' Sons Co. (Denies') was a corporation organized and existing under the laws of the State of Tennessee with its principal office in Memphis, Tennessee.

12. At the time of its acquisition, Denies' was engaged in the production and sale of ready-mixed concrete, lightweight aggregates, concrete products, brick, roofing, fabricated sheet metals and general building materials principally in the Memphis metropolitan area. For the calendar year 1962, Denies' had sales of \$7,242,473, assets of \$4,594,004, and net profits before taxes of \$308,756.

13. Denies' operated five ready-mixed concrete plants in the Memphis metropolitan area and one in Nicholson, Mississippi. The bulk of Denies' production of ready-mixed concrete was sold in Shelby County, Tennessee. Denies' was either the largest or second largest producer of ready-mixed concrete and the largest or second largest consumer of portland cement in the Memphis metropolitan area. During 1962, Denies' purchased 302,972 barrels of portland cement and sold 219,071 cubic yards of ready-mixed concrete.

14. At all times relevant herein, Denies' was a corporation engaged in commerce, as "commerce" is defined in the Clayton Act.

VI

Acquisition

15. On or about September 6, 1963, Mississippi River Fuel Corporation acquired 50% of the outstanding stock of Denies' for \$1,300,650. Since September, 1963 Mississippi River Fuel Corporation has continued to acquire Denies' stock, so that it now owns approximately 60% of Denies' outstanding stock.

VII

Richter Concrete Corporation and Richter Transfer Co.

16. Prior to January 31, 1964, Richter Concrete Corporation (Richter Concrete) and Richter Transfer Co. (Richter Transfer) were corporations organized and existing under the laws

of the State of Ohio with their principal office in Cincinnati, Ohio.

17. At the time of its acquisition Richter Concrete was engaged in the production and sale of ready-mixed concrete in the Cincinnati metropolitan area. For the calendar year 1963, Richter Concrete had sales of \$6,005,423 and net profits after taxes of \$32,084. Richter Concrete's assets, as of June 30, 1963, amounted to \$1,136,747.

18. At the time of its acquisition Richter Transfer Co. was engaged in the business of hauling and excavating. Richter Transfer also owned a fleet of 138 concrete mixer trucks which it provided to Richter Concrete under an exclusive lease contract.

19. Richter Concrete operated either nine or ten ready-mixed concrete plants in the Cincinnati metropolitan area. The bulk of Richter Concrete's production of ready-mixed concrete was also sold in the Cincinnati metropolitan area. Richter Concrete was either the largest or the second largest producer of ready-mixed concrete and the largest or second largest consumer of portland cement in the Cincinnati metropolitan area. During 1963, Richter purchased 609,642 barrels of portland cement and sold 438,829 cubic yards of ready-mixed concrete.

20. At all times relevant herein, Richter Concrete and Richter Transfer were corporations engaged in commerce, as "commerce" is defined in the Clayton Act.

VIII

Acquisition

21. On or about January 31, 1964, Mississippi River Fuel Corporation, through its whollyowned subsidiary, Stewart Sand & Material Co., acquired all of the outstanding stock of Richter Concrete and Richter Transfer for a combined consideration of \$1,492,896.

IX

The Nature of Trade and Commerce

22. Portland cement is a material which, in the presence of water, binds aggregates, such as sand and gravel, into concrete. Portland cement is the essential ingredient in the manufacture of ready-mixed concrete. There is no practicable substitute for portland cement in the manufacture of concrete.

23. The portland cement industry in the United States is substantial. In 1963, there were about 51 cement companies in the

United States, operating approximately 182 plants. Total shipments of portland cement in that year amounted to 349,321,000 barrels, having a value of \$1,116,555,000.

24. On a national basis, approximately 57% of all portland cement is shipped to companies engaged in the production of ready-mixed concrete. In the heavily-populated metropolitan areas, the percentage of portland cement consumed by ready-mixed concrete companies is generally higher. Ready-mixed concrete producers are the only businesses engaged in the sale of concrete as a commodity.

25. Due to such factors as transportation costs and the necessity of supplying competitive delivery service to customers, the effective market area of portland cement production and distribution facilities is limited. Similar considerations limit the market area for ready-mix companies.

26. Cement producers sell their portland cement to consumers, such as ready-mixed concrete companies, manufacturers of concrete products, contractors, and building materials dealers. In the past, such consumers, in general, have not been integrated or affiliated with portland cement producers.

27. In recent years, there has been a trend of mergers and acquisitions by which ready-mixed concrete companies in major metropolitan areas in various portions of the United States have become integrated with portland cement companies. As ready-mix companies have been acquired by producers of cement, competing cement producers have sought to acquire other cement consumers in order to protect their markets against the actual or expected foreclosure caused by these acquisitions, and to prevent additional foreclosure of their markets as a result of future such acquisitions by their competitors. Thus each acquisition by a cement producer of a substantial consumer of portland cement forms an integral part of a chain reaction of acquisitions—contributing both to the share of the market already foreclosed by acquisitions, and to the impetus for further such acquisitions.

28. The two largest ready-mixed concrete producers in the Memphis area have, since September 1963, been wholly or partially acquired by portland cement companies.

X

Violation of Section 7

29. The effect of Mississippi River Fuel Corporation's acquisitions of Stewart Sand & Material Co. and Richter Concrete

Corporation (including Richter Transfer Co.) and its acquisition of a majority stock interest in John A. Denies' Sons Co., both in themselves and by aggravating the trend towards vertical integration between suppliers and consumers of portland cement may be substantially to lessen competition or to tend to create a monopoly in the production and sale of portland cement and ready-mixed concrete in the Kansas City, Cincinnati and Memphis areas, respectively, in adjoining markets, or in the United States as a whole, in the following ways among others:

(a) Competitors of respondent have been or may be foreclosed from a substantial share of the market for portland cement.

(b) The entry of new sellers of portland cement and ready-mixed concrete may be inhibited or prevented.

(c) The ability of non-integrated competitors of respondent effectively to compete in the sale of portland cement may be substantially impaired.

(d) As an integrated manufacturer and seller of portland cement and ready-mixed concrete, respondent has achieved or may achieve a decisive competitive advantage over its competitors which are engaged only in the manufacture and sale of portland cement, or ready-mixed concrete.

(e) The production of ready-mixed concrete, now a decentralized, locally controlled, small business industry, may become concentrated in the hands of a relatively few producers of portland cement.

Now therefore the acquisition of Stewart Sand & Material Co., Richter Concrete Corporation and Richter Transfer Co., and the acquisition of a majority stock interest in John A. Denies' Sons Co., by Mississippi River Fuel Corporation, as above alleged, constitute violations of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended.

Mr. Melvyn H. Fruit, Mr. William A. Arbitman, and Mr. Thomas F. McNerney for the Commission.

Mr. William R. McDowell, Dallas, Texas, and Mr. Cleon L. Burt and Mr. T.M. Armstrong, St. Louis, Missouri, for the respondent.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

JANUARY 29, 1968

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PRELIMINARY STATEMENT

The Federal Trade Commission, on January 22, 1965, issued and subsequently served its complaint charging that acquisitions by respondent of certain ready-mixed concrete companies in three separate metropolitan areas constituted violations of Section 7 of the Clayton Act, as amended.

By its answer to the complaint, the respondent in effect admitted that it had made the challenged acquisitions but denied that they were unlawful. Although not specifically pleaded, it early became apparent that, in addition to defenses with respect to competitive effects, it was respondent's position that all three of its challenged acquisitions, which were made before it built its plant and began the production of cement, were made for the purpose of providing a basis for its entry into the portland cement industry, and that the effect of its acquisitions was, there-

fore, to increase rather than lessen competition in that industry. Respondent also presented evidence for the purpose of showing that one of the acquired companies was in a failing condition at the time of acquisition.

The prehearing procedures were prolonged and complicated, involving a variety of interlocutory matters which required Commission action, vigorously contested deposition and discovery proceedings, and ten prehearing conferences in the course of which more than 60 exhibits were received in evidence. Pursuant to authority granted by the Commission's order of June 18, 1965, hearings were held in Washington, D.C., Kansas City, Missouri, Memphis, Tennessee, and Cincinnati, Ohio; but because of the delays involved in the prehearing procedures, the hearings did not begin until May 1, 1967. There were 25 days of hearings which, after several necessary brief intervals, concluded on July 13, 1967. The transcript of the hearings and of the prehearing conferences, all of which were public, covers over 3,500 pages. Approximately 90 exhibits offered by counsel supporting the complaint, and approximately 35 exhibits offered by counsel for respondent, were received in evidence (one being received *in camera*—RX 2, Tr. 1398-9). A number of stipulations were entered into by counsel and, pursuant to agreement of counsel, official notice was taken of certain published material.

At the request of the hearing examiner, the Commission, on July 25, 1967, extended the time for filing initial decision from October 11 to December 18, 1967, so as to enable the hearing examiner to allow the time for filing proposals requested by counsel for respondent. The hearing examiner thereupon allowed counsel for the parties until September 25, 1967, later extended to October 2, to file proposed findings of fact, conclusions of law and order; together with reasons therefor and briefs in support thereof, and until October 16, 1967, later extended to October 23 and then to October 30, 1967, to file replies thereto. The proposals and briefs of counsel were filed substantially in accordance with that schedule. Pursuant to the hearing examiner's request of December 7, 1967, the Commission, by its order of December 13, 1967, further extended the time for filing initial decision to January 29, 1968.

After having considered the record in this proceeding, including the proposals and contentions of the parties, the hearing examiner issues this initial decision. Findings proposed by the parties which are not adopted herein, either in the form pro-

posed or in substance, are rejected as not being supported by the record or as involving immaterial or unnecessary matter. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of this initial decision, are hereby denied.

The parenthetical references herein to the testimony and exhibits, and to the other parts of the record, are intended to be convenient guides to the principal items of evidence supporting findings of fact and do not represent complete summaries of the evidence which was considered in making such findings; and references to the proposals of counsel are intended to include their references to the record. As used herein, the abbreviations in the following list are intended to have the meanings there specified:

CB—Proposed Findings, Conclusions, and Order filed by counsel supporting the complaint October 2, 1967.

CRB—Reply to Brief of Respondent filed October 30, 1967, by counsel supporting the complaint.

CX—Commission Exhibit.

Fi.—Numbered paragraphs of the Findings of Fact herein.

RB—Brief of Respondent filed October 2, 1967.

RRB—Reply Brief of Respondent filed October 31, 1967.

RX—Respondent Exhibit.

Staff Rpt—Economic Report on Mergers & Vertical Integration in the Cement Industry, Staff Report to the Federal Trade Commission, April 1966. Officially noticed Tr. 2384-92.

Tr.—Transcript of Testimony and of Prehearing Conferences.

MOTION TO VACATE HEARING AND EXPUNGE THE RECORD

The brief of counsel for respondent contains what amounts to, and will be treated as, a motion that the "hearing herein be vacated and the record expunged unless respondent is acquitted of the charges against it." This motion is based upon a ruling by the hearing examiner directing counsel for respondent not to confer with a witness concerning his testimony during a recess between the direct and cross examination of the witness (RB pp. 78-86). The reply of counsel supporting the complaint in opposition to the motion appears in their reply brief (CRB pp. 41-5).

The ruling complained of was made in connection with the testimony of the first witness who appeared at the hearings herein, Mr. Arthur W. Manley, who is senior vice president of respondent and president of the subsidiary responsible for its ce-

ment and ready-mixed concrete operations (Tr. 989-90). He appeared in response to a subpoena duces tecum to testify at the instance of the Federal Trade Commission (Tr. 966).

At the conclusion of his direct examination a brief recess was ordered, and counsel supporting the complaint objected to any discussion during the recess by counsel for respondent with the witness concerning the cross examination. Counsel for respondent stated that he intended to discuss the prospective cross examination with the witness. He was instructed by the hearing examiner not to do so, to which ruling he excepted, with no discussion of the specific grounds for his exception. It was made clear that the ruling also applied to any luncheon or other recess, and that it enjoined only discussion with the witness concerning his testimony in this proceeding and did not restrict any other conversations or communications with the witness (Tr. 1157-9, 1185-6).

No claim of prejudice was made at the time of the ruling or thereafter. Following the ruling, counsel for respondent proceeded with cross examination, and recross examination, on May 2, 1967, and the witness was excused (Tr. 1160-90, 1211-3).

On June 5, 1967, Mr. Manley was called as a witness for the respondent and his testimony was extensive, continuing from approximately 10 a.m. to approximately 4:30 p.m. (Tr. 2342-2496). During the period from May 2 to June 5, there was no restriction whatsoever upon the freedom of counsel for respondent to consult with Mr. Manley and to prepare for the presentation of defense evidence through him. If any handicap upon counsel resulted from the ruling in question—and no such handicap has been asserted or made apparent—it was surely removed by counsel's subsequent consultations with, and presentation of evidence through, Mr. Manley.

Counsel for respondent contend that by the ruling in question the witness was denied the right to "consult with or be advised by his counsel," and that such a denial violates Section 6(a) of the Administrative Procedure Act and constitutes denial of due process of law guaranteed by the Fifth Amendment (RB pp. 78-9). Specifically, counsel contend that the ruling violated " 'the right to be accompanied, represented, and advised by counsel' accorded 'any person compelled to appear in person before any agency or representative thereof' by Section 6(a) of the Administrative Procedure Act 5 USCA § 1005(a)"; that this right "comprehends the right to consult with counsel at a noon recess during the course of the witness' examination" (RB p. 79); and that

"The vice inherent in the denial of these fundamental rights taints the entire proceeding and record, requiring that the Commission's hearing herein be vacated and the record expunged. * * *" (RB p. 86.)

The contentions of counsel for respondent are founded squarely on the principle that the witness was denied the right to "consult with or be advised by his counsel." Counsel for respondent, however, appeared as counsel for "Mississippi River Fuel Corp. & Subsidiaries" (Notice of appearance filed May 10, 1965) and not as counsel for Mr. Manley. Nonparty witnesses who were accompanied by counsel were allowed to confer with their counsel, but not with counsel for the parties, during recesses in their testimony (Tr. 2038-9, 2169-70; see also Tr. 1396, 2234-5).

Although Mr. Manley was senior vice president of the respondent and president of the subsidiary responsible for respondent's cement and ready-mixed concrete operations, he was not an individual respondent in this proceeding. Counsel for respondent had not filed an appearance as counsel for the witness and, at the time of the ruling in question, he did not assert, as a ground for his opposition to the ruling or otherwise, that he was counsel for the witness. Neither counsel nor the witness asserted that the witness was represented by counsel or that the witness desired to consult with his counsel. The purpose of the proposed consultation was clearly for the benefit of counsel in his capacity as counsel for respondent, the only capacity in which he appeared in this proceeding. There was nothing to indicate that consultation was desired for the benefit or protection of the witness.

The ruling here in question was consistent with instructions by the hearing examiner to other witnesses in this proceeding, including Mr. Forkin, an official of the subsidiary responsible for respondent's cement and ready-mixed concrete operations (see Tr. 1920, 1945, 2038-9, 2169-70, 2273, 2830); and was consistent with the situation involving respondent's expert witness who, with the agreement of counsel supporting the complaint, was permitted to confer with counsel for respondent concerning his testimony during recesses in both the direct and cross examinations (Tr. 2965, 3344-5). The ruling was also consistent in principle with rulings by the hearing examiner, at the request of counsel for respondent, excluding from the hearing room while a witness was testifying, other witnesses scheduled to testify on the same or similar matters (Tr. 963-5; see also Tr. 1032, 1134,

1552, 1608, 1621, 2002, 2047); and with a ruling excluding a witness from the hearing room during a conference between counsel and the hearing examiner concerning a problem with respect to the evidence being presented through the witness (Tr. 1945-8).

All these rulings were for the same basic purpose—to avoid influences which may improperly affect the testimony of witness. Cross examination is an indispensable tool in the search for truth, and it is particularly important to avoid improper influences in connection with it. The cross examination of a friendly witness warrants careful attention to avoid such influences, even to the extent of preventing or limiting the use of leading questions, because of the peculiar opportunity which it provides to correct, qualify or explain direct testimony.

It is the opinion of the hearing examiner that a private conference between counsel and a friendly witness after direct examination and in preparation for cross examination would have the effect of a preliminary private cross examination, and would be far more objectionable than leading questions to a friendly witness in open hearing. It would afford an opportunity for the witness to be made aware that his direct testimony may have been damaging in certain respects, and to be guided in framing answers calculated to repair the damage, or otherwise to be influenced in giving testimony. This could, of course, be done in good faith or unintentionally and, in many instances, could actually contribute to a fuller exposition of the truth. But where such a conference is undertaken over objection, and the witness is questioned concerning it upon returning to the stand, a basis is provided for suspicion concerning the credibility of the testimony on cross examination.

In the absence of strong countervailing considerations, such as those involving the rights of an accused in a criminal prosecution, or a persuasive showing of prejudice to the witness or to a party, it is the opinion of the hearing examiner that a private conference of the sort here involved should not be allowed over objection. Except in special circumstances not present here, once a witness takes the stand his testimony ought to be entirely his own without any private influence or suggestion of any nature or from any source. Any basis for suspicion of improper influence ought to be carefully avoided.

This is not to suggest that counsel for respondent would have brought any improper influence to bear upon the witness in this

situation or that Mr. Manley would have yielded to any improper influence in giving his testimony. In making the ruling here in question, however, the hearing examiner considered it important to avoid even the appearance that the testimony of the witness on cross examination may have been influenced or guided by advice or information received in a private conference after he had testified on direct examination.

Counsel for respondent do not suggest that either the respondent or the witness was prejudiced in any way by the ruling, and the record makes it abundantly clear that there is no reasonable basis upon which it could be urged that prejudice resulted. For this reason and the reasons set out above, it is the opinion of the hearing examiner that it was not improper for him to direct counsel for respondent not to confer with the witness concerning his testimony during a recess between the direct and cross examination of the witness. The motion of counsel for respondent to vacate the hearing and expunge the record herein is, accordingly, denied.

FINDINGS OF FACT

The Respondent

1. Respondent Mississippi River Fuel Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal office located at 9900 Clayton Road, St. Louis, Missouri (Complaint and Answer). The name of the respondent was changed to Mississippi River Corporation in May 1965 (Tr. 1002-4).

2. Respondent, and its subsidiaries, excluding Missouri Pacific Railroad Company, are engaged principally in exploring and drilling for, and in the production, transportation and sale of natural gas and oil, and in the production and sale of portland cement and ready-mixed concrete. Its principal subsidiaries include Mississippi River Transmission Corporation, Natural Gas and Oil Corporation, and Stewart Concrete and Material Company with its subsidiaries John A. Denie's Sons Co., Richter Concrete Corporation, and Maclay Concrete, Inc. Respondent also owns a majority stock interest in the Missouri Pacific Railroad Company. At all times relevant herein respondent has been engaged in commerce as "commerce" is defined in the Clayton Act (Complaint and Answer; CX 87A; CB pp. 3-4; RB pp. 2-6).

3. The consolidated total assets, revenues and net income of respondent and its subsidiaries (not including Missouri Pacific

except to the extent of capital stock owned and dividends received), as shown by its annual reports for each year, were as follows (CXs 1, 2, 3, 7, 86A, 87A):

Year	Total assets	Revenues	Net income
1961	\$144,312,341	\$ 86,806,663	\$ 8,801,236
1962	152,325,515	86,257,973	7,816,817
1963	151,902,924	72,328,315	9,063,991
1964	180,820,042	101,750,127	9,780,044
1965	190,470,763	101,260,323	10,068,137
1966	190,851,350	107,952,497	10,130,729

Entry Into Portland Cement Industry

4. Mississippi River Fuel Corporation was incorporated in 1928 for the purpose of building, owning, and operating a natural gas transmission line from newly discovered reservoirs in northern Louisiana to St. Louis, Missouri, and for the purpose of marketing gas in the St. Louis area (Tr. 1163-4; RB 2). The pipeline system was subsequently expanded and developed primarily for the St. Louis, Missouri market area. In 1950, the company entered into a diversification program designed to utilize its pipeline facilities more efficiently and economically. As a part of that program, it bought a tract of land (sometimes referred to as the Selma tract) consisting of 4,500 acres along the Mississippi River located at Festus, Missouri, about 35 miles south of St. Louis. In order to provide a sizeable outlet for natural gas, respondent utilized about a thousand acres of that tract for the construction of a nitrate plant, which it later sold to a fertilizer company, and for the building of a community of homes, known as Selma Village, to accommodate the labor force. This left for further development about 3,500 acres which contained valuable deposits of limestone and silica sand. It was eventually decided to utilize this property for the production of portland cement (Tr. 999-1000, 1011, 1166-73, 1202-6).

5. In July 1963, respondent's board of directors authorized the construction of a portland cement plant on the Selma tract and, at the same time, authorized the acquisition of three ready-mixed concrete companies. It was later decided not to acquire one of those companies. The other two acquisitions authorized at that time (Stewart and Denie's), together with a third acquisition subsequently authorized (Richter), constitute the acquisitions challenged in this proceeding (Tr. 1154-5, 2356-9, 2457-8, 2494; RB 5).

6. On July 15 and 19, 1963, respondent entered into contracts for the design and engineering of its portland cement plant and for

consulting engineering services; and, in February and July 1964, it entered into contracts for construction of the plant. The initial plant was to have a production capacity of three million barrels annually, with provision for subsequent expansion to a capacity of six million barrels (Tr. 997-8, 1000, 2360-1, 2459-61, 2491-3; CX 6). In July 1965, the three million barrel capacity plant was completed and went "on stream," that is, it was producing in sufficient quantity and began making shipments to the trade (Tr. 1004, 1187-8, 2401; CX 86A). This was respondent's first commercial production of portland cement.

The Challenged Acquisitions

Stewart Sand and Material Company

7. On or about October 18, 1963, respondent, by the exchange of 154,343 shares of its common stock, acquired all of the outstanding stock of Stewart Sand and Material Company (generally referred to herein as Stewart), a corporation organized and existing under the laws of the State of Missouri, with its principal office located in Kansas City, Missouri. At the time of this acquisition, Stewart was (and for a number of years had been) engaged in the production and sale of ready-mixed concrete and mineral aggregates in the States of Missouri and Kansas. At all times relevant herein, it was engaged in commerce, as "commerce" is defined in the Clayton Act. For the calendar year 1962, Stewart had net sales (exclusive of interdepartmental transfers) of \$6,874,869 and net profits (after provision for income taxes) of \$275,540. As of December 31, 1962, it had assets of \$6,210,435 (Complaint and Answer; CXs 25 I, N, and O, 27). In October 1964, its name was changed to Stewart Concrete and Material Company (Tr. 46, 990-1).

8. The portland cement assets and operations of the respondent, including the plant site, the plant itself, the barge fleet and the terminals, were identified with the name River Cement Company. That company had no separate corporate existence, but operated as a division of respondent. In October 1964, all of the portland cement assets and operations of respondent, and all of its interests in ready-mixed concrete companies, were transferred to Stewart in exchange for Stewart stock; and River Cement Company became a division of Stewart. Since that time, Stewart has had the responsibility for the direction and control of all of respondent's portland cement and ready-mixed concrete operations (Tr. 992-5, 999, 1188-9; CXs 3, 6, 7). When it was

completed and went on stream, the cement plant of respondent was owned and operated by Stewart, and Stewart was and still is a wholly owned subsidiary of respondent (Tr. 992, 1188-90, 2342-3; CX 86A).

John A. Denie's Sons Co.

9. On or about September 6, 1963, respondent acquired 50 percent of the outstanding stock—and assumed effective control—of John A. Denie's Sons Co. (generally referred to herein as Denie's), a corporation organized and existing under the laws of the State of Tennessee, with its principal office located in Memphis, Tennessee. At the time of this acquisition, Denie's was engaged in the production and sale of ready-mixed concrete, lightweight aggregates, concrete products, brick, roofing and fabricated sheet metals, and in the resale of general building materials. At all times relevant herein, it was engaged in commerce, as "commerce" is defined in the Clayton Act. For the fiscal year ended November 30, 1962, Denie's had total income of \$7,242,473, net income before federal income taxes of \$308,756, and assets of \$4,594,004 (Complaint and Answer; CX 17; Tr. 2813-5).

10. After its initial acquisition, respondent continued to acquire Denie's stock. On May 6, 1964 (Answer), or in October 1964 (CX 7), respondent transferred all of its stock in Denie's to Stewart in exchange for Stewart stock. By June 1967, Stewart owned about 87 percent of Denie's outstanding stock, and Stewart continues to control the operations of Denie's (Tr. 45-6, 992, 1178, 2342-3, 2678).

Richter Concrete Corporation and Richter Transfer Company

11. On January 28, 1964, Stewart organized an Ohio corporation under the name Richter Concrete Corporation (sometimes referred to herein as Richter 1964). On January 31, 1964, Richter 1964 acquired: all of the assets of Richter Concrete Corporation, an Ohio corporation chartered on January 17, 1933, with its principal office located in Cincinnati, Ohio (sometimes referred to herein as Richter 1933, and now known as Associates Incorporated); and certain assets, including ready-mixed concrete trucks and other vehicles, formerly owned by Richter Transfer Company, a corporation organized and existing under the laws of the State of Ohio, with its principal office located in Cincinnati, Ohio. These acquisitions were made for a total cash consideration of \$1,492,896 (Complaint and Answer; Tr. 48-50; CXs 30, 31, 32).

12. At the time of the acquisition of their assets, Richter 1933 was engaged in the production and sale of ready-mixed concrete, and Richter Transfer Company was engaged in the business of hauling and excavating and owned a fleet of 138 concrete mixer trucks, which it had under lease to Richter 1933 and which were acquired by Richter 1964. For the fiscal year ending June 30, 1963, Richter 1933 had sales of \$5,761,970 and net profits after taxes of \$32,084; and, as of June 30, 1963, its assets amounted to \$1,136,747 (Complaint and Answer; Tr. 48-50; CX 29D-E).

13. The concrete mixer trucks acquired from Richter Transfer Company were under lease to Richter 1933 and constituted an integral part of its operations. Richter 1933 and Richter Transfer Company, together with an additional company, Richter Interstate Carriers, Incorporated, were parts of a family-owned business operating under a common direction and control with essentially the same personnel (Tr. 1179, 2307-10, 2359; CXs 28A, 31, p. 22). For the purposes of this proceeding, therefore, it is unnecessary to distinguish further between Richter 1933 and Richter Transfer Company; and further references herein to Richter or to the Richter acquisition are intended to include both of those companies or the assets acquired from them. Richter 1964 was organized for the purpose of making the Richter acquisition. It is a wholly owned subsidiary of Stewart and is operated under the direction and control of Stewart (Tr. 992-3, 1139, 1179, 1207-10, 2342-3, 2359; CXs 7, 31, 32).

14. Respondent's answer to the complaint denied that Richter was engaged in commerce, as "commerce" is defined in the Clayton Act—that is, interstate commerce. Consistent with this denial, respondent has contended throughout that at the time of the acquisition Richter was not engaged in interstate commerce and, accordingly, that the Commission has no jurisdiction with respect to the Richter acquisition (Tr. 93, 127, 164-6, 620-5, 945-52, 971-2, 1133; Motion 3/10/66; H. Ex. Order 3/23/66; Comm. Order 4/20/66 [69 F.T.C. 1117]; RB pp. 70-7; RRB pp. 8-9).

15. Counsel stipulated that during the years 1961, 1962 and 1963 Richter regularly purchased portland cement in interstate commerce (Tr. 260-4); and the record discloses that during the same period it also regularly purchased lightweight aggregates in interstate commerce (Tr. 2323-5). The record also discloses that Richter did not have licenses to deliver ready-mixed concrete into Kentucky, and that it did not regularly engage in

the sale of ready-mixed concrete outside of the State of Ohio (Tr. 2302-4).

16. In 1963, however, Richter delivered a limited amount of ready-mixed concrete into Kentucky in connection with a contract to supply concrete for the deck of a bridge across the Ohio River at Cincinnati. On July 9, 1963, pursuant to that contract, Richter delivered into Kentucky 121 cubic yards of concrete. When it was called to its attention that it did not have the proper licenses to work on that side of the river, Richter discontinued its deliveries into Kentucky and arranged for a ready-mixed concrete company in that State to complete the portion of the contract requiring such deliveries (Tr. 2302-3, 2314-8).

17. Except for the 121 cubic yards delivered in Kentucky, all of the concrete supplied by Richter for the bridge was delivered to the contractor from Richter's trucks on the abutment of the bridge or on the river bank, both in Ohio. It was delivered by Richter into the motorized buggies of the contractor or into a hoist provided by the contractor and was thereafter transported by the contractor to the part of the bridge where it was used (Tr. 2325-6).

18. Richter's contract was to supply the ready-mixed concrete for paving the bridge deck that spanned the Ohio River, and the contract was completed in the latter part of 1963. Richter supplied about 4,000 cubic yards of ready-mixed concrete pursuant to that contract, which represented about three-fourths of the total required, the balance being supplied by the Kentucky company. Since the boundary between Ohio and Kentucky is the low-water mark on the Ohio side of the river, it is apparent that much, probably most, of the concrete supplied by Richter was used for paving that part of the bridge deck that extended over the river into Kentucky, but the record does not disclose the actual amount so used (Tr. 2302, 2318-21, 2327-8).

19. It is clear, therefore, that during the period relevant herein Richter regularly purchased portland cement and lightweight aggregates in interstate commerce for use in its production of ready-mixed concrete. Although it did not regularly sell ready-mixed concrete outside of Ohio, Richter sold and delivered 121 cubic yards into Kentucky on July 9, 1963. During the latter part of 1963, it also sold and delivered approximately 4,000 cubic yards of ready-mixed concrete to a contractor who accepted delivery in Ohio and immediately transported a substantial part of it into Kentucky. The concrete transported by the contractor

into Kentucky did not come to rest in Ohio but continued its movement in transit until its final installation in the part of the bridge deck extending into Kentucky. Its transfer from Richter's trucks to the contractor's equipment in Ohio did not interrupt its flow in commerce. The transportation of the concrete into Kentucky by the contractor constituted a continuation of the Richter deliveries, and those deliveries were in interstate commerce.

20. The thrust of respondent's contention is that Richter was not regularly engaged in the interstate sale of ready-mixed concrete and, accordingly, that it was not engaged in a "line of commerce," within the meaning of Section 7 of the Clayton Act, which may be competitively affected by the acquisition (RB pp. 70-7; RRB pp. 8-9). The production and sale of portland cement is one of the lines of commerce in which it is alleged that competition may be substantially lessened by the challenged acquisitions. Since Richter regularly purchased cement in interstate commerce, it was engaged in a "line of commerce," within the meaning of Section 7 of the Clayton Act, in which it is alleged that competition may be substantially lessened by the acquisition. The Commission has also made it clear that purchases in interstate commerce constitute a form of engaging in commerce for purposes of its jurisdiction under the statute (*Foremost Dairies Inc.*, 60 F.T.C. 944, 1069 [1962]; *Beatrice Foods Company*, Docket No. 6653, Comm. Op., 4/26/65, p. 47 [67 F.T.C. 473, 730-731]).

21. During the latter part of 1963, the period immediately preceding the acquisition, Richter was also engaged in interstate commerce by selling and delivering 121 cubic yards of ready-mixed concrete from Ohio into Kentucky, and by selling and delivering to a contractor in Ohio, for installation in Kentucky, a substantial part of 4,000 cubic yards of ready-mixed concrete.

22. It is found, therefore, that at all times relevant herein Richter was engaged in commerce, as "commerce" is defined in the Clayton Act.

Product Descriptions and Definitions

23. Portland cement is a powdered product which, in the presence of water, binds minerals aggregate into concrete, and which as a constituent of mortar will hold building blocks or bricks together (CX 83 p. 6). Though there is a variety of cements

manufactured for this purpose, grey portland cement represents over 95 percent of all shipments (Staff Rpt p. 18). It is produced by burning at a very high temperature a finely ground mixture consisting principally of calcium carbonate, together with lesser proportions of magnesium carbonate, silica, alumina, and iron oxide, and grinding the resulting clinker into an extremely fine powder. Uniformity of the final product is controlled by careful chemical analysis of the mixture. Finished portland cement is a perishable product if exposed to moisture (CX 83 pp. 3, 6, 8; Tr. 1028, 1218-9).

24. The American Society for Testing Materials (ASTM) has grouped portland cements under five types, designated Type I through Type V, based on certain differences in composition and characteristics. Type I, a general purpose cement, is produced in greatest volume, and Types I, II and III together constitute more than 97 percent of all the portland cement in the United States (CX 83 pp. 3, 6; Tr. 1220, 1411-2, 1449-50). A bag of portland cement is standardized as a unit representing 94 pounds, and a barrel as a unit which equals four bags, or 376 pounds. It is sold primarily in bulk, relatively little, about 12 percent, being sold in bags, and none being sold in barrels, the latter term simply representing the common unit of measure (Staff Rpt pp. 10, 18, 64; CX 34 p. 6, CX 83 p. 4; Tr. 2001).

25. As used in this initial decision the term "portland cement," or the unqualified term "cement," is intended to refer to grey portland cement, including ASTM Types I through V, but is not intended to include masonry cement, white cement or other specialty cements which may be composed in part of portland cement (see CX 83 p. 4; Tr. 1474-5, 1478, 1807-8, 2042, 2047-9, 2400).

26. Concrete is made by mixing cement, and sand and gravel, broken stone, or other aggregate, with water so as to cause the cement to set and bind the entire mass into a hard product resembling stone (CX 83 pp. 4, 6; Tr. 1687). The characteristics of the finished product, and particularly its strength, are affected by the proportion of cement used in the mixture.

27. As used in this initial decision, the term "ready-mixed concrete," or the unqualified term "ready-mix," is intended to include all portland cement concrete delivered to a purchaser in a plastic and unhardened state. It includes central mixed, transit mixed and shrink mixed concrete (see Staff Rpt p. 45; Tr. 1686, 1775-7, 1851-3), but does not include concrete mixed, usually at

the job site, by a contractor using his own materials and equipment (see Tr. 1777, 2261, 2263-6, 2270-1), and does not include dry mixtures to which water is added by the purchaser (see Tr. 1687, 2120-1).

28. As used in this initial decision, the term "concrete products" is intended to include all masonry products containing portland cement delivered to a purchaser in a hardened state, such as concrete pipe, precast and prestressed concrete products, and precast architectural products, and is also intended to include packaged dry mixtures containing portland cement to which water is added by the purchaser.

The Portland Cement Industry

29. The production of portland cement is widely distributed throughout the United States, one or more cement plants being located in all but seven of the States in the continental United States, and two each in Hawaii and Puerto Rico (Staff Rpt p. 18; CX 85 p. 4). The annual production capacity of the United States (including Puerto Rico) increased from about 268 million barrels in 1950 to about 482 million barrels in 1965. Since 1950, however, the industry has become more concentrated, the number of cement producers in continental United States having decreased from 64 in 1950 to 48 in 1966, due primarily to the number of acquisitions by members of the industry having exceeded the number of new entries (Staff Rpt pp. 7-8, 40, 55, 115-6, 120-1; CB p. 44; RRB p. 4).

30. Between 1950 and 1955, increases in production exceeded increases in capacity, but subsequently capacity increased at a faster rate than production. The rate of cement capacity utilization in 1950 was 84.2 percent. It reached a high of 94.4 percent in 1955, and during the years 1961 through 1965 it varied from a low of 71.8 percent in 1962 to a high of 77 percent in 1965 (Staff Rpt pp. 54-5; CX 85 p. 6). The rate of capacity utilization, however, probably was somewhat higher than indicated by these figures "due to geographic inequalities, seasonal fluctuation, and obsolete equipment still in use but being operated at high cost and with only a short remaining useful life span" (CX 83 p. 3; RRB pp. 9-10).

31. The Bureau of Mines Minerals Yearbook reports that in 1961 there were 175 active cement plants in the United States, including Puerto Rico, which shipped over 320 million barrels having a value of about \$1,065 million (CX 35 p. 4); in 1962

there were 178 active plants which shipped over 331 million barrels having a value of about \$1,090 million (CX 36 p. 3); in 1963 there were 181 active plants which shipped over 349 million barrels having a value of about \$1,118 million (CX 37 p. 4); in 1964 there were 181 active plants which shipped over 366 million barrels having a value of about \$1,169 million (CX 38 p. 4); and in 1965 there were 181 active plants which shipped over 374 million barrels having a value of about \$1,178 million (CX 85 p. 4).

32. There are no cement companies serving the entire United States, but the larger companies, through a network of geographically scattered plants, cover major portions of the country. For example, in 1964 the four largest companies, on an average, operated 14 cement plants and made shipments to 30 States (Staff Rpt p. 19). Size differences among cement producers depend primarily on the extent of their multiplant operations. The average size of all cement plants in operation in 1964 was 2.6 million barrels capacity; and the average size of the plants operated by the four largest producers was 2.5 million barrels (Staff Rpt p. 20). There are, however, extreme variations from these averages, the size of individual plants ranging from about 500,000 barrels to 9 million and 10 million barrels capacity, and in one instance up to about 16 million barrels capacity (CX 77 for 1965).

33. The effective marketing area of a cement plant is geographically limited by high shipping costs in relation to product value. In most circumstances cement is not shipped over long distances—about 90 percent of all cement moving less than 160 miles from production point to point of use in 1964. Markets for cement are primarily local or regional rather than national in scope and production points are widely scattered to serve the available markets (Staff Rpt p. 18; CX 83 p. 3).

34. In many instances the effective marketing area of a cement plant is greatly expanded by the establishment of terminals which provide storage and distribution facilities for relatively large quantities of cement, frequently at considerable distances from the plant. Each distribution terminal provides an operating base with adequate inventories from which to distribute cement promptly and economically within its own geographic area. Access to water for barge transportation provides a low cost way to supply distribution terminals in markets which are relatively distant from the plant, and high volume transportation by rail permits plants

to utilize distribution terminals to compete in markets which are beyond their otherwise normal marketing areas. The use of terminals has become widespread since 1960. About 21 percent of all cement shipments in 1964 originated at 234 terminals, 164 of which were established between 1960 and 1964 (see Staff Rpt pp. 27-8, 36, 64-6; and CX 83 p. 3).

35. Cement is a homogeneous product manufactured to standard and rigid specifications and, in general, the product of one plant is physically substitutable for the product of another (Staff Rpt p. 18; Tr. 1028, 1216-21, 1276, 1410A-11, 1449, 1474, 1528, 1570, 1665, 2128). There are, however, some variations in shades of color which in certain situations prevent mixing cement from different plants in the same job, but these color variations do not otherwise affect the quality of the cement and are not ordinarily of such consequence as to cause the cement from one plant to be preferred to that from another for a particular job (Tr. 1891, 2241-3, 2281). In a practical sense, therefore, all cement manufacturers compete with each other, or are potential competitors, in the sale of cement to the extent that their geographic locations and the facilities available to them are such as to make competition economically feasible and attractive.

36. An established brand name and goodwill, and a long reputation for quality and service, aid a cement company in having its product accepted by the trade and give it a degree of competitive advantage (Tr. 1059-60, 1243, 1356-7, 2020, 2063-4). Because of the homogeneity of the product, however, consumers will not ordinarily pay more for the cement of one producer than that of another. In order to compete in a particular market, therefore, the cement supplier must meet the lowest—or the prevailing—delivered price of his competitors in that market. The availability of prompt delivery service, usually by truck, has also become a competitive necessity, and a cement supplier must meet that service to the extent that it is provided by competitors. This frequently makes it necessary to maintain a substantial inventory of cement in a local or nearby plant or distribution terminal so as to enable the consumer to obtain his reasonable requirements on short notice, thus permitting the consumer to maintain a relatively small inventory with its consequent cost savings (CB pp. 37-8; RB pp. 42-3; RRB 14-5; Staff Rpt p. 31).

37. The prevailing delivered price of cement in a particular market is usually established by the supplier with the lowest freight costs to that market, especially one with a local or nearby

plant. In rare instances, however, a supplier with higher freight costs may undercut the prevailing price—and establish the low price—for the purpose of penetrating a market (CB pp. 37–8; RB pp. 42–3; Tr. 1484–9; RRB 14–5; Staff Rpt p. 31).

38. In order to compete effectively in markets located at some distance from its plant, therefore, a cement supplier frequently must absorb a portion of the freight charges to the destination to meet the prevailing delivered price and, in many instances, must establish local distribution terminals at considerable cost to meet the service provided by competitors. These additional costs reduce the net price of the cement at the plant, and are among the important considerations affecting the dimensions of the economically feasible and attractive marketing area of a particular plant (CB pp. 37–8; RB pp. 42–3; RRB 14–5; Staff Rpt p. 31).

The Ready-Mixed Concrete Industry

39. Portland cement is an essential ingredient in the manufacture of ready-mixed concrete. Various admixtures are sometimes specified or permitted which will reduce the amount of cement necessary to produce concrete of the required quality and strength, but there is no practicable substitute for cement in the manufacture of ready-mixed concrete (CX 34 pp. 6–7, CX 83 pp. 7–8; Tr. 54, 1613–4, 1662–3, 1690–1, 1770, 1831, 1853, 1874–5, 2157–8, 2238; CB pp. 32–3).

40. The amount of cement used in producing a cubic yard of ready-mix and its relative cost in the final product and, consequently, the price at which the final product is sold, vary with the quality and strength of the concrete specified. For example, to produce concrete with a compressive strength of 3,000 pounds per square inch, the strength most commonly specified, requires about five to five and a half bags of cement per cubic yard of ready-mix, while a strength of 2,000 pounds requires about four and a half bags, and of 4,000 pounds, about six and a half bags. With these variations, however, cement represents, by a substantial margin, the largest single item of cost in producing ready-mixed concrete—the average being well over half (probably 60 to 70 percent) of the cost of the materials used, and more than a third of the total costs of the materials and of producing, selling and delivering ready-mix (CX 101 pp. 6–7; Tr. 1614–7, 1663–6, 1692–5, 1765–71, 1831–2, 1854, 1875–7, 2157–9, 2213, 2223, 2238–40. CB pp. 32,3).

41. The ready-mixed concrete companies constitute the largest and an increasingly important class of cement customers. In 1959 about 53 percent of all cement sales were made to ready-mixed concrete companies; in 1961 they received 56.4 percent of total shipments; and in 1965 their share had increased to 59.1 percent. The other principal types of cement customers include concrete products manufacturers who received 14.2 percent of total shipments in 1965; contractors who mix their own concrete at construction sites received 14.7 percent; and building material dealers who serve essentially as retail outlets for cement suppliers received 8 percent (Staff Rpt pp. 1, 10, 44; CX 35 p. 16, CX 36 p. 17, CX 37 p. 15, CX 38 p. 14, CX 85 p. 12; CB p. 31).

42. Prior to World War II, most construction contractors purchased cement and produced their own concrete. Since that time, however, they have relied to an increasing extent upon the ready-mix companies for the production and delivery to the job site of their concrete requirements, making it unnecessary for contractors to maintain their own concrete mixing facilities. Primarily as a result of this changing trend, ready-mix concrete production has emerged as a specialized manufacturing activity, increasing from about 350 establishments in 1948, with sales of about \$175 million, to over 4600 establishments in 1963, with sales of over two billion dollars (Staff Rpt pp. 12, 45-7; CX 40, Table 1; RX 5).

43. Most ready-mix producers are relatively small with single plant operations and with annual production of less than 50,000 cubic yards. Large firms are distinguished from small firms more by the number of plants they operate than by the size of their plants, but the larger firms, on the average, ship much more per plant than the small firms. Of over 1,700 firms responding to a 1964 survey, 12 percent had annual shipments in excess of 100,000 cubic yards, and accounted for nearly 60 percent of the reported shipments, and only 23 of the firms had shipments of 500,000 cubic yards or more, and accounted for 20 percent of the reported shipments (Staff Rpt pp. 12, 45-7).

44. The effective marketing area of a ready-mix plant is sharply limited by a number of factors—some applying generally and others varying to some extent due to local conditions. The cost of transportation is relatively high and increases with time and distance; the product is perishable and must be installed or poured within limited periods of time after mixing; and the de-

livery schedules and service requirements of the customer must be met.

45. The area to be served effectively and competitively must be such as to permit a relatively high degree of utilization of ready-mix trucks, involving, among other things, truck capacity, highway weight limitations, licensing requirements, the density of population and traffic, the availability of arterial highways, and the location of competitive plants. The average haul of ready-mix from plants in suburban areas is longer than from plants in congested downtown areas, but even in open suburban areas deliveries in excess of 30 miles are unusual. The time between loading and final delivery by the plants located in the three local areas involved in this proceeding ranged from about 30 to 90 minutes, and the distance of their deliveries generally averaged from about 5 to 12 miles (Staff Rpt pp. 45-6; CB p. 41 par. 92; RB p. 28).

46. The markets for ready-mixed concrete producers are, therefore, essentially local and their plants are ordinarily in and around the centers of population where commercial construction is sufficiently sustained to support their specialized activity in the production of ready-mix. Even the largest producers operate in limited geographic areas, rarely reaching beyond a single metropolitan area. In any metropolitan area the large firms ordinarily operate several strategically located plants so as to serve the various parts of the area conveniently and quickly (Staff Rpt pp. 46-7; CB p. 41 par. 90).

47. Ready-mixed concrete competes in varying degrees with other materials in construction and paving projects. A national trade association and local trade associations have been established to promote its uses, improve its quality, and supply helpful information to producers (CB p. 34 par. 76). On the larger projects, architects and engineers determine which building material will be used. In its actual sale, as distinguished from its promotion, ready-mixed concrete generally does not compete with any other product. The prices at which it is sold are adjusted to be competitive with the prices of other ready-mix producers and not with the prices of other building materials (CB pp. 33-4 par. 72).

48. Relatively small quantities of ready-mixed concrete are ordinarily sold at prices generally prevailing in the local area. On larger jobs, however, prices are determined by individual quotations, either through bids or negotiations, or both. The

quoted price and the ability of a particular producer to compete are affected by the quantity of ready-mix involved, the distance of the job from the producing plant, the proportion of cement required by the specifications, the delivery schedule, the conditions of unloading at the job site, and other factors. On such jobs price is ordinarily the most important consideration in determining which producer will receive the business. But the producer must also have the ability to produce in the quantities required and to provide prompt delivery and good service, and the reputation of the producer and his personal relationships with the contractors are important factors (CB p. 34 pars. 73-75).

The Relevant Product Markets—Lines of Commerce

49. Counsel supporting the complaint propose that portland cement and ready-mixed concrete is each a relevant "line of commerce," within the meaning of Section 7 of the Clayton Act, in which to examine the effects of the challenged acquisitions (CB p. 32 par. 64 and p. 35 par 78). These proposals, although not specifically made by counsel for respondent, do not appear to be in dispute. Respondent's contention that it made the challenged acquisitions of ready-mixed concrete producers so as to enable it to enter into the production of portland cement underlines its position that these are the relevant product markets for the purposes of this proceeding, and there is no suggestion by respondent that other products should be considered.

50. Portland cement has little utility alone. It becomes a useful product only when combined with water and aggregates to form concrete (CB p. 30 par. 60; RRB p. 11). It is an essential ingredient for which there is no practicable substitute in the manufacture of ready-mixed concrete; and ready-mixed concrete constitutes the largest and an increasingly important use of portland cement (Fi. 39, 41).

51. The production of ready-mixed concrete constitutes a specialized manufacturing activity which is recognized as a separate and distinct industry (Fi. 42; CB p. 34 par. 77). The sale of ready-mixed concrete does not involve direct and substantial competition with any other product (Fi. 47). Building materials, such as steel, aluminum, wood, brick, asphalt, glass and concrete, compete to some extent with each other, and in some uses and for some purposes may be substituted for each other. Concrete, the ultimate form of ready-mixed concrete, however, has its own

particular uses and characteristics which set it apart from other building materials (CB p. 35).

52. Portland cement and ready-mixed concrete each represents a relevant product market, or a relevant "line of commerce," in which to examine the effects of the challenged acquisitions for the purposes of this proceeding.

The Relevant Geographic Markets—Sections of the Country

53. Although the complaint alleges that the effect of the challenged acquisitions may be, *inter alia*, to lessen competition in the production and sale of portland cement and ready-mixed concrete "in the United States as a whole," counsel supporting the complaint do not propose that the United States as a whole is an appropriate market area within which to examine the effects of the challenged acquisitions (CB pp. 37-44, 55, 63, 72, 79).

54. The complaint also alleges that the effect of the challenged acquisitions may be to lessen competition "in adjoining markets" to the local areas in which the acquired companies did business. No evidence was presented, however, which purports to define "adjoining markets" or to show the extent of actual or possible competitive effects in them.

55. The complaint alleges and the record discloses that in recent years there has been a trend of acquisitions of ready-mixed concrete companies by cement manufacturers. Such acquisitions are highly contagious and stimulate moves by competing cement manufacturers to capture or retain segments of the markets by acquisitions or other business relationships. Although this trend has been manifested in various areas of the United States, counsel supporting the complaint do not propose that the competitive consequences of the challenged acquisitions in contributing to this trend be examined nationally. On the contrary, the thrust of their proposals with respect to this trend seems to be that, although consistent with the effects of similar acquisitions in other areas, the "triggering" effects of the challenged acquisitions are manifested primarily in their respective local areas (CB pp. 44-6 pars. 96-99, p. 55 par. 118, p. 63 par. 141, p. 72 par. 161, p. 74).

56. The record, accordingly, does not provide a basis for a meaningful or factually sufficient examination of the possible competitive effects of the challenged acquisitions "in the United States as a whole" or "in adjoining markets" to the local areas in which the acquired companies did business. To the extent that these acquisitions were a part, or typical, of a national trend,

their effects, on the basis of the record in this proceeding, must be examined in the context of their respective local areas.

57. Counsel supporting the complaint propose that the Standard Metropolitan Statistical Areas (SMSA) encompassing Memphis, Kansas City and Cincinnati, the cities in which the ready-mix companies involved herein were located and did business, are the appropriate sections of the country within which to examine the effects of the challenged acquisitions in both the portland cement and ready-mixed concrete lines of commerce (CB pp. 37-44). The evidence presented in support of the complaint purports to show the market structure, including the competitors involved, the degree of concentration, and the extent and characteristics of the competitive activity, in each of these areas with respect to portland cement and ready-mixed concrete.

58. Counsel for respondent urge, however, that these areas, as defined, "furnish no basis for either a reliable definition of the markets in ready-mixed concrete or cement, or for a relevant measurement of substantiality" (RB p. 26). They contend that these areas are defined for general-purpose use in presenting economic and social data; that the criteria used in defining them have "no relevance whatsoever to functional realities of ready-mixed concrete or cement consumption, or markets as developed by the record"; and that they were adopted for use in this case "without any consideration of the realities of the markets * * *" (RB p. 27; RRB pp. 12-3).

59. The SMSA are defined by the Bureau of the Budget on the basis of such factors as population, labor force, and the extent of social and economic integration between the central city and the outlying parts of each area which, for each of the areas here in question, consists of whole counties (CB p. 39 par. 85; RB pp. 26-7; RRB 12-3). The definitions were not arbitrarily devised to distort the competitive showing one way or another. On the contrary, the definitions of the Bureau of the Budget, which were wholly unrelated to this proceeding, were adopted by counsel supporting the complaint as descriptions of what they considered to be economically and competitively integrated geographic areas surrounding each city, with respect to which they proposed to offer proof.

60. None of the three areas is competitively insulated from other areas. To some extent, ready-mixed concrete is sold outside each area by companies located in the area, and is sold inside each area by companies located outside the area. It is also ap-

parent that the acquired companies did not compete vigorously in every part of each area, and that each defined area, particularly Memphis and Cincinnati, is broader than the actual area of effective competition of the acquired company located in it (Tr. 121-2; CB p. 43).

61. Each of the three SMSA was, however, adopted in the complaint as the relevant "section of the country" within which to examine, measure and test the competitive consequences of each challenged acquisition. If the evidence does not establish that each was an area of effective competition with respect to each acquisition, the proof concerning the effect of that acquisition upon competition in a "section of the country" must fail. But the proof that they are relevant geographic markets cannot be either saved or destroyed by the purposes for which the areas were defined by another governmental agency. (See Tr. 3113.)

62. Without specifically referring to the SMSA, the complaint defines, by counties, the three local areas involved in this proceeding, and the evidence is related to the areas as so defined. Those definitions, accordingly, are adopted for the purposes of this initial decision and, as used herein, references to the Kansas City, Memphis and Cincinnati areas are intended to have the following meanings:

The Kansas City area consists of the counties of Clay, Jackson, Platte and Cass in the State of Missouri, and the counties of Johnson and Wyandotte in the State of Kansas.

The Memphis area consists of the county of Shelby in the State of Tennessee and the county of Crittenden in the State of Arkansas.

The Cincinnati area consists of the counties of Warren, Clermont and Hamilton in the State of Ohio, the county of Dearborn in the State of Indiana, and the counties of Campbell, Kenton and Boone in the State of Kentucky.

63. At the time of acquisition, Stewart operated seven ready-mixed concrete plants—five of which were located in the Missouri part of the Kansas City area and two in the Kansas part of the area (CX 26C-D). At the time of acquisition, Denie's operated five ready-mixed concrete plants located in Shelby County in the Memphis area. It did not have a plant located in the Arkansas part of the area. Denie's also had a sixth plant but it was located in southern Mississippi at a considerable distance outside the area. It was a portable plant which commenced operations in 1963 and was closed in 1964, with sales in each of

those years of only \$27,000 and \$21,000, respectively (CX 22C; Tr. 2748). At the time of acquisition, Richter operated eight plants in Hamilton County and one in Clermont County in the Cincinnati area. It had no plants in the Indiana or Kentucky parts of the area or elsewhere (CX 32C).

64. The evidence does not specifically describe their sales areas but, consistent with evidence concerning other major ready-mixed concrete producers competitive with them, it is inferred that the plants of the acquired companies (except the Mississippi plant of Denie's) sold substantially all of their ready-mixed concrete in the Kansas City, Memphis and Cincinnati areas in which they were located. In 1963 the acquired companies had the largest or second largest volume of sales of the ready-mixed concrete producers located in their respective areas (CXs 50, 53, 81).

65. Representatives of the three or four other principal producers of ready-mix in each area testified in this proceeding. From their testimony and other evidence it is apparent that the ready-mix producers who competed to any significant extent in each of those areas did so from plants located in each area (except DeSoto Ready-Mix Co. with its plant in Mississippi near the Tennessee line, which made a large portion of its sales in the Memphis area), and that there was no competition of consequence from ready-mix plants located outside each area (Kansas City: CX 50; Tr. 1610-2, 1627-8, 1661, 1677-9, 1689-90. Memphis: CX 53; Tr. 1762-3, 1784, 1829, 1833, 1848, 1860-1, 1874, 1885-6. Cincinnati: CX 81; Tr. 2153-5, 2162, 2170-3, 2210-1, 2222-3, 2236, 2247-8). It is also apparent that, with minor exceptions, the plants located in each of those areas sold all, or substantially all, of their ready-mixed concrete in their respective areas (Kansas City: Tr. 1623-6, 1669, 1701-3. Memphis: Tr. 1779, 1830, 1849, 1879-80. Cincinnati: Tr. 2153-4, 2173-8, 2217, 2222-3, 2226-7, 2237); and that the ready-mixed concrete companies in each area usually did not have plants located outside that area (Tr. 1282, 1368, 1417, 1453, 1480, 1508-9, 1536, 1610-2, 1689-90, 1762-3, 1829, 1848, 1874, 2009, 2091, 2210-1, 2236. See exceptions: Botsford in Kansas City, Tr. 1661, 1677-9; and Hilltop in Cincinnati, Tr. 2153-5, 2170-3).

66. Cement manufacturers normally supply general geographic areas within the economic and competitive reach of their plants, and there are a number of distinguishable markets within the reach of a single cement-producing plant. These are centered in metropolitan areas where the concentration of population and

construction cause the greatest demand for cement and ready-mixed concrete. There is a direct correlation between the concentration of population and the consumption of cement and its principal product, ready-mixed concrete (Staff Rpt p. 26; CB p. 41 par. 89). Typically, cement producers stated generally that "you can base the consumption of cement on a per capita basis, on a barrel and a half or two barrels per capita [per annum]" (Tr. 1413, 1746); that the large amounts of cement consumed in the metropolitan markets "really are a function of population" (Tr. 1480); and that because of the concentration of population "the per capita consumption in urban areas is greater than in rural areas" (Tr. 2008-9).

67. The several metropolitan areas within the reach of each plant, referred to in the record as "focal points" of cement distribution, ordinarily represent the plant's most concentrated and attractive markets. Most distribution terminals are located in or adjacent to metropolitan areas and cement producers concentrate their sales efforts in such areas (CB p. 38 pars. 82 and 84). The realities of economic and competitive access to one as compared to another metropolitan market within a cement plant's general area of distribution are affected by a variety of factors, such as differentials in transportation costs, the locations of competing suppliers whose price must be met, the potential volume of sales, and the extent to which access to consumers may be limited or foreclosed by business relationships with cement suppliers (see Staff Rpt pp. 26, 67; RX 38).

68. The record shows the shipments of cement into the Kansas City, Memphis and Cincinnati areas by each producing plant during each of the years 1961, 1962 and 1963 (CXs 48, 51, 78). Each of those areas constitutes only a part, frequently a relatively small part, of the total market served by each plant shipping into it (CXs 49, 52, 79). With few possible exceptions, the total market served by each plant shipping into each of those areas is not coextensive with, and has little in common with, that of any other such plant; and with few exceptions, a different group of companies compete in selling cement in each of those areas. In instances in which the same company served more than one of those areas during the 1961-1963 period, it served each area from a different plant (CXs 48, 51, 78), except for insignificant amounts in special circumstances (Tr. 1235).

69. Undoubtedly there are other cement producers so located as to constitute potential suppliers to one or more of the three

metropolitan areas in question (see RRB pp. 13-4; Tr. 2374-5, 2463-78). If and when their own situations, the facilities available to them, or the competitive circumstances in the areas, should change, it is possible, of course, that those areas will become attractive markets for some producers who are now potential suppliers. The testimony of the ready-mixed concrete producers in those areas, however, discloses that they considered the suppliers then shipping into their areas to be their only practicable sources of supply for cement at that time.

70. The representatives of cement companies who testified in this proceeding were consistent in identifying large metropolitan centers of population as the most important and most attractive markets for cement in the geographic reach of their plants. Each such area was recognized as a distinct market for cement. Witnesses representing cement companies serving the Kansas City, Memphis or Cincinnati areas invariably included one of them as a "focal point" and one of the most attractive and important markets in their respective areas of distribution (Tr. 1040-1, 1221, 1231, 1279, 1289, 1361, 1412, 1423, 1452, 1479, 1507-8, 1535, 1551, 1572, 1746, 2009, 2124. See RB p. 30).

71. Examination of the Kansas City, Memphis and Cincinnati areas as effective areas of competition among ready-mixed concrete producers undoubtedly discloses inconsistencies and anomalies (RB pp. 28-9). To some extent competition in the areas are probably affected by potential competition on their fringes (Tr. 3124), by possible competitive overlaps with adjacent areas (Tr. 3125-6), and by similar considerations. It is possible, of course, to devise alternative concepts of the proper market areas for analysis, including a broadening of the area by a series of concentric circles—each with a string of competitors capable of competing in two directions—or by narrowing or "atomizing" the area to the immediate vicinity of each plant as distinguished from the whole of the defined areas (Tr. 3125-8).

72. In some respects the defined areas are broader than they need be; and at certain points it might be helpful if they were expanded. The inconsistencies and anomalies disclosed by the record, which result from the fact that the defined areas do not precisely describe the whole areas and the only areas of possible competitive impact, however, are not of such magnitude as materially to impair their validity as appropriate areas for consideration in this proceeding. And the availability of alternative concepts of market area definitions does not render improper the

concept which was adopted. The concept relied upon by counsel supporting the complaint must be examined on the basis of the showing which has been made with respect to it.

73. The record persuasively and impressively establishes that during the 1961-1963 period there was active and aggressive competition among the ready-mixed concrete producers located in each of the Kansas City, Memphis and Cincinnati areas; that those producers purchased their cement from the companies which ordinarily shipped into their respective areas; that those cement companies constituted the only practicable sources of supply for the ready-mix companies in each area and that there were no other producers to whom they could practicably turn for their cement; that each of those areas constituted an important and attractive market for the cement companies which normally supplied it; and that the competition among such cement suppliers for those markets was "direct and immediate."

74. It is the opinion of the hearing examiner, therefore, that the Kansas City, Memphis and Cincinnati areas are appropriate sections of the country within which to examine the effects of the challenged acquisitions on the ready-mixed concrete and portland cement lines of commerce; and that, for the purposes of this proceeding, they constitute the relevant geographic markets for consideration in connection with both the portland cement and the ready-mixed concrete product markets.

Competition in the Kansas City Area

75. The Stewart acquisition was made in October 1963 (Fi. 7), and respondent's cement plant went "on stream" in July 1965 (Fi. 6). Statistical evidence was presented with respect to the Kansas City area for the years 1961, 1962 and 1963. The record does not contain comparable statistics for subsequent years, but it does show the amount and sources of cement received by Stewart in 1966 (CB p. 63 par. 138).

76. In 1961 and 1962 eight producers, and in 1963 nine producers, shipped portland cement into the Kansas City area—total shipments in each year amounting to 2,402,000 barrels, 2,214,000 barrels, and 2,248,000 barrels, respectively (CX 48).

77. Each of the two largest suppliers to the area, Missouri Portland Cement Company and Lone Star Cement Corporation, had a plant located in the area (CX 48; CB p. 58 par. 126, p. 59 par. 130). Since January 1962 the third largest supplier, Ash Grove Lime & Portland Cement Co., has operated in the area a

limited capacity transfer station, which functions as a distribution terminal, and which has been supplied by rail from its plant located about 120 miles from Kansas City (CX 48; CB p. 57 par. 124). In 1962 another principal supplier, Victor Portland Cement Company, a division of General Portland Cement Company, installed a distribution terminal in the area that was supplied by rail from its plant located about 150 miles from Kansas City (CX 48; CB p. 58 par. 128). Universal Atlas Cement, Division of United States Steel Corporation, which in 1961 and 1963 was the fourth largest supplier, and in 1962 the fifth largest supplier to the area, shipped by rail and truck from its plant located about 175 miles from Kansas City. It did not have a distribution facility in the area until 1965 when it installed a transfer station (CX 48; CB p. 58 par. 127).

78. Other suppliers to the Kansas City area during each of the years 1961 through 1963 were Lehigh Portland Cement Company, from its plant at Iola, Kansas (about 100 miles distant); Monarch Cement Company, by rail and truck from its plant at Humboldt, Kansas (about 120 miles distant); and Dewey Portland Cement Company, Division of Martin Marietta Corporation, from its plants at Tulsa and Dewey, Oklahoma (about 250 and 210 miles distant, respectively). Oklahoma Cement Company did not ship into the Kansas City area in 1961 or 1962, but in 1963 it shipped 43,000 barrels from its plant at Pryor, Oklahoma (about 200 miles distant) (CX 48; CB p. 57 par. 125, p. 59 par. 129, p. 60 par. 132; Rand McNally Standard Highway Mileage Guide officially noticed for certain distances).

79. Counsel supporting the complaint urge that Dewey and Oklahoma Cement cannot be considered as practicable sources of supply of cement for the Kansas City area because neither has a plant or terminal in or near the area (CB p. 60 par. 132).

80. Dewey's shipments into the area were 46,000 barrels in 1961; 32,000 barrels in 1962; and 49,000 barrels in 1963. Its plant at Dewey, Oklahoma, was closed in 1963, but it made shipments from its Tulsa plant—about 250 miles from Kansas City—in 1962 and 1963. The plant of Oklahoma Cement, from which it shipped 43,000 barrels in 1963, is about 200 miles from Kansas City. Neither company has a terminal in the Kansas City area, and both companies are at a disadvantage in transportation costs compared to other suppliers of the market, except respondent (RX 30A). Both of these companies actually competed in the Kansas City area in 1963, however, and, although market statistics

for later years are not in the record, both were recognized in 1967 as active competitors, but not large suppliers, in the Kansas City area (Tr. 1231-2, 1553, 1577-8).

81. During the years 1961, 1962 and 1963, the supply of cement to the Kansas City area was largely dominated by Missouri Portland and Lone Star, the companies with plants in the area. Next in order were Ash Grove, Universal Atlas, and Victor Portland, two with distribution facilities since 1962, but Universal Atlas did not have a distribution facility in the area until 1965. Next came Lehigh and Monarch, without distribution facilities in the area but with plants located 100 and 120 miles from Kansas City; and finally Dewey and Oklahoma Cement (the latter only in 1963), without distribution facilities in the area and with plants from 200 to 250 miles distant. In 1963, all nine suppliers were active competitors in the market, with sales ranging from 671,000 barrels by Missouri Portland, to 43,000 barrels by Oklahoma Cement (CX 48; RX 26-30). Some of these competitors had advantages over others, and some were more effective than others, but each had demonstrated a purpose and an ability to supply cement on a competitive basis to the Kansas City area.

82. It is the opinion of the hearing examiner that all eight of the suppliers to the Kansas City area in 1961 and 1962, and all nine in 1963, were practicable sources of supply for cement consumers in that area. Statistics for subsequent years are not in the record, but the record does disclose that all nine of those companies were recognized as active competitors in the Kansas City area at the time of the hearings in May 1967, and, accordingly, that they continued to be practicable sources of supply (Tr. 1231-2, 1553, 1577-8). By that time, however, an additional major supplier had entered the Kansas City market and another company had appeared as a major prospective or "potential" supplier to the area.

83. Since its plant went on stream in July 1965, Kansas City has been one of respondent's primary portland cement markets. It is described as a natural market for respondent which it proposes ultimately to supply by barge shipments. All of its shipments to that market, a distance of almost 300 miles, have, however, been made by rail. The first shipments, beginning on July 28, 1965, were made to a temporary "bazooka" delivery system, and its present distribution terminal, which began operations on March 28, 1966, is so located that it can receive only rail shipments. In

1966, respondent shipped 346,812 barrels of cement to Stewart in Kansas City, and it was estimated, very roughly, that in the same year its sales to other consumers in Kansas City amounted to about 300,000 barrels (CB pp. 59-60 par. 131, p. 63 par. 138; Tr. 1016, 2444).

84. In April 1967, Dundee Cement Company completed construction of a new plant, with a capacity of about seven million barrels, at Clarksville, Missouri, about 70 miles north of St. Louis (and probably over 300 miles from Kansas City). Before announcing its intention to build that plant, it made a study of Kansas City as a prospective market because it was felt that it was sufficiently close to the location of its proposed plant. Its initial study, which was made in 1962, was encouraging, but when it later learned of respondent's acquisition of Stewart it decided not to make a major effort in that market. It is, however, the present intention of Dundee to try to sell cement in Kansas City, and it now has a salesman operating in that area (Tr. 1370-1, 1375-80, 1385, 1392-3; CB p. 60 par. 133; RB p. 38). Based upon its present intention and the history of its operations in other areas, to which reference is made elsewhere herein (Fi. 116-9, 145-7), there is substantial reason to believe that Dundee is a very real potential supplier to the Kansas City area.

85. During the period 1961-1963, the ready-mixed concrete companies were the principal consumers of cement in the Kansas City area, the sales of the several suppliers to the ready-mix companies ranging from 51 percent to 100 percent of their total shipments to the area. In 1961 shipments to the ready-mix companies represented 65 percent of total cement shipments into the area, and in 1962 and 1963, they represented 75 percent (CB p. 61 par. 135).

86. During the same period Stewart was the largest portland cement consumer among the Kansas City ready-mix companies. Its purchases accounted for from 28 percent to 31 percent of purchases by the ready-mix companies, and for from 20 percent to 23 percent of total cement shipments into the area. In 1961 Stewart purchased 488,000 barrels of cement; in 1962 it purchased 470,000 barrels; and in 1963 it purchased 528,000 barrels (CB p. 62 par. 136).

87. In 1961 the approximately 15 ready-mix companies operating in the Kansas City area sold 1,201,000 cubic yards of ready-mixed concrete; in 1962 they sold 1,292,000 cubic yards; and in 1963 they sold 1,301,000 cubic yards. Stewart was by far the

largest producer, with 356,000 cubic yards, 346,000 cubic yards, and 395,000 cubic yards in each year, respectively, representing shares of 29.6 percent, 26.8 percent, and 30.4 percent. Its two nearest rivals had shares in those years ranging from 10.5 percent to 12.9 percent (CB p. 76 pars. 166-7; CX 50; RX 26K).

88. In 1961, Missouri Portland was the largest supplier of cement to Stewart with 109,000 barrels; Lone Star was second with 93,000 barrels; and Universal Atlas was third with 90,000 barrels. In 1962, Missouri Portland supplied 109,000 barrels; Lone Star, 103,000; and Universal Atlas 65,000. In both years Victor was a substantial supplier, with 67,000 barrels in each year, and so was Monarch, with 55,000 barrels and 61,000 barrels, respectively. In those two years Ash Grove also supplied 36,000 and 35,000 barrels, respectively; and Dewey supplied 38,000 and 30,000 barrels, respectively. In 1963, Stewart's purchases were more evenly distributed among its suppliers, Missouri Portland, Universal Atlas, and Victor, each supplying about 17 percent; Monarch about 14 percent; Ash Grove 13.6 percent; Lone Star 11 percent; and Dewey 9.3 percent (CB p. 62 par. 137).

89. Respondent started shipping cement into the Kansas City area in July 1965 and quickly became the principal supplier to Stewart. In 1966, Stewart purchased 514,700 barrels of cement, of which 346,800 barrels, representing 67.4 percent, were supplied by respondent. Ash Grove supplied 58,600 barrels, representing 11.4 percent of Stewart's purchases; and 8.7 percent of Stewart's purchases were supplied by Monarch, 5 percent by Victor, 4 percent by Universal Atlas, and 3.5 percent by Missouri Portland (CB p. 63 par. 138).

90. Each of the plants supplying cement to the Kansas City area also supplies cement to a general geographic area covering all or parts of several states, and there are substantial differences in the general areas supplied by each plant (CB pp. 57-9 pars. 124-8). In 1961, the total cement shipments of the plants supplying Kansas City amounted to 11,004,000 barrels, of which 2,402,000 barrels were shipped into the Kansas City area; in 1962, total shipments were 11,627,000 barrels, with 2,214,000 barrels to Kansas City; and in 1963, total shipments were 14,343,000 barrels, with 2,248,000 barrels to Kansas City (RXs 26-O-P, 28). The following table (RX 26J) shows for each of the years 1961, 1962 and 1963 each supplier's share of Kansas City's total cement market, and of Kansas City's ready-mix market; and the percentage of each plant's total shipments which

went to the Kansas City area, to the ready-mix companies in the area, and to Stewart:

91. From 1961 to 1963, Stewart's purchases from Missouri Portland declined by 17 percent, and from Lone Star by 38 percent (RX 26I). This represented a decline from 6.9 percent to 4.9 percent of the total sales of the Missouri Portland plant supplying the Kansas City area during a period when the total sales of that plant increased 19 percent; and a decline from 6.6 percent to 4.2 percent of the total sales of the Lone Star plant supplying the Kansas City area during a period when the total sales of that plant declined less than 2 percent (RX 26J and P; RB p. 35). During the same period, Stewart's purchases from Ash Grove doubled, representing an increase from 7 percent to 14 percent of Stewart's purchases (RX 26I). This was an increase from 1.9 percent to 4 percent of the total sales of the Ash Grove plant supplying the Kansas City area during a period when the total sales of that plant decreased about 4 percent (RXJ and P). Stewart spread its purchases among seven of the nine cement companies supplying the Kansas City area, and its importance as a customer was 4.4 percent of the output of all plants supplying the area in 1961, 4 percent in 1962, and 3.7 percent in 1963 (RX 26J; RB p. 35).

92. Comparable statistics for the whole market subsequent to 1963 are not in the record. The record discloses, however, that all nine of the cement suppliers to the Kansas City area in 1963 continued as active competitors in that area in 1967, that respondent had entered the area as a major supplier, and that Dundee had become a major potential supplier to the area (Fi. 82, 83, 84). In 1966, Stewart's purchases amounted to 514,700 barrels of cement, about 13,000 barrels less than it purchased in 1963 (CB p. 63 par. 138; CX 54; RX 26L), and it may reasonably be inferred that it continued in approximately the same relative market position among the ready-mix companies in the area. In 1966, however, Stewart spread its purchases among only six of the 10 cement companies supplying the Kansas City area, and 67.4 percent of its total requirements were supplied by respondent (Fi. 89). The record indicates that there were no other changes of significance in this proceeding in the competitive situation in the Kansas City area subsequent to 1963.

93. In these circumstances it appears that the statistics for the 1961-1963 period provide a reasonably informative basis for appraising the probable competitive effects of respondent's ac-

quisition of Stewart, even though it did not start shipping cement into the Kansas City area until July 1965.

94. Counsel supporting the complaint urge that during the period 1961-1963 there were indications that the highly concentrated Kansas City market was becoming deconcentrated. The number of portland cement suppliers increased from eight to nine. Missouri Portland's share of the market decreased from 37 percent to 30 percent; Lone Star's share decreased from 31 to 23 percent; Ash Grove's share increased from 13 to 18 percent; the combined share of the two largest suppliers decreased from 68 percent to 53 percent; and the share of the four largest suppliers decreased from 87 percent to 81 percent. This was during a period when total shipments into the market decreased from 2,402,000 barrels in 1961, to 2,248,000 barrels in 1963 (CB pp. 60-1 par. 134). But the statistics end with the year 1963.

95. Although respondent acquired Stewart in October 1963, it did not become a cement supplier to the Kansas City area until July 1965. In 1966, it shipped over 346,000 barrels to Stewart, and it was estimated that its sales to other consumers in the area were about 300,000 barrels (Fi. 83). With shipments of approximately 600,000 barrels into Kansas City, respondent's volume in 1966 was comparable with the volumes of Missouri Portland and Lone Star in 1963 (CX 48), and it had apparently become one of the three major suppliers to the area.

96. It is apparent, therefore, that respondent's entry into the Kansas City area contributed substantially to further deconcentration of the portland cement market in that area. With Dundee standing as a major potential supplier to the area (Fi. 84), the prospects of further deconcentration of the Kansas City cement market appear to be very real and substantial.

97. Respondent's acquisition of Stewart in October 1963 was made as a part of its comprehensive plan to enter the portland cement industry. When it began shipping cement to the Kansas City area in July 1965, its ownership of Stewart, the leading consumer of cement in the area, gave it the power to foreclose competing cement companies from a substantial part, probably 20 percent or more, of the cement market in that area. No larger foreclosure by a single acquisition could have been accomplished in this market. (See CB p. 63 par. 139.)

98. Respondent's acquisition of Stewart caused Dundee to re-appraise its intention to make a major effort to enter the Kansas

City market upon the completion of its new plant at Clarksville, Missouri, in May 1967, but Dundee remains as a very real potential supplier to that area (Fi. 84). The acquisition also was undoubtedly a contributing factor to efforts by other cement suppliers to protect their positions in the market by acquisitions of, or loans to, ready-mix customers in the area (Tr. 1583-7, 1602-4, 1674-5; see RB pp. 19-20).

Competition in the Memphis Area

99. The initial acquisition of 50 percent of Denie's stock was made in September 1963, and at that time respondent assumed effective control of the Denie's operations (Fi. 9). Respondent's cement plant went "on stream," and respondent started shipping cement in July 1965 (Fi. 6). Statistical evidence was presented with respect to the Memphis area for the years 1961, 1962 and 1963. The record does not contain comparable statistics for subsequent years, but it does show the amount and sources of cement received by Denie's in 1966 (CB p. 54 par. 114).

100. Total shipments of cement into the Memphis area in 1961 were 1,536,000 barrels; in 1962, 1,704,000 barrels; and in 1963, 1,523,000 barrels. The market was highly concentrated in Missouri Portland Cement Company, with 46 percent, 50 percent and 41 percent, and Marquette Cement Manufacturing Company, with 50 percent, 44 percent, and 38 percent, of the cement supply in each year, respectively. The combined share of those two companies was 96 percent, 94 percent and 79 percent, in each year, respectively. In 1963, Arkansas Cement Corporation shipped 174,000 barrels into the Memphis area, representing 11 percent of the market, its shipments in 1961 amounting to only 16,000 barrels, and in 1962 to 35,000 barrels. Texas Industries, Inc. made no shipment to the Memphis area in 1961 or 1962, but in 1963 it shipped 86,000 barrels into the area, representing 6 percent of the market. No other supplier shipped more than 33,000 barrels into the Memphis area in any of the three years (CX 51; RX 26R and W; CB p. 52 par. 110).

101. Missouri Portland supplies the area from a distribution terminal built in Memphis in 1948. Its plant at Joppa, Illinois, went into production in the latter part of 1963 and, since then, shipments into the Memphis area have been made by water from that plant rather than from St. Louis. Prior to that time its shipments to the terminal in the area were made by water from its St. Louis, Missouri, plant except for a small quantity of 7,000

barrels which, for some unexplained reason, was shipped from its Kansas City, Missouri, plant in 1963 (CB p. 49 par. 105).

102. Marquette supplies the area from a distribution terminal it has operated in Memphis since 1929. The terminal is supplied by barge from Marquette's Cape Girardeau, Missouri, plant, about 200 miles from Memphis (CB p. 48 par. 104).

103. Arkansas Cement supplies the area from a distribution terminal which it has operated in Memphis since September 1962. Its only plant, which is located at Foreman, Arkansas (about 300 miles from Memphis), went into operation in the latter part of 1958, and shipments from its plant are made by rail and truck. In 1963, the first full year of operation of its Memphis terminal, its shipments into the area increased to 174,000 barrels from 35,000 barrels in 1962. In 1961 it did not sell to ready-mixed concrete producers in Memphis because it had no terminal there to serve them, but in 1963 almost 80 percent of its sales in Memphis were to ready-mix companies, and since then the proportion has been about 90 percent (CX 51; CB p. 47 par. 103; Rand McNally Standard Highway Mileage Guide officially noticed for distance).

104. Penn-Dixie Cement Corporation had sold cement in Memphis in the 1940s up through the early 1950s and had discontinued doing so because it did not have the capacity at the time to provide a steady supply to that market. With the advent of the 1960s, however, it needed additional markets for its Richard City, Tennessee, plant and decided to re-enter the Memphis market. In May 1963, it opened a distribution transfer station in Memphis and shipped 24,000 barrels of cement into that area in 1963. It made no shipments into the area in 1961 or 1962. Since 1963, it has actively competed in the Memphis area. It supplies its Memphis distribution facility by rail from its Richard City plant, a distance of 200 miles (CX 51; Tr. 1450-60, 1464-6; CB pp. 49-50 par. 106).

105. Texas Industries, Inc., with its plant located at Midlothian, Texas, about 450 to 500 miles from Memphis, has no distribution terminal in the Memphis area and ships cement to the area by rail (CX 51; Tr. 1269, 1867). In 1961 and 1962 it made no shipments into the area. In 1963, however, it shipped 86,000 barrels into the area, representing 6 percent of the market. In 1963 it supplied 15,000 barrels to Fischer Lime & Cement Company, one of the two largest ready-mix companies in Memphis, which company was acquired by Texas Industries in June 1963

(CXs 53, 55; CB p. 51 par. 108(c); CB p. 55 pars. 116-7). Since it sold 71,000 barrels in Memphis in addition to its sales to Fischer, Texas Industries demonstrated a capacity to compete in that market in 1963. It still ships to its subsidiary in Memphis, and in 1966 it sold 19,600 barrels of cement to respondent's subsidiary, Denie's (CB p. 51 par. 108(c), p. 54 par. 114). Denie's purchases of cement from Texas Industries in 1966 were required by the specifications for particular jobs—clearly indicating that Texas Industries is still an active competitor in that market (Tr. 2431-2; see Tr. 1108-9, 1268-9, 1857-9).

106. Lone Star Cement Corporation shipped 26,000 barrels of cement into the Memphis area in 1961; 33,000 barrels in 1962; and 9,000 barrels in 1963. It does not have a distribution terminal in Memphis. All of its shipments to the area were made from its Birmingham, Alabama, plant (a distance of about 250 miles), except 6,000 barrels in 1962 which were shipped from its Demopolis, Alabama, plant (a distance of about 300 miles) (CXs 51, 76; Rand McNally Standard Highway Mileage Guide officially noticed for distances). The record does not show the circumstances under which the Lone Star shipments were made or why they decreased in 1963. Lone Star's shipments into the Memphis area at the present time are described as insignificant, but apparently it is still a competitor in the area (Tr. 1268-9, 1291; see CB p. 51 par. 108(d)).

107. Southern Cement Company, Division of Martin Marietta Corporation, shipped 23,000 barrels of cement into the Memphis area in 1961; 32,000 barrels in 1962; and 13,000 barrels in 1963. It does not have a distribution terminal in Memphis. All of its shipments to the area were made from its plant at Roberta, Alabama (a distance of about 300 miles) (CXs 51, 76; Rand McNally Standard Highway Mileage Guide officially noticed for distance). The record does not show the circumstances under which these shipments were made or the extent to which the company has shipped into the area since 1963. Southern Cement's shipments into the area at the present time are described as insignificant, but apparently it is still a competitor in the area (Tr. 1268-9; see CB p. 51 par. 108(e) and Tr. 1291).

108. The record shows that Universal Atlas Cement, Division of United States Steel Corporation, made no shipments into Memphis in 1961. In 1962, it shipped 5,000 barrels, and in 1963 it shipped 9,000 barrels of cement into the Memphis area from its plant at Leeds, Alabama (a distance of about 275 miles).

All of its 1962 and 1963 shipments went to Fischer Lime & Cement Company, Inc., one of the two largest ready-mix companies in Memphis, which company was acquired by Texas Industries, Inc. in June 1963 (CXs 51, 55; Fi. 105; Rand McNally Standard Highway Mileage Guide officially noticed for distance). The testimony discloses, however, that Universal Atlas does not solicit or sell cement in the Memphis area except some white cement, a relatively expensive specialty product which is not competitive with grey portland cement (Tr. 1420-1; Fi. 23, 25). It is apparent, therefore, that Universal Atlas does not compete in the sale of portland cement in the Memphis area, and the record provides no basis for considering it to be a potential competitor in that area. (See CB p. 51 par. 108(b).)

109. Alpha Portland Cement Company made no shipments into the Memphis area in 1961. It shipped less than 500 barrels into the area in 1962, and 2,000 barrels in 1963, but the circumstances under which these shipments were made are not clear from the record. Since July 1965, and probably longer, however, Alpha has not sold cement or solicited the sale of cement in the Memphis area (CB p. 50 par. 108(a)). It is not a competitor in the Memphis area, and the record provides no basis for considering it to be a potential competitor in that area.

110. The record shows that Mississippi Valley Portland Cement Company shipped 2,000 barrels of cement into the Memphis area in 1961 from its plant at Redwood, Mississippi (a distance of about 220 miles). It made no shipments into the area in 1962 or 1963 (CX 51; Rand McNally Standard Highway Mileage Guide officially noticed for distance). The record discloses very little additional information about this company. It entered the cement industry in 1959. Its plant had an annual capacity of one million barrels, with an expected capacity in 1966 of two million barrels (CXs 59B, 61, 77; Staff Rpt pp. 40-2). Mississippi Valley was not identified as a competitor in the Memphis area at the present time (Tr. 1267-9, 1291). The record provides no basis for considering it to be a potential competitor in that area; and counsel apparently consider it to be of no significance in the market. (See CB pp. 46-53 pars. 100-110; RX 26R, V, W, X.)

111. The record discloses, therefore, that Missouri Portland, Marquette, Arkansas Cement, and Penn-Dixie, all with distribution facilities in the area, were active competitors in the Memphis area in 1963, and that they have continued actively to compete in the area. It also discloses that three additional companies—

Texas Industries, Lone Star, and Southern Cement—shipped cement into the Memphis area in 1963 and that they are still competitors to some extent in the area. Although three other companies—Universal Atlas, Alpha, and Mississippi Valley—shipped cement into the area during the 1961–1963 period, they have not continued to compete in the area and the record provides no basis for considering them to be potential competitors in the area.

112. Counsel supporting the complaint urge that the practicable sources of cement to the Memphis area are the companies with terminals in the area, and that the other companies that shipped into the area during the 1961–1963 period are not practicable sources of supply (CB p. 46 par. 100, p. 50 par. 108).

113. Although statistics for years subsequent to 1963 are not in the record, the seven companies that shipped cement into the Memphis area in 1963, and that are still competitors to some extent in the area, have demonstrated a purpose and an ability to compete in the area. It is the opinion of the hearing examiner that all of those companies are practicable sources of cement to the Memphis area. The extent to which each of them may actually ship cement into the area will, of course, depend upon their respective business judgments based upon a variety of factors, including prevailing competitive circumstances and changing conditions of supply and demand.

114. In addition to the sources of supply of cement to the Memphis area in 1963, which continue to be practicable sources of supply to the area, an additional major supplier has entered the market and another company has appeared as a major prospective or “potential” supplier to the area.

115. Since its plant went on stream in July 1965, Memphis has been one of respondent’s primary cement markets. Over 90 percent of its shipments to that market (a distance of over 250 miles) have been made by barge, only occasional shipments during surge periods being made by rail. Since it started shipping cement, respondent has operated a large distribution terminal in Memphis to serve that area (CB p. 50 par. 107; Rand McNally Standard Highway Mileage Guide officially noticed for distance). In 1966, respondent shipped 289, 511 barrels of cement to Denie’s in Memphis, and it was estimated, very roughly, that in the same year its sales to other consumers in the Memphis area amounted to about 400,000 barrels (CB p. 54 par. 114; Tr. 2444).

116. In April 1967, Dundee Cement Company completed con-

struction of a new plant with a capacity of about seven million barrels at Clarksville, Missouri, about 70 miles north of St. Louis (and about 360 miles from Memphis). From that plant the company proposes to ship cement along the Mississippi River as far south as the Gulf Coast, including the intermediate area on either side of the river (Tr. 1371-2; Rand McNally Standard Highway Mileage Guide officially noticed for distance).

117. Before announcing the construction of that plant, Dundee had a study made in 1962 or 1963 of Memphis as a prospective market. It felt at that time that Memphis was probably one of the most desirable markets along the river and one which it would very likely want to enter with a distribution terminal. After Dundee's study was made, respondent and Texas Industries, Inc. acquired the two major ready-mix companies in the area, representing the principal part of the Memphis ready-mix market. This changed Memphis from an open market to one in which a substantial amount of cement would be foreclosed to Dundee's efforts. If these acquisitions had not been made, Dundee would have entered the Memphis market (Tr. 1370-8, 1385-9, 1399-1401).

118. Dundee decided not to enter the Memphis market because of the acquisitions by respondent and Texas Industries, Inc., and it has no present plans to sell cement in Memphis (Tr. 1375). It has, however, established, or is in process of establishing, distribution terminals in such places as New Orleans, Louisiana, and Mobile, Alabama, and it considers that any city located on a navigable waterway contiguous to the Mississippi River is a potential market for its plant and a potential location for a distribution terminal (Tr. 1386-7).

119. Although it has no present plans to sell cement in Memphis, its history of operations in other areas, to which reference is made elsewhere herein (Fi. 84, 145-7), and the availability of that market to its plant, indicate that Dundee is likely to move vigorously into Memphis if any significant change should occur in the competitive situation in that area. In addition to changes normally to be expected in conditions of supply and demand, the possibility of Dundee's entry into the Memphis market is heightened by the competitive changes which may result from the divestment in December 1967, required by a Federal Trade Commission consent order, with respect to Fischer, the ready-mix subsidiary of Texas Industries, Inc. in Memphis. (See Tr. 1847; CB p. 55 par. 117.) In these circumstances, in-

cluding its extensive barge shipments along the river which regularly pass Memphis, and its evaluation of Memphis as a particularly desirable market, it is the opinion of the hearing examiner that Dundee stands as a major potential supplier to the Memphis area.

120. During the period 1961-1963, the ready-mixed concrete companies were the principal consumers of cement in the Memphis area. In 1961, approximately 66 percent of the total sales of cement in the area were made to the ready-mix companies; in 1962, approximately 57 percent; and in 1963, approximately 68 percent. Sales by Missouri Portland to the ready-mix companies amounted to approximately 62 percent, 52 percent, and 65 percent in each year, respectively, of its total sales in the Memphis area; and by Marquette, to approximately 70 percent, 61 percent and 83 percent (CX 51; RX 26V-W; see CB p. 53 par. 111).

121. In 1961 and 1962, Denie's was the largest portland cement consumer among the Memphis ready-mix companies, and in 1963, it was the second largest. Its purchases accounted for from 29 to 33 percent of purchases by the ready-mix companies serving the area, and from 18 to 22 percent of total cement shipments into the area. In 1961, Denie's purchased 340,000 barrels of cement; in 1962, it purchased 313,000 barrels; and in 1963, it purchased 302,000 barrels. Its nearest rival in the area, Fischer Lime & Cement Company, purchased 309,000 barrels, 306,000 barrels, and 350,000 barrels in each of those years respectively (CXs 51, 55, 56; RX 26T-U; see CB p. 53 par. 112).

122. In 1961, the 12 ready-mix companies serving the Memphis area sold 688,000 cubic yards of ready-mixed concrete; in 1962, they sold 725,000 cubic yards; and in 1963, they sold 769,000 cubic yards. Denie's was one of the two largest producers with 209,000 cubic yards, 219,000 cubic yards, and 213,000 cubic yards in each year, respectively, representing shares of 30.4 percent, 30.2 percent, and 27.7 percent. Its only close rival, Fischer Lime & Cement Company, had shares in those years of 31.4 percent, 30.1 percent, and 31.9 percent (CX 53; RX 26S; CB p. 75 par. 163).

123. In 1961, Marquette was the largest supplier of cement to Denie's with 200,000 barrels representing 58.8 percent of Denie's total purchases; and the only other supplier was Missouri Portland with 140,000 barrels representing 41.2 percent. In 1962, Marquette supplied 148,000 barrels representing 47.3 percent; and Missouri Portland supplied 155,000 barrels representing 49.5

percent. In 1963, Marquette supplied 145,000 barrels representing 48 percent, and Missouri Portland supplied 140,000 barrels representing 46.4 percent. In 1962, Arkansas Cement was the only other supplier to Denie's with 3.2 percent of its purchases. In 1963, Arkansas Cement supplied 4 percent of Denie's purchases, and three other companies—Alpha, Penn-Dixie, and Texas Industries, Inc.—each supplied less than one percent (CB pp. 53-4 par. 113).

124. Respondent started shipping cement into the Memphis area in July 1965 and quickly became the principal supplier to Denie's. In 1966, Denie's purchased 321,700 barrels of cement, of which 286,500 barrels, representing 89.1 percent, were supplied by respondent. In that year Texas Industries, Inc. supplied 6.1 percent of Denie's purchases, Marquette supplied 4.7 percent, and Missouri Portland supplied 320 barrels representing 0.1 percent. In 1966, Denie's purchased cement from companies other than respondent only because it was required by the specifications for particular jobs to use cement produced by the other companies (CB pp. 54-5 pars. 114-5).

125. Each of the plants supplying cement to the Memphis area also supplies cement to a general geographic area covering all or parts of several States, and there are substantial differences in the general areas supplied by each plant (CB pp. 47-50 pars. 103-6). In 1961, the total cement shipments of the plants supplying Memphis amounted to 12,842,000 barrels, of which 1,536,000 barrels were shipped into the Memphis area; in 1962, total shipments were 16,468,000 barrels, with 1,704,000 barrels to Memphis; and, in 1963, total shipments were 22,420,000 barrels, with 1,523,000 barrels to Memphis (RXs 26W-X, 27). The following table (RX 26R) shows for each of the years 1961, 1962 and 1963 each supplier's share of the total cement market of Memphis, and of the ready-mix market of Memphis; and the percentage of each plant's total shipments which went to the Memphis area, to the ready-mix companies serving the area, and to Denie's (footnotes 1 and 2 of the table indicate certain possible inaccuracies in these figures, but they are consistent with the figures used in other paragraphs of these findings and are adequate for present purposes):

Initial Decision

Cement companies in the Memphis market
[Percent]

Cement Company	Share of Memphis' total cement market			Share of Memphis' ready-mix market			Shipments to Memphis as percent of plant's total shipments			Sales to ready-mix companies as percent of plant's total shipments			Sales to John Dantie's as percent of plant's total shipments		
	1961	1962	1963	1961	1962	1963	1961	1962	1963	1961	1962	1963	1961	1962	1963
Missouri Portland ¹	46	50	41	48	45	39	17	19	10	11	10	7	3.4	3.5	2.8
Arkansas Cement	50	44	38	53	47	47	25	23	19	18	14	15	6.6	4.5	4.6
Universal Atlas	1	2	1	1	3	1	1	2	6	---	1	3	---	---	.4
Texas Industries	---	---	6	---	---	2	---	---	4	---	---	---	---	---	---
Penn-Dixie	---	---	1	---	---	1	---	---	2	---	---	---	---	---	---
Martin Marietta	1	2	1	1	2	1	1	1	1	---	---	---	---	---	1
Lone Star	2	2	1	3	3	3	2	2	1	2	1	2	---	---	---
Alpha	---	---	---	---	---	---	---	---	---	---	---	---	---	---	---
Total	100	100	100	100	100	100	12	1704	7	8	6	5	2.6	1.9	1.3
Total barrels (thousands)	---	---	---	---	---	---	1,536	21,523	1,015	974	1,033	840	313	302	313
Percent change	---	---	---	---	---	---	---	+10.9	-10.6	-6.2	+7.6	---	-8.0	-3.5	---

¹ Represents all supplying plants. The share of the St. Louis plant's total shipments sold in Memphis was 17, 19 and 12 percent, in years 1961-1963, respectively.

² De Soto Redi-Mix Co. reported purchasing 28,298 barrels of cement from Lone Star Cement Corp. This was not reported by Lone Star nor included by the FTC in its summarization, Exhibit 51. (revised). The latter was used for this tabulation.

126. The competitive impact of respondent's acquisition of Denie's was manifested most directly and substantially upon the sales of cement by Missouri Portland and Marquette in the Memphis area. During the years 1961, 1962 and 1963, the combined sales of those two companies to Denie's represented 100 percent, 96.8 percent and 94.4 percent of Denie's total cement purchases in each year, respectively (CB p. 54 par. 113); and Denie's total purchases represented 22.1 percent, 18.4 percent, and 19.8 percent of the total Memphis cement market in each year, respectively (CB p. 53 par. 112). In 1962, Arkansas Cement, the only other supplier to Denie's supplied 3.2 percent of Denie's purchases, and in 1963 it supplied 4 percent, and in 1963 three other companies each supplied less than 1 percent of Denie's purchases (CB p. 54 par. 113).

127. Although of considerable importance as a cement consumer in the Memphis market, Denie's was of relatively small importance as a customer of the plants supplying that market. In 1961, shipments to Denie's represented only 2.6 percent of total cement shipments of the plants supplying the Memphis market; in 1962, they represented 1.9 percent; and in 1963, they represented 1.3 percent. In 1961, 1962 and 1963, Denie's purchases from Missouri Portland represented 3.4 percent, 3.5 percent and 2.3 percent of the total shipments in each year, respectively, of that company's plants supplying the area; and Denie's purchases from Marquette represented 6.6 percent, 4.5 percent and 4.6 percent of the total shipments in each year respectively of that company's plant supplying the area (Fi. 125).

128. Comparable statistics for the whole market subsequent to 1963 are not in the record. The record discloses, however, that the seven cement companies which were practicable sources of supply to the Memphis area in 1963 still compete in the area to some extent and have demonstrated a purpose and an ability to continue to compete in the area (Fi. 113). It also discloses that respondent entered the area as a major supplier in July 1965, and that Dundee now stands as a major potential supplier to the Memphis area (Fi. 115, 116-9). In 1966, Denie's purchased 321,700 barrels of cement, almost 20,000 barrels more than it purchased in 1963 (CB p. 54 par. 114; CX 56; RX 26T), and it may reasonably be inferred that it continued in approximately the same relative market position among the ready-mix companies in the area. In 1966, however, 89.1 percent of Denie's total requirements were supplied by respondent, the remainder being

purchased from three other companies only because their cement was specified for particular jobs (Fi. 124). The record indicates that there were no other changes of significance to this proceeding in the competitive situation in the Memphis area subsequent to 1963.

129. In these circumstances it appears that the statistics for the 1961-1963 period provide a reasonably informative basis for appraising the probable competitive effects of respondent's acquisition of Denie's, even though it did not start shipping cement into the Memphis area until July 1965.

130. Counsel supporting the complaint urge that during the period 1961-1963 there were a number of indications that the highly concentrated Memphis market was becoming less concentrated. They urge that among these indications were: an increase in the number of suppliers to the market, from six to nine, while the volume of cement shipments into the market decreased from 1,536,000 barrels to 1,523,000 barrels; a decrease in the combined share of the two largest suppliers from 96 percent to 79 percent; and a decrease in the combined share of the four largest suppliers from 99 to 96 percent (CB pp. 52-3 par. 110).

131. These are valid, but limited, indications of a tendency toward a lessening of concentration in the Memphis market, with some modification as to the number of suppliers. One supplier in 1961, Mississippi Valley, was inconsequential, with shipments of 2,000 barrels; and it has since disappeared as a supplier (Fi. 110). Two of the suppliers in 1963, Universal Atlas and Alpha, were not regular or substantial suppliers to the area; neither has continued to ship into the area and the record does not indicate that either has shipped into the area since 1963 (Fi. 108-9). In a practical sense, therefore, it appears that there were five cement suppliers to the area in 1961, and that by 1963 the number had increased to seven.

132. The seven cement suppliers in 1963 have continued to compete in the Memphis area and continue to be practicable sources of supply to the area (Fi. 113). Although respondent acquired Denie's in September 1963, it did not become a cement supplier to the Memphis area until July 1965. In 1966, it shipped over 289,000 barrels to Denie's and it was estimated that its sales to other consumers in the area were about 400,000 barrels (Fi. 115). With shipments of approximately 650,000 barrels into the Memphis area, respondent's volume in 1966 was com-

parable with the volumes of Missouri Portland and Marquette in 1963 (CX 51), and it had apparently become one of the three major suppliers to the area.

133. It is apparent, therefore, that respondent's entry into the Memphis area contributed substantially to a lessening of concentration in the portland cement market in that area. With Dundee standing as a major potential supplier to the area (Fi. 119), the prospects of a further lessening of concentration in the Memphis cement market appear to be real and substantial.

134. Respondent's acquisition of Denie's in September 1963 was made as a part of its comprehensive plan to enter the portland cement industry. When it began shipping cement to the Memphis area in July 1965, its control of Denie's, one of the two leading consumers of cement in the area, gave it the power to foreclose competing cement companies from a substantial part, probably 20 percent or more, of the cement market in that area. This was as large a foreclosure as could have been accomplished in this market, and its importance was increased by the fact that Denie's only comparable rival—Fischer Lime & Cement Co.—had been acquired by Texas Industries in June 1963 (an acquisition with respect to which divestment is required by a consent order entered into with the Federal Trade Commission on December 5, 1965). (See CB pp. 54-5 pars. 115-7.)

135. Prior to the acquisitions of the two leading ready-mix companies in the area, Dundee had intended to enter the Memphis market with a distribution terminal upon the completion of its new plant at Clarksville, Missouri, in May 1967; but because of the acquisitions by respondent and Texas Industries, Dundee decided not to do so. Although it has no present plans to sell cement in Memphis, Dundee stands as a major potential supplier to the area (Fi. 116-9). The acquisitions by respondent and Texas Industries, Inc. also were undoubtedly contributing factors to efforts by other cement suppliers to protect their positions in the market by loans to, or other business relationships with, ready-mix companies in the area. (See CB p. 55 par. 118; RB p. 22; CRB p. 15 n. 5.)

Competition in the Cincinnati Area

136. The Richter acquisition was made in January 1964 (Fi. 11) and respondent's cement plant went "on stream" in July 1965 (Fi. 6). Statistical evidence was presented with respect to the Cincinnati area for the years 1961, 1962 and 1963. The

record does not contain comparable statistics for subsequent years, but it does show the amount and sources of cement received by Richter ("Richter 1964") in 1966 (CB pp. 71-2 par. 158).

137. In each of the years 1961, 1962 and 1963, nine producers shipped portland cement into the Cincinnati area, total shipments in each year amounting to 2,674,000 barrels, 2,320,000 barrels, and 2,500,000 barrels, respectively (CX 78). Three of the producers had distribution terminals in the area in 1961, and four in 1962 and 1963 (CX 80). Two others served the area by truck or rail from plants about 50 to 60 miles distant, and the other three served the area from plants ranging from about 110 to 150 miles distant. All nine of the producers are still supplying cement to the Cincinnati area and are active competitors in that market (CB p. 64 par. 143).

138. Universal Atlas Cement, Division of United States Steel Corporation, was the second largest cement supplier to the Cincinnati area in 1961 and the largest supplier in 1962 and 1963. In 1961, it supplied 541,000 barrels to the Cincinnati area, representing 20 percent of total shipments into the area; in 1962 it supplied 539,000 barrels, representing 23 percent; and in 1963 it supplied 555,000 barrels, representing 22 percent. It supplied its customers in Cincinnati from its Fairborn, Ohio, plant, a distance of approximately 60 to 65 miles. It did not have a distribution terminal in the area during the 1961-1963 period, but delivered directly to its customers from its Fairborn plant primarily by truck, such deliveries requiring about four hours. It completed a relatively small distribution terminal in Cincinnati in mid-1964, but it is not presently in use because of the decrease in its sales to Richter (CB pp. 68-9 par. 152, 154; RX 26B).

139. Southwestern Portland Cement Company was the largest cement supplier to the Cincinnati area in 1961 with 607,000 barrels, representing 23 percent of total shipments into the area. It was the second largest supplier in 1962 with 414,000 barrels, representing 18 percent; and in 1963 it was also the second largest supplier with 402,000 barrels, representing 16 percent. It has served the Cincinnati area since 1925 from its plant at Fairborn, Ohio, a distance of about 50 miles. About 70 percent of its shipments to customers in the area are made by truck, which deliveries, since the recent completion of a freeway system, require about an hour and a half. The remainder of its shipments are made by rail. The company believes that it can serve the area effectively from its plant without operating a distribu-

tion terminal in Cincinnati. Southwestern's sales in Cincinnati have improved since 1963 (CX 78; RX 26B; Tr. 2124-7, 2143; CB pp. 68-9 pars. 150, 154).

140. Kosmos Portland Cement Company was the third largest cement supplier to the Cincinnati area in 1961 and 1962, with 526,000 barrels in 1961, representing 20 percent of total shipments into the area, and with 390,000 barrels in 1962, representing 17 percent. In 1963, it was the fourth largest supplier to the area with 335,000 barrels, representing 14 percent of total shipments. Its only plant is located at Kosmosdale, Kentucky, and it has an annual capacity of three million barrels. Kosmos was acquired as a subsidiary in 1957 by The Flintkote Company, which, with its cement plants in other areas, had an aggregate capacity in 1963 of 13,850,000 barrels. Kosmos has had a distribution terminal in Cincinnati for about 25 years which it supplies by barge from the Kosmosdale plant, a distance of about 135 miles. In May 1967, it was in process of moving its terminal to a new location in Cincinnati, but its earlier plans to expand its terminal facilities were revised because of the increase in competition in the area and the decrease of its sales to Richter after Richter was acquired by respondent (CX 59; RX 26B; CB p. 67 par. 147, p. 69 par. 154, pp. 71-2 pars. 157-8; Tr. 2091-6, 2100-5, 2115-7).

141. Louisville Cement Company has a plant at Speed, Indiana, and another at Logansport, Indiana, with an aggregate annual capacity variously reported to be 5,200,000 and 6,450,000 barrels (CX 59; Tr. 2000, 2045). In 1961, Louisville Cement was the fifth largest cement supplier to the Cincinnati area with 261,000 barrels, representing 10 percent of total shipments into the area; in 1962, it was the fourth largest supplier with 272,000 barrels, representing 12 percent; and in 1963, it was the third largest supplier with 348,000 barrels, representing 14 percent. During that period it supplied its customers in Cincinnati from its Speed, Indiana, plant, a distance of about 110 miles, by rail and truck, and from a truck transfer station in Lawrenceburg, Indiana. Truck deliveries to Cincinnati from the plant required about three hours, and from the transfer station, about 30 minutes to one and a half hours. In March 1964, it started serving its customers from a distribution terminal in Cincinnati, and shipments to that terminal are made by rail from its Speed, Indiana, plant (CB pp. 67-8 par. 149, p. 69 par. 154; Tr. 2010-3; CX 78; RX 26B).

142. Marquette Cement Manufacturing Company was the fourth largest cement supplier to the Cincinnati area in 1961, with 268,000 barrels, representing 10 percent of total shipments into the area; it was the eighth largest supplier in 1962, with 135,000 barrels, representing 6 percent; and it was the sixth largest supplier in 1963, with 187,000 barrels, representing 7 percent. During that period it supplied the Cincinnati area from its plant at Superior, Ohio (a distance of about 145 miles), but the record does not disclose how the deliveries were made. In 1963, Marquette constructed a distribution terminal in Cincinnati and made its first shipments to that terminal early in 1964. The terminal was supplied by barge shipments from the Superior plant until early 1967; and since then, it has been supplied by barge shipments from Marquette's Pittsburgh plant (a distance of over 275 miles), which was completed in 1964. Cincinnati can be supplied more economically from the Superior plant, and the company anticipates that after 1967 it will probably go back to supplying Cincinnati from Superior (CX 78; RX 26B; Tr. 1277, 1278-9, 1282, 1284, 1309; CB p. 68 par. 151, p. 69 par. 154; Rand McNally Standard Highway Mileage Guide officially noticed for distance).

143. Columbia Cement Company, a division of Pittsburgh Plate Glass Company, operates cement plants at East Fultonham, Ohio, Barberton, Ohio, and Bellingham, Washington, with an aggregate annual capacity of about seven million barrels. In 1961, it was the seventh largest supplier of cement to the Cincinnati area with 121,000 barrels, representing 5 percent of total shipments into the area; and in 1962 and 1963, it was the fifth largest supplier, with 177,000 barrels in 1962 and 211,000 barrels in 1963, representing 8 percent in each year. It did not have a distribution terminal in Cincinnati until 1962, but established one there in that year in order to meet competition by providing prompt delivery service to its customers. All of its shipments of cement into the Cincinnati area are made by rail from Columbia's plant at East Fultonham, a distance of 125 to 150 miles (CB pp. 65-6 par. 145; CX 78; Tr. 1502-3, 1506-7, 1510, 1519-20).

144. Alpha Portland Cement Company was the eighth largest supplier to the Cincinnati area in 1961, with 119,000 barrels, representing 4 percent of total shipments into the area; it was the sixth largest supplier in 1962, with 175,000 barrels, representing 8 percent; and it was the seventh largest supplier in 1963, with 179,000 barrels representing 7 percent. The statistics show ship-

ments into the area during the 1961-1963 period from the Birmingham, Alabama, and the Ironton, Ohio, plants of Alpha, but do not show how much from each plant. The reason for including the Birmingham plant in the figures could not be explained, but it is clear that Cincinnati is not a part of the Birmingham plant's normal sales area and that any shipments into Cincinnati from Birmingham during that period were limited and unusual. Alpha established a distribution terminal in Cincinnati in 1960 and has operated it since that time. It ships into the Cincinnati area by rail and truck from its Ironton plant, a distance of about 150 miles (CB p. 65 par. 144; RX 26B).

145. Dundee Cement Company was the sixth largest supplier to the Cincinnati area in 1961, with 177,000 barrels, representing 7 percent of total shipments into the area; it was the seventh largest supplier in 1962, with 136,000 barrels, representing 6 percent; and it was the eighth largest supplier in 1963, with 169,000 barrels, representing 7 percent. It began shipping cement into the area in 1960, and at that time it constructed a distribution terminal in Cincinnati. It supplies the area by rail shipments from its plant at Dundee, Michigan (a distance of about 230 miles), and its transportation costs are the highest of any company shipping cement into Cincinnati (CB p. 66 par. 146; CX 78; RXs 26B, 30B; Tr. 1361-4, 1383; Rand McNally Standard Highway Mileage Guide officially noticed for distance).

146. Dundee was organized about 1957 or 1958, and its stock is held primarily by foreign interests engaged extensively in the production and sale of cement in Europe. Its first cement plant, which was located at Dundee, Michigan, and had an annual capacity of about five and a half million barrels, was completed in 1959 and started shipping cement early in 1960. In April 1967, it completed construction of a plant at Clarksville, Missouri, with an annual capacity of about seven million barrels (Tr. 1352-3, 1370-1, 1381, 1383-5).

147. Dundee, a new company in this country, entered the Cincinnati market in 1960 without an established reputation or trade name, without trade relationships constituting captive outlets for its cement, and with significant transportation cost disadvantages. It became an active and effective competitor in the area, however, by its aggressive efforts in developing novel and attractive sales and service techniques and, to some extent, by its pricing policies. In these competitive activities it was undoubtedly aided substantially by the financial strength of its

organizers and their experience in foreign cement markets (Tr. 1354-63, 1384-5, 2026-7; RX 30B; Staff Rpt p. 42; RB p. 11; see also Fi. 84, 116-9).

148. Lehigh Portland Cement Company was the ninth largest supplier, that is, the smallest supplier, to the Cincinnati area in each year during the 1961-1963 period. In 1961, it supplied 54,000 barrels, representing 2 percent of total cement shipments into the area; in 1962, it supplied 82,000 barrels, representing 3 percent; and in 1963, it supplied 114,000 barrels, representing 5 percent. All of these shipments were made from Lehigh's plant at Mitchell, Indiana (a distance of about 130 miles), except for 6,000 barrels in 1961 which were shipped from its plant at Union Bridge, Maryland (a distance of over 450 miles) (CB p. 67 par. 148; RX 26B; Rand McNally Standard Highway Mileage Guide officially noticed for distance).

149. Since its plant went on stream in July 1965 Cincinnati has been one of respondent's major cement marketing areas. About 90 percent of its shipments to that market, a distance of about 350 miles, have been made by barge, and the remainder by rail, usually during surge periods. Since it started shipping cement, respondent has operated a large distribution terminal in Cincinnati to serve that area (CB p. 69 par. 153). In 1966, respondent shipped 252,883 barrels of cement to Richter, and it was estimated, very roughly, that in the same year its sales to other consumers in the Cincinnati area amounted to about 500,000 barrels (CB p. 72 par. 158; Tr. 2443-4).

150. During the period 1961-1963, the ready-mixed concrete companies were the principal consumers of cement in the Cincinnati area, and their importance as consumers increased during the period. In 1961, approximately 50 percent of the total sales of cement in the area were made to the ready-mix companies; in 1962, approximately 63 percent; and in 1963, approximately 66 percent. Sales by the several suppliers to the ready-mix companies ranged from 25 percent to 87 percent of their total cement sales in the Cincinnati area in each year (CB p. 70 par. 155).

151. During the period 1961-1963, Hilltop Concrete Corporation was the largest ready-mixed concrete producer based in the Cincinnati area. In 1961, it sold 422,000 cubic yards of ready-mixed concrete; in 1962, 445,000 cubic yards; and in 1963, 529,000 cubic yards. In each year, however, these figures included substantial sales by Hilltop's ready-mix plants located outside of the Cincinnati area. By subtracting the sales of its out-

side plants, the sales of Hilltop's ready-mix plants located in the Cincinnati area were 209,000 cubic yards of ready-mixed concrete in 1961; 204,000 cubic yards in 1962; and 267,000 cubic yards in 1963 (CX 81; CB pp. 76-7 par. 168).

152. Subtracting the sales of Hilltop's ready-mix plants located outside the area, the total sales of the ready-mix companies operating in the Cincinnati area were 1,087,000 cubic yards of ready-mixed concrete in 1961; 1,185,000 cubic yards in 1962; and 1,309,000 cubic yards in 1963. Excluding Hilltop's outside plants, Richter was the largest producer, with 376,000 cubic yards in 1961, representing 34.6 percent of the Cincinnati ready-mix market; 412,000 cubic yards in 1962, representing 34.8 percent; and 439,000 cubic yards in 1963, representing 33.5 percent. Hilltop was the second largest producer, with 19.2 percent of the market in 1961; 17.2 percent in 1962; and 20.4 percent in 1963. The third largest producer had 8.8 percent, 8.9 percent, and 9.1 percent of the ready-mix market in each year, respectively, and the remainder of the market was distributed among approximately 20 other companies.

153. Among the ready-mixed concrete companies in the Cincinnati area, Richter was the largest consumer of cement shipped into the area during the 1961-1963 period. In 1961, it purchased 507,000 barrels, representing 19.9 percent of total shipments into the area; in 1962, it purchased 550,000 barrels, representing 23.7 percent; and in 1963, it purchased 611,000 barrels, representing 24.4 percent (CB p. 70 par. 156).

154. Throughout the 1961-1963 period, Richter's cement purchases were spread relatively evenly among the companies shipping into the Cincinnati area, substantial purchases being made in each year from eight of the nine suppliers to the market. Universal Atlas was the largest supplier of cement to Richter, with 122,000 barrels in 1961, representing 24.1 percent of Richter's total purchases in that year; 111,000 barrels in 1962, representing 20.2 percent; and 125,000 barrels in 1963, representing 20.5 percent. Southwestern was the second largest supplier to Richter, with 18.5 percent, 15.3 percent, and 15.4 percent of Richter's total purchases in each year, respectively; Kosmos supplied 17.6 percent, 15.3 percent and 12.9 percent; and Louisville Cement supplied 14.6 percent, 10.2 percent, and 13.1 percent. In 1961, Alpha and Lehigh each supplied 6.7 percent, and Columbia supplied 4.9 percent of Richter's cement purchases; and in 1962 and 1963, Alpha, Columbia, and Lehigh each supplied ap-

proximately 10 percent. Marquette supplied 6.9 percent, 8.6 percent and 6.7 percent in each year respectively. Dundee did not supply any cement to Richter in 1961 or 1962, and in 1963 it supplied only 2,000 barrels (CB p. 71 par. 157).

155. Each of the plants supplying cement to the Cincinnati area also supplies cement to a general geographic area covering all or parts of several States, and there are substantial differences in the general areas supplied by each plant (CB pp. 65-9 pars. 144-53). In 1961, the total cement shipments of the plants supplying Cincinnati amounted to 21,517,000 barrels, of which 2,674,000 barrels were shipped into the Cincinnati area; in 1962, total shipments were 20,889,000 barrels, with 2,320,000 barrels to Cincinnati; and in 1963, total shipments were 23,436,000 barrels, with 2,500,000 barrels to Cincinnati (RXs 26G-H, 29). The following table (RX 26B) shows for each of the years 1961, 1962 and 1963, each supplier's share of Cincinnati's total cement market, and of Cincinnati's ready-mix market; and the percentage of each plant's total shipments which went to the Cincinnati area, to the ready-mix companies serving the area, and to Richter:

Cement companies in the Cincinnati market
[Percent]

Cement company	Share of Cincinnati's total cement market			Share of Cincinnati's ready-mix market			Shipments to Cincinnati as percent of plant's total shipments			Sales to ready-mix companies as percent of plant's total shipments			Sales to Richter as percent of plant's total shipments		
	1961	1962	1963	1961	1962	1963	1961	1962	1963	1961	1962	1963	1961	1962	1963
Alpha ¹	4	8	7	6	10	10	5	8	10	4	6	8	1.5	2.7	2.5
Universal Atlas ²	20	23	22	23	20	19	28	28	24	16	15	7	6.4	5.8	5.7
Louisville	10	12	14	15	13	18	8	8	12	10	6	10	2.4	1.7	2.7
Kosmos	20	17	14	17	17	13	22	17	13	10	11	9	4.2	3.7	3.1
Columbia	5	8	8	3	5	7	7	6	11	2	4	6	1.4	2.7	3.2
Lehigh ³	2	3	5	3	5	5	3	5	6	2	6	4	2.4	3.6	3.4
Marquette	10	6	7	7	7	10	23	12	14	3	10	12	3.0	4.1	3.2
Southwestern	23	18	16	22	17	11	23	18	16	11	10	7	3.9	3.7	3.8
Dundee	7	6	7	3	5	7	6	3	4	1	1	2	---	---	---
Total	100	100	100	100	100	100	12	11	11	6	7	7	2.6	2.6	2.8
Total barrels (thousands)	---	---	---	---	---	---	2,674	2,329	2,500	1,239	1,406	1,604	507	550	611
Percent change	---	---	---	---	---	---	---	-13	+8	---	+9	+14	---	+8	+11

¹ Source of shipments by plant could not be determined from available data. These percentages are based on combined shipments from the Birmingham and Ironton plants.
² Market's share of total shipments from Fairborn and Universal plants combined were 15, 16, and 24 percent in 1961, 1962, and 1963, respectively. All calculation assumed Fairborn plant was the sole source of shipments into the Cincinnati SMSA.
³ Calculations assume total shipments into Cincinnati were from the Mitchell plant.

156. Although of considerable importance as a cement consumer in the Cincinnati market, Richter was of much less importance as a customer of the plants supplying that market. In each of the years 1961 and 1962, shipments to Richter represented only 2.6 percent of the total cement shipments of the plants supplying the Cincinnati market; and in 1963, they represented 2.8 percent. In 1961, 1962 and 1963, Richter's purchases from Universal Atlas, its largest supplier, represented 6.4 percent, 5.8 percent and 5.7 percent of the total shipments in each year, respectively, of that company's plant supplying the area; and Richter's purchases from Southwestern, its second largest supplier, represented 3.9 percent, 3.7 percent, and 3.8 percent of the total shipments in each year, respectively, of that company's plant supplying the area. Richter's purchases from its other suppliers (disregarding its inconsequential purchases from Dundee) represented in each year from 1.4 to 4.2 percent of the total shipments in each year of the plant of each company supplying the area (Fi. 155).

157. Respondents' acquisition of Richter in January 1964 was made as a part of its comprehensive plan to enter the portland cement industry. When it began shipping cement to the Cincinnati area in July 1965, its ownership of Richter, one of the leading consumers of cement in the area, gave it the power to foreclose competing cement companies for a substantial part, probably about 20 percent, of the cement market in that area (although the statistics do not provide a basis for satisfactorily determining the approximate share of the market represented by Richter's purchases when respondent entered the market). (See CB p. 72 par. 159.)

158. After respondent started shipping cement into the Cincinnati area in July 1965, it quickly became the principal supplier to Richter. In 1966, Richter purchased 389,000 barrels of cement, of which 252,800 barrels, representing 65 percent, were supplied by respondent. In the same year, Richter purchased cement from six other companies, as follows: Columbia, 43,300 barrels, representing 11.1 percent; Universal Atlas, 32,300 barrels, representing 8.3 percent; Lehigh, 26,100 barrels, representing 6.7 percent; Kosmos, 20,800 barrels, representing 5.3 percent; Alpha, 7,800 barrels, representing 2 percent; and Southwestern, 5,700 barrels, representing 1.5 percent (CB pp. 71-2 par. 158).

159. The competitive impact of respondent's acquisition of Richter was manifested in varying degrees upon the companies

supplying cement to the Cincinnati area. Richter's purchases from Universal Atlas in 1963 amounted to 125,000 barrels, and in 1966 to 32,300 barrels; from Columbia, in 1963, to 64,000 barrels, and in 1966 to 43,300 barrels; from Lehigh, in 1963, to 62,000 barrels, and in 1966 to 26,100 barrels; from Kosmos, in 1963, to 79,000 barrels, and in 1966 to 20,800 barrels; from Southwestern, in 1963, to 94,000 barrels, and in 1966 to 5,700 barrels; and from Alpha, in 1963, to 64,000 barrels, and in 1966 to 7,800 barrels. Richter's other suppliers in 1963, Louisville with 80,000 barrels, Marquette with 41,000 barrels, and Dundee with 2,000 barrels, made no sales to Richter in 1966. These comparisons assume a somewhat different significance, however, when it is considered that Richter's total purchases declined from 611,000 barrels in 1963, to 389,000 barrels in 1966 (CB pp. 71-2 pars. 157-8). It should also be considered that Southwestern's sales in Cincinnati have improved since 1963 (Fi. 139), and that in April 1966, Louisville Cement announced that it was its policy not to sell cement to integrated companies (Tr. 2071-81; RB pp. 37-8).

160. Statistics for the Cincinnati market as a whole, subsequent to 1963, are not in the record. The record discloses, however, that all nine of the cement suppliers to the Cincinnati area during the 1961-1963 period have continued as active competitors in that area, and that respondent entered that market in July 1965 (Fi. 137, 149). In 1966, respondent shipped almost 253,000 barrels of cement to Richter, and it was estimated that its sales to other consumers in the area were about 500,000 barrels (Fi. 149). With shipments of over 700,000 barrels into Cincinnati, respondent's total volume in 1966 was larger than the volume of any supplier in 1963; and its 1966 volume of about 500,000 barrels to consumers other than Richter was comparable with the volumes of the leading suppliers to that market in 1963, including their sales to Richter (CX 78).

161. It is apparent, therefore, that respondent's entry into the Cincinnati area has added a major cement supplier to that market. It is also apparent that all of the suppliers previously in the market have continued actively to compete in that area. It is clear that respondent's successful entry into the Cincinnati market was greatly facilitated by its control of Richter, but the competitive impact of its entry has extended well beyond the Richter operation and respondent has become a major supplier to other consumers in the area. Respondent's entry has un-

doubtedly displaced others for a share of the available market and has created competitive problems and dislocations among the several companies supplying the market. (See CB p. 72 par. 161.) There is no indication, however, that any of the suppliers are likely to be eliminated as competitors in the market, or that there has been, or is likely to be, any diminution in the amount of vigor of competition in the Cincinnati cement market as a result of respondent's entry.

Competitive Effects in the Ready-Mixed Concrete Industry

162. Counsel supporting the complaint urge, in effect, that, by virtue of its ownership of ready-mixed concrete facilities, respondent is able to sell or transfer portland cement to its own ready-mix companies at cost or at any markup without reference to prevailing market prices; and that it is able, by the device of manipulating the price of cement, to provide substantial cost advantages to its ready-mix subsidiaries (CB p. 78 pars. 173-4).

163. Counsel apparently concede that while operating in the shadow of this proceeding respondent has not elected to employ this device. They urge, however, that respondent has the capacity to transfer substantial cost advantages to its subsidiaries and that, by thus employing the "power of the 'deep pocket' of a 'rich parent'," it may seriously impair the ability of nonintegrated ready-mix companies to compete; and that the competitive advantages inherent in this situation have raised the barriers to entry and have significantly diminished the prospects for new entry by nonintegrated ready-mix companies in the Kansas City, Memphis, and Cincinnati markets (CB pp. 79-84).

164. Counsel for respondent characterize the possible competitive advantage accruing to an integrated producer by the transfer of cost from one level of activity to the other as "a contrived conjecture which is neither legally nor practically possible" (RB p. 46). They rely in large measure upon the testimony of their expert witness, Dr. Martin H. Seiden, a qualified economist (RB pp. 47-9).

165. Dr. Seiden reasons that if respondent gave a ready-mix subsidiary a cement cost advantage which was reflected in lower ready-mixed concrete prices, the competing independent ready-mix companies, with low profit margins, would not be able to absorb the difference but would turn to their cement suppliers to meet the challenge. He conceives that the cement suppliers "would match each other instantly," that if they failed to do so they

would lose business, and that the impact on the ready-mix companies and on the cement manufacturers would be the same whether or not they were integrated (Tr. 3511-3).

166. This concept is consistent with the testimony of a competitive ready-mix producer, at least to the extent that a cost advantage to a subsidiary of respondent could be substantiated (Tr. 1736; RB p. 49). Respondent contends that a price advantage to one of its subsidiaries would be immediately known and met by other suppliers, citing the Federal Trade Commission Staff Report:

In all regions for which data are available the patterns of concentration are sufficiently high so that each seller [of cement] will tend to be acutely aware of the competitive strategies employed by competing sellers. (Staff Rpt p. 31; RRB p. 15.)

167. The experience and opinions of the ten ready-mix competitors of respondent's subsidiaries who testified in this proceeding provide very limited support for the proposition that respondent's acquisitions may substantially lessen competition in the ready-mixed concrete industry in the Kansas City, Memphis or Cincinnati areas. (See CB pp. 78-9 par. 175; RB pp. 43-7, 49-50; see also Tr. 1636-8, 1673-5, 1680-2, 1714, 1716-7, 1727-8, 1736, 1789, 1799-1806, 1818, 1825-6, 1836, 1886-7, 2163-8, 2189-94, 2253-6.) The views of those who seemed to have some concern about the acquisitions are indicated generally and briefly by the instances referred to in the following paragraph.

168. Although he was not "disturbed" by respondent's acquisition of Stewart, a ready-mix producer in Kansas City, who had previously had experience with integrated competitors in another area and anticipated a possible price war, was "concerned" about the situation, and decided to sell his company's stock to a cement company (Tr. 1673-5, 1680-2). Another ready-mix producer in Kansas City felt that any differential in the price of cement could make a considerable difference in overall material cost, and was concerned about the possibilities of cost transference between cement companies and ready-mix subsidiaries, but he had no knowledge of specific instances in which it had occurred (Tr. 1714, 1716-7, 1727-8; see Tr. 1736). A ready-mix company in Memphis was concerned about the two acquisitions in that area, and decided to expand its operations and increase its sales efforts, which it did quite successfully (Tr. 1801-6, 1818, 1825-6). A ready-mix company in Cincinnati—Hilltop—felt that after respondent started shipping cement, Richter's prices for ready-

mix were abnormally low. There had been price fluctuations in the area and sharp price competition between Richter and Hilltop, however, before respondent started shipping cement; and, early in 1967, there was an increase in ready-mix prices in the Cincinnati area (Tr. 2163-8, 2189-94).

169. The contentions of counsel supporting the complaint with respect to the possible manipulation of prices and transference of cost advantages to integrated subsidiaries are persuasive and, in many situations, valid legal and practical conceptions. There is little in the record, however, to support the proposition that they apply in this proceeding. There is no evidence that respondent has transferred any cost advantages to its ready-mix subsidiaries, and there is very little impressive indication of concern among the ready-mix companies that it is likely to do so. There is impressive expert testimony that in the situation presented in this proceeding it would not be practical for respondent effectively to use this device. No other evidence or contention was presented that the effect of the challenged acquisitions may be substantially to lessen competition in the ready-mixed concrete industry.

170. It is the opinion of the hearing examiner, therefore, that the record in this proceeding does not provide an adequate basis for finding that the effect of respondent's challenged acquisitions may be substantially to lessen competition in the ready-mixed concrete industry in the Kansas City, Memphis or Cincinnati areas.

Competitive Effects in the Portland Cement Industry

171. Counsel supporting the complaint assert that the acquisition of ready-mixed concrete companies was part and parcel of respondent's plan of entry into the portland cement industry and that respondent never considered operating ready-mixed concrete plants independently of operating a portland cement plant (CB p. 11 par. 19). They urge, in effect, that respondent's entry into the portland cement industry by the acquisition of ready-mix producers had substantial anticompetitive effects, and that the amount of the market foreclosed to other cement companies compel the conclusion that the acquisitions were unlawful (CRB pp. 8, 26-7). They contend that the effect of the acquisitions may be substantially to lessen competition or to tend to create a monopoly in the sale of portland cement in the Kansas City, Memphis and Cincinnati areas because of the power which

respondent achieved through them to foreclose a substantial portion of the market in each area from competing cement suppliers, because they raised the barriers to entry by others into the markets, and because of the pressures which they imposed upon others to take similar action (CB pp. 54-5 pars. 115-20, p. 63 pars. 139-42, p. 72 pars. 159-62).

172. As early as 1955, respondent considered how it might best undertake the commercial development and utilization of the large deposits of limestone and silica sand contained in the Selma tract which it had acquired (Fi. 4; Tr. 1114). It gave serious consideration to utilizing this property for the production of portland cement, and initially conceived of a cooperative development of the area with an established cement producer. In 1957 talks were entered into between representatives of respondent and Missouri Portland Cement Company concerning a possible joint venture or merger for the construction of a cement plant on this tract. Respondent acquired about 50,000 shares of Missouri Portland stock, but discussions ended with a change in the management of Missouri Portland. Respondent sold its Missouri Portland stock and the cooperative project with that company was terminated (CB pp. 4-5 pars. 7-9; RB pp. 3-4).

173. Respondent continued its consideration and study of developing the tract for cement production and of the problem of entering the portland cement industry. As early as January 1959, consideration was given to "starting to acquire existing businesses which would offer captive markets," but such ideas were at that time indefinite and tentative (CX 9 pp. 3-4; CB p. 6 par. 10). In November 1961, some consideration was given to the possibility of a joint venture with, or the acquisition of, Alpha Portland Cement Company, based upon the thought that it did not appear to be wise to "attempt to break into the market alone," but that relationship did not materialize (CB pp. 6-7 par. 11; RB p. 4). A survey and report to the respondent in April 1962 proposed the construction of a plant and entry into the cement industry on the condition, among other things, that "Captive sales were assumed in selected market areas in the midwest." (CB p. 8 par. 12).

174. Respondent sought the guidance of its attorneys and was advised that, if it were going to develop a cement and ready-mixed concrete complex, it should first acquire the ready-mix companies which it considered necessary and then build its own cement plant to supply them. It was advised that vertical in-

tegration through this method of internal expansion would not constitute a violation of law. Respondent undertook to follow that pattern (Tr. 1177-8, 2352).

175. In August 1962, respondent's board of directors authorized the expenditure of a quarter million dollars to acquire stock of Jahnke Service, Incorporated, one of the largest ready-mix companies in New Orleans, Louisiana, and within a short time respondent acquired about 5,000 shares of that stock. When it later decided not to go into the New Orleans market, respondent sold the Jahnke stock (Tr. 2352-3; CB p. 9 par. 14; RB p. 4). In December 1962, respondent acquired a one-third interest in Maclay Concrete, Inc., a small ready-mix company in Festus, Missouri (CB p. 9 par. 14; RB p. 4). Although Maclay is now a wholly-owned subsidiary of respondent, that acquisition was not challenged in this proceeding (Tr. 993, 1150-2).

176. During the period prior to 1963, Mr. E. P. Kramer, a vice president, now retired, had considerable responsibility for respondent's diversification program (Tr. 2343-5). He had strongly advocated that respondent should enter the portland cement industry, but it was his firm position that it should do so only in conjunction with assured outlets in selected markets (Tr. 1114-1-4, 1211, 2349-51).

177. In May 1963, Mr. Arthur W. Manley, senior vice president of respondent (Tr. 989-90), became responsible for respondent's proposed entry into the cement industry. To satisfy himself concerning the marketing problems involved, he decided at that time to visit several of the prospective market areas and make personal inquiries concerning the existing competitive circumstances. During the period from May to July 1963 he visited Kansas City, Memphis and Cincinnati, among other places; and after those visits he felt that Mr. Kramer was exactly right and that if the company were to go into the cement business it should secure assured outlets for its product (Tr. 1114-4, 2355).

178. As a result of his visit to Kansas City and his conversations with people in the ready-mix business there, Mr. Manley "came away with the idea that these people were so tied to the cement companies that it would be virtually impossible to break into the market unless you had an outlet that would assure you a certain amount of cement" (Tr. 1117). He felt that Kansas City was a primary market that respondent had to get into, that in order to get into that market respondent had to buy Stewart,

and that it would have been impossible to attempt entry on any other basis (Tr. 2416-22).

179. Cincinnati was a large market on the perimeter of the area in which respondent proposed to market cement (Tr. 2408). In order to supply that market, it would be necessary for respondent to transport cement by barge and to have a sizeable terminal in Cincinnati to receive the cement. A terminal of the necessary size would have to handle about 400,000 barrels of cement a year to reach a break-even point. Mr. Manley was advised on his visit to Cincinnati that respondent couldn't afford the necessary terminal there unless it could get all of the business of either Hilltop or Richter; that otherwise it could not break into the Cincinnati market; and that Hilltop and Marquette were very closely tied (Tr. 1137-9). If it had been Mr. Manley's decision, respondent would not have entered the Cincinnati market if it had not acquired Richter and, without that acquisition, respondent probably would not have entered the cement industry (Tr. 1208-11).

180. Upon his visit to Memphis, Mr. Manley received information similar to that which he had received in Kansas City and Cincinnati; and, on the morning following his arrival, an announcement was made in the Memphis papers that Texas Industries, Inc. had acquired Fischer. He was advised that Denie's was in a bad cash position and that "unless they got some outside help, they probably weren't going to make it" (Tr. 1140-4).

181. During the May-July 1963 period, Mr. Manley also made personal visits to Nashville, Tennessee, and Louisville, Kentucky. It was decided not to enter the Nashville market because it was too far away, and it was felt that some discouraging relationships existed between cement and ready-mix companies. It was also decided not to enter Louisville because it was felt that the cement market was not large enough to justify the investment in the terminal which would be necessary to serve that area, because the price of cement was low in that market and freight absorption would be high, and also because of the proximity of the plants of Kosmos and Louisville Cement (Tr. 2404-5, 2407, 2414-5).

182. During the same period, Mr. Manley also visited with industry people in St. Louis, Missouri, where respondent is based. He believes that a large ready-mix company in St. Louis is tied to a cement company, but otherwise that there are no close ties between cement and ready-mix companies in that market. Re-

spondent is wellknown in St. Louis and its top officers are leaders in the community. It was felt that respondent could successfully enter the St. Louis cement market without captive outlets (Tr. 2408-10, 2424, 2426).

183. On the basis of his visits to the various prospective market areas during the May-July 1963 period, and his other knowledge of the industry, Mr. Manley was firmly of the opinion that respondent should not enter the cement industry unless it had assured outlets in selected markets for a substantial part of its production. He was inclined to believe that there were relationships between cement producers and consumers which would preclude respondent from entering the market in any volume without such outlets. He also felt that assured outlets were needed to establish trade acceptance of the product of a new company, to provide status for its product through the reputations of established ready-mix companies, and to provide an initial volume of business to sustain the operation of the necessary terminals and other facilities (Tr. 1181-4).

184. Following his visits to the several markets during the May-July 1963 period, Mr. Manley recommended that respondent should buy Stewart, Denie's, and Richter (Tr. 1176). If respondent had not been able to acquire these companies or other ready-mix companies of equivalent stature in each of these three selected market areas, he would have recommended that respondent should not build a cement plant. If it had been his decision, respondent would not have entered the cement industry had it not been for the assured outlets provided by these acquisitions (Tr. 1180-4).

185. On May 24, 1963, the chairman of the board of directors of respondent publicly announced that the company planned to build a cement plant. In July 1963, the board of directors authorized construction of the plant (Tr. 1114-5-8, 1131-2, 1154-5, 2356, 2494) and at the same time authorized the acquisition of three ready-mixed concrete companies. Two of the acquisitions authorized at that time (Stewart and Denie's), together with a third acquisition subsequently authorized (Richter), constitute the acquisitions challenged in this proceeding (Fi. 5). The third ready-mix acquisition authorized in July 1963, Breckenridge Material Service Company, in St. Louis, Missouri, was not made because respondent finally decided that it would be able to enter St. Louis without an assured or captive outlet in that market (Tr. 2356-8). It subsequently entered St. Louis, and its sales in

that market in 1966 were estimated to be somewhere in the range of 800,000 barrels of cement (Tr. 2444).

186. During the period from July 1963 to July 1964, respondent entered into contracts for the design, engineering, and construction of its cement plant (Fi. 6). During the period from September 6, 1963 to January 31, 1964, respondent acquired Denie's, Stewart, and Richter, and since then it has operated them as ready-mixed concrete producers (Fi. 7-11). In July 1965, respondent's plant was completed and it began the commercial production of portland cement (Fi. 6).

187. Respondent's entry into the portland cement industry was founded squarely upon its acquisition of ready-mix companies as captive outlets for a substantial part of its cement production. The testimony of respondent's official responsible for its project to establish a cement-concrete complex, which evidence is uncontradicted, strongly indicates that respondent would not have entered the cement industry without the assured outlets for its product represented by its challenged acquisitions of ready-mixed concrete producers. The record as a whole makes it abundantly clear that respondent's entry into the ready-mixed concrete industry and its subsequent entry into the cement industry did not constitute separate enterprises, but that they were simultaneously decided upon as mutually interdependent parts of a single, comprehensive project.

188. Respondent's plant which was completed in July 1965 had an annual capacity of three million barrels of cement. In its construction, however, provision was made for subsequent expansion to a capacity of six million barrels (Fi. 6). Whether or not, and when, respondent will expand its plant to a capacity of six million barrels depends to some extent upon the pendency and possible outcome of this proceeding. At the time of the hearings herein, the company was in process of considering the proposed expansion in order to improve the return on its investment. It is a difficult decision, but Mr. Manley feels that the company will have to go forward with the expansion. With respect to the proposed expansion, it is Mr. Manley's opinion that if the company is able to retain the acquired ready-mix producers, it will make "difficult" what "otherwise would be an impossible job" (Tr. 1000, 2375-7).

189. The present investment in respondent's cement facilities, excluding the cost of acquiring the ready-mix companies, is approximately \$35,000,000, consisting of about \$29,000,000 in

the plant, about \$4,500,000 in the distribution terminals, and about \$1,500,000 in the barges. Because the plant was planned for future expansion to an annual capacity of six million barrels, it included certain oversized equipment and facilities in order to minimize the additional investment which would be required for the later expansion. It is estimated that the investment in the plant and facilities to provide for the proposed future expansion was about four to five million dollars more than would have been required for a plant and facilities geared only to a three million barrel capacity. It is also estimated that the proposed expansion to a capacity of six million barrels will require an additional investment of about \$23,000,000. It was respondent's intention to enter the cement industry in two stages—initially to establish its production and sales of three million barrels annually and, when conditions warranted, to expand to its ultimate goal of six million barrels (Tr. 1000-2, 2359-62, 2461-2, 2486-90).

190. In 1966, its first full year of production, respondent sold three million barrels of cement—the full rated capacity of its plant (Tr. 1156-7, 2447). Approximately 900,000 barrels were supplied to respondent's ready-mix subsidiaries and the remaining approximately 2,100,000 barrels were sold to consumers other than those owned by respondent (Tr. 2377, 2380, 2443; CB p. 54 par. 114, p. 63 par. 138, p. 72 par. 158; RRB p. 10). The bulk of respondent's sales in 1966 were made in St. Louis, Kansas City, Memphis, and Cincinnati (Tr. 2426, 2444). Some sales were also made in Monroe, Louisiana, as a market-probing operation, and some in Festus, Missouri, to respondent's subsidiary, Maclay, and respondent is now building a terminal in Natchez, Mississippi (Tr. 1006-7, 1011-3, 1085, 1094-5, 1150-2, 2362-3, 2401-2, 2444).

191. Although the foregoing represent the areas in which respondent has actually sold cement since its plant went "on stream," it considers that the effective marketing area of its present plant includes all or parts of the States of Missouri, Kansas, Illinois, Indiana, Ohio, Kentucky, Tennessee, Mississippi, Louisiana, and Arkansas. If respondent should double the capacity of its plant by the contemplated expansion to six million barrels annually, it anticipates that its proper marketing area would be substantially expanded beyond its present perimeter to include additional parts of some of the foregoing States and all or parts of the States of Alabama, Louisiana, Texas, Oklahoma,

Nebraska, Iowa, Minnesota, and Wisconsin (Tr. 1019-23, 1086-7, 1112-3, 2363-75, 2401-6; RX 3).

192. Respondent is a new entry into a highly concentrated industry into which entry is difficult. (Staff Rpt pp. 7, 19-26, 40.) Respondent's entry added a new, strong and vigorous competitor to the cement markets in the Kansas City, Memphis, and Cincinnati areas and the area in the general vicinity of St. Louis, Missouri, and added a potential competitor actively probing markets in a broad area which it considers to represent the normal market for its present plant; and, by virtue of its entry into the portland cement industry and its proposed plant expansion, it now stands as a very real potential competitor in a much broader area.

193. Counsel supporting the complaint argue forcefully and, in large measure, persuasively that respondent could have entered the portland cement industry successfully without making the challenged acquisitions (CRB pp. 23-5). They also urge, in effect, that good business reasons and the self-interest of respondent are not factors in determining an antitrust violation, but that the inquiry should be whether the effect upon competition is substantially adverse (CRB pp. 11-2).

194. The pertinent question for determination here is, of course, whether or not the effect of the challenged acquisitions may be substantially to lessen competition. Assuming that it could have successfully done so, the fact is that respondent made the business judgment that it would not enter the portland cement industry without the assured outlets which it considered necessary to warrant its diversification into that industry rather than into other enterprises (Fi. 172-87). Whether or not that business judgment was well founded, or constituted a good business reason for its decision, need not be determined in appraising the competitive effects of the acquisitions.

195. It is the opinion of the hearing examiner that respondent's acquisitions of the ready-mixed concrete producers challenged in this proceeding constituted an essential part of its decision to enter the portland cement industry, and that without those, or substantially equivalent assured outlets for cement, it would not have entered the industry. In addition to supplying cement to its ready-mix subsidiaries, over two-thirds of respondent's production in 1966 was sold to other consumers.

196. Careful consideration has been given to the competitive conditions existing in each of the cement markets in the Kansas

City, Memphis, and Cincinnati areas at the time respondent acquired a ready-mix producer in each area. Each of those markets was highly concentrated in a relatively few suppliers, and the degree of concentration was particularly acute in the Memphis cement market. Respondent's entry added a major cement supplier and a strong and vigorous new competitor to each of those markets and contributed substantially to deconcentration of the portland cement market in each area.

197. All of the companies supplying cement to the Kansas City, Memphis, and Cincinnati areas when respondent made the challenged acquisitions have continued as suppliers to, and as active competitors in, each area. Respondent's successful entry into each cement market was greatly facilitated by its control of, and the volume of captive sales assured by, the acquired ready-mix producer. Its entry has undoubtedly displaced others from a share of the available market in each area, and has undoubtedly created competitive problems and dislocations among the several companies supplying each market. The evidence does not provide any indication, however, that any of the suppliers are likely to be eliminated as competitors in any of the markets or that there has been, or is likely to be, any diminution in the amount or vigor of the competition in any of the markets, as a result of respondent's entry.

198. Respondent's acquisitions and its entry into the several affected market areas have caused competitors in each market to undertake counteractive strategies, such as acquisitions, loans, or other trade relationships, designed to tie cement consumers to them and to assure themselves of substantial outlets for their cement. Evidence was presented concerning instances in which counteractive measures of this sort were employed by competitors as a result of respondent's acquisitions, but such evidence is not sufficient to permit an evaluation of the effects of the activities of the competitors in those instances, or of the legality of their practices.

199. It is the opinion of the hearing examiner that the record in this proceeding does not provide an adequate basis for finding that the effects of respondent's challenged acquisitions may be substantially to lessen competition in the portland cement industry in the Kansas City, Memphis, or Cincinnati areas. The record does not provide a basis for a meaningful or factually sufficient examination of the possible competitive effects of the challenged acquisitions in any other areas or sections of the

country, and no contention was presented that an examination with respect to other areas should be made (see Fi. 53-7, 74).

The Failing Company Defense With Respect to Denie's

200. In addition to other defenses, respondent has also defended its acquisition of Denie's on the ground that Denie's was a failing company when it was acquired (RB pp. 52-69). It is the opinion of the hearing examiner, wholly apart from this defense, that the record does not provide an adequate basis for finding that the effect of respondent's acquisition of Denie's may be substantially to lessen competition. For the purposes of the result reached by the hearing examiner, therefore, it is unnecessary to deal with this additional defense; but, because this is an issue upon which the Commission must rule if it disagrees with the hearing examiner's decision, it is appropriate to consider and rule upon it in this initial decision.

201. Respondent contends, in effect, that Denie's was in a failing condition when it was acquired, and, therefore, that "the probable effect of the acquisition was not to lessen competition, but rather to improve, foster, and preserve competition," asserting that "This is an issue of fact, which is an essential element in the Commission's case against the respondent." (RB p. 52). This seems to suggest that the burden is on counsel supporting the complaint to prove that Denie's was not in a failing condition when it was acquired.

202. It is the burden of counsel supporting the complaint to prove that the effect of respondent's acquisition of Denie's may be substantially to lessen competition, and it is unlikely that the necessary showing could be made with respect to the acquisition of a company that was not competitively viable. The evidence concerning the purchase of cement and sales of ready-mixed concrete by Denie's, and concerning its strong position and competitive activity in the Memphis ready-mix market during the years 1961 through 1963, however, are sufficient, in the absence of strong countervailing facts, to establish that Denie's was a competitively effective and viable company during that period. As the proponent of the factual proposition that Denie's was in a failing condition at the time it was acquired, respondent has the burden of proof with respect thereto (Sec. 3.43(a) of the Commission's Rules of Practice). This defense by respondent is, accordingly, considered on that basis.

203. The Denie's corporation which was acquired by respond-

ent in September 1963, was organized in 1961 as FAB Corporation. On December 1, 1961, it purchased the business and assets and adopted the name of John A. Denie's Sons Co. The original Denie's company had been in business in Memphis for many years, and in the ready-mixed concrete business since about 1946. It was also engaged in other businesses, including a roofing plant, a brick plant, a prestressed concrete plant, and a concrete block plant. Most of the assets of the original Denie's, including its name and its accounts receivable and inventory, but excluding its land and certain other assets, were purchased as a going business by the new Denie's, and the entire personnel of the original company was taken over by the new company (Tr. 1934-9).

204. Mr. Morrie A. Moss, who was a defense witness, had owned about 81 percent of the original Denie's company, and the remainder was owned by employees (Tr. 1934). He was president of the original company, and continued as president of the new company until February 1962, when he resigned and a new president was installed (Tr. 1939, 1954). He owned no stock in the new company, but was retained as a consultant for a period of five years with compensation of a thousand dollars a month (Tr. 1939, 1954-5). Although a "consultant," he did not participate in any of its operations. He "was available only if asked and was seldom asked anything" (Tr. 1939-40). He was, however, a creditor for the unpaid balance of the purchase price, about \$2,440,000 covered by mortgage notes payable monthly for nine years, and was very much interested in keeping abreast of the business the new company was doing through monthly statements and annual audit reports which he received concerning its operations (Tr. 1940, 1949-50, 1988-91).

205. Mr. Moss testified that the management of the new Denie's was inexperienced and that the company did not prosper. He was highly critical of its management and operations, particularly with respect to poor maintenance of the truck fleet, poor service, and poor personnel relations. He expressed the opinion that the new company was able to keep going because of bank loans, that its position in the market was steadily falling off, dropping to third or fourth position in 1963, that by 1963 it had no prospects for adequate funds unless something was done to reverse the whole situation, and that its failure, if not imminent, was inevitable. He did not know of any other prospective purchaser of the company, and did not know that respondent

was negotiating for the purchase of its stock. At the time of the acquisition, Denie's had outstanding to him an obligation of about \$1,500,000, and Mr. Moss stated that if it had failed he would have liquidated the company rather than attempt to resume its operation (Tr. 1942-3, 1956-60, 1965, 1968, 1992).

206. Because of the unpaid balance of its obligation to him, Mr. Moss had a real and pressing interest in the condition of Denie's after the business was sold to the new company, and in his testimony he demonstrated considerable familiarity with the general operations and condition of the company under its new management (Tr. 1956, 1983). He did not, however, participate in management decisions, and did not have personal knowledge of the considerations upon which those decisions were based. His views concerning the poor maintenance and condition of the truck fleet, the poor personnel relations, and the poor service and customer dissatisfaction, were based largely upon hearsay information obtained from friends in the company and from customers (Tr. 1952, 1968, 1971-3). It does not appear whether this information was based upon the views of a few dissident employees and customers, or was generally representative. He was uncertain about the significance and meaning of figures in the company's reports and financial statements concerning maintenance expenditures (Tr. 1941-3, 1974-5, 1985-6, 1994-6), and he was in error in his impression that in 1963 Denie's had dropped to third or fourth position in the Memphis ready-mix market (CX 53).

207. Mr. Moss had operated the company successfully for many years. He sold the company and was suddenly excluded from participation in its management decisions, but continued to hold a large obligation of the company payable over a period of years. In such circumstances it is natural that he would be sensitive to criticisms of the new management by employees and customers of the company, and would place a high degree of reliance upon such criticisms. He had little actual knowledge, however, of the specifics or details of the operations or financial condition of the company. His compensation of \$1,000 per month was regularly paid to him by the company for five years (Tr. 1955), and the monthly payments of about \$25,000 on the mortgage notes were always made on time (Tr. 1988-91; CX 21D).

208. It is the opinion of the hearing examiner that Mr. Moss did not have sufficient knowledge of the specifics and details of Denie's operations and financial condition to support his opinion

that the company was in precarious financial circumstances and that its failure was inevitable. His testimony adds little of substance to the financial statements and other evidence concerning Denie's condition when it was acquired by respondent.

209. Mr. W. C. Jenne also testified in support of respondent's failing company defense with respect to Denie's (RB pp. 57-8). He is president of S & W Construction Company, based in Memphis, with a general and highway contracting business in an area within 500 miles of Memphis, and with a volume amounting to about 20 million dollars annually (Tr. 1894).

210. Mr. Jenne stated that when respondent acquired Denie's its plant was so run down that it could not expect to meet any sort of delivery schedule. His company had purchased almost exclusively from Denie's until about three years before the acquisition when the plants started to run down. He said that from a year to 18 months before respondent's acquisition, Denie's service had reached a point where his company could not use it (Tr. 1896, 1903).

211. On cross examination, Mr. Jenne said that his company became dissatisfied with Denie's because its bad performance gradually developed, and got progressively worse on a number of jobs (Tr. 1909-10). After checking his records, he said that the major job which caused his company to be dissatisfied with Denie's service was in November 1959, and that from then until January 1964, after the acquisition by respondent, his company did no business of consequence with Denie's (Tr. 1921-6).

212. Respondent's contention that Denie's was a failing company when acquired is based upon the operations of the company which was organized late in 1961. Respondent asserts that this "was an entirely different Denie's from the original John A. Denie's Sons Co.," the "success" of which "had been due in large measure to the operational skill of a Mr. Forrest Ladd, combined with the financial or business skill of Mr. Morrie A. Moss" (RB pp. 53-4).

213. It is clear that Mr. Jenne's appraisal of Denie's run-down condition and poor service which caused his company to discontinue dealing with it, was based upon his experience in dealing with the original company while it was being operated by Mr. Moss, and was not based upon his experience during the period when the company acquired by respondent was being operated by the new management after 1961. There is no showing of a sound basis upon which Mr. Jenne had knowledge of

the condition of Denie's plants or of the quality of its service when respondent made its acquisition. Mr. Jenne's testimony, therefore, does not lend substantial support to respondent's contention with respect to the failing condition of Denie's when it was acquired.

214. Mr. Patrick J. Forkin was the only other witness who testified in support of respondent's contention that Denie's was in a failing condition when it was acquired by respondent. Mr. Forkin is a certified public accountant. He was formerly employed by Price Waterhouse & Company, a public accounting firm, as an accountant supervising field audits, and in that employment he worked on respondent's accounts. He was employed by respondent in 1963, and he is treasurer and secretary of Stewart, Denie's, and Richter (Tr. 2675-8, 2863-5).

215. Mr. Forkin testified that respondent acquired Denie's realizing that it was "on the rocks," insolvent and bankrupt, and that there were "no visible means of Denie's extricating" itself from this situation (Tr. 2686, 2688, 2719, 2760-1, 2820, 2839-40). His opinion was based upon a brief review of Denie's affairs and records, particularly its financial statements, which he made on August 29, 30 and 31, 1963. This review was in the nature of an acquisition audit, or "business man's review." He had no knowledge concerning the specific details of Denie's activities prior to that time (Tr. 2680-2, 2685-6, 2842; CX 20). Among the considerations upon which Mr. Forkin based his opinion were the balance sheet, and the fact that 16 months after Denie's stock was publicly sold at \$10 a share, respondent was able to purchase its stock at \$6 a share (Tr. 2687). Information which he subsequently acquired confirmed and strengthened his opinion, and convinced him that Denie's was in much worse condition than respondent had realized when it made the purchase (Tr. 2688).

216. Mr. Forkin was highly critical of Denie's management and operations before the acquisition because of its expansion into new areas and product lines, and its expansion of existing facilities. It established a ready-mix business at Picayune, Mississippi, approximately 700 miles from its home base, a geographic area which Mr. Forkin did not consider feasible for Denie's operations. He felt that Denie's had improperly expanded its contracting department to take on very large jobs, thus extending its commitments far beyond its financial resources and managerial talent and experience. He was also critical of the large-scale expansion of its sheet metal department, and of the establish-

ment of a precast concrete department. After respondent took over the operations of the company, these operations proved to be losers and it was necessary to phase them out. The process took several years and resulted in heavy losses (Tr. 2688-9, 2741-8).

217. Mr. Forkin emphasized particularly the state of disrepair of Denie's ready-mix fleet at the time of the acquisition, describing it as "virtually junk" because of inadequate expenditures for maintenance. He said that no additions were made to the ready-mix fleet in 1962 or 1963, and that when the company was acquired the average age of the fleet was 9.4 years. He considered that this was an excessive average age, and that it caused costly repair and service problems. It resulted in extreme difficulty in servicing the trucks and obtaining replacement parts, and in very serious "down time" when the trucks could not operate because they were undergoing repairs. He said that the company did not have the money required to buy new trucks in order to reduce the average age and improve the efficiency of the ready-mix fleet (Tr. 2693, 2723, 2729-32, 2735; RX 15).

218. Denie's annual report for the fiscal year ending November 30, 1962, showed a profit before taxes of \$308,756, and after taxes, of \$153,756 (CX 17); and its annual report for 1963 showed a loss before taxes of \$492,727, and after taxes, of \$337,727 (CX 18).

219. Mr. Forkin considered that the 1962 figure was a "paper profit" representing a "manipulated figure." He said that it included estimated profits on long-term contracts which ultimately resulted in losses; that Denie's improperly capitalized an interest expense of \$121,000 on a debt that was interest free until December 10, 1964; and that Denie's had made inadequate expenditures on fleet maintenance. It was his opinion that if its bookkeeping had been accurate, and its maintenance expenditures had been adequate, it would not have shown a profit in 1962 (Tr. 2689-94).

220. Mr. Forkin said that in 1963 Denie's showed an operating loss of \$493,000 before taxes, but that the net loss was reduced by a tax credit of \$155,000. He compared the 1962 profit before taxes of about \$300,000 with the 1963 loss before taxes of about \$500,000, stating that it represented an operating reversal between the two years of about \$800,000. (His references to a "paper profit" in 1962, however, leave it unclear whether he intended to indicate that this was an actual or only an apparent

reversal.) He also said that in 1963 Denie's paid a cash dividend of 25 cents per share, which he considered to be unwarranted (Tr. 2698-9, 2715-6).

221. When respondent acquired its initial interest in Denie's, it did not buy stock from stockholders, but bought 216,775 shares of authorized, but theretofore unissued stock from Denie's for \$1,300,650, which amount went directly into the treasury as new capital. In this manner, the amount of outstanding stock was approximately doubled, and the respondent acquired approximately a 50 percent interest in Denie's. Mr. Forkin said that the transaction was handled in this way because, at the time it was acquired by respondent, Denie's cash position was largely non-existent. He said that Denie's was in dire need of cash and that this infusion of cash directly into the company was necessary to keep it alive (Tr. 2717-20).

222. Mr. William R. Lemberg, a certified public accountant employed by the Federal Trade Commission, testified as a rebuttal witness. He had reviewed the records in evidence pertaining to the financial condition of Denie's, but he had no knowledge of the condition of the company beyond the information contained in those records. It was his opinion, on the basis of the financial statements of the company's condition as of July 31, 1963, that Denie's was not in a bankrupt condition or insolvent. In expressing his opinion he assumed that the figures in the financial statement were reliable. He recognized that the fact of solvency or insolvency would depend, not only upon the reliability of the figures, but also upon a variety of underlying factors, such as general business and economic conditions, management decisions and competency, the condition of the company's property and equipment, the collectability of its receivables, and day-to-day operating problems (Tr. 3538, 3541, 3547-65).

223. In evaluating the testimony of Mr. Forkin that Denie's was in a failing condition when it was acquired by respondent, it must be understood that he testified as a financial expert. The record does not show that he was qualified to make a reliable evaluation of general business conditions, management competency, and other underlying factors necessarily involved in the determination of the question here presented. It must also be understood that the acquisition was initiated by the respondent rather than by the management of the acquired company.

224. Denie's annual reports to its stockholders in 1962 and 1963 are in sharp contrast with Mr. Forkin's appraisal of the

condition of the company. The company which was newly organized at the end of 1961 took over the entire personnel of the original company, the only change in management being in the president of the company (Tr. 1938-9). After its first year of operation, the new company reported to its stockholders that in making the change in ownership Denie's had benefited from "the trained and experienced people" in its organization, and that it was looking ahead to "a program of expansion." It also reported that it was necessary "to see that the present plant is maintained in good working order." It reported additions to its properties, and the approval of new plants; and, on February 28, 1963, it declared a cash dividend of 25 cents per share (CX 17).

225. For the fiscal year ending November 30, 1963, almost three months after respondent's stock acquisition, Denie's reported to its stockholders that its loss of almost \$338,000 was due in part to severe price competition in the company's major product lines. It also reported efforts to modernize and improve the company's operations, which involved sizeable costs. During the year, Denie's put in full operation a new ready-mix plant, inaugurated a two-way radio central dispatching system for its trucks, and completed and improved other facilities (CX 18).

226. The record as a whole leaves considerable doubt that respondent acquired the stock believing that Denie's was in a failing condition. This doubt is increased by a preacquisition report to the respondent by Mr. Forkin concerning the condition of Denie's, and by a letter to the president of Denie's from Mr. Manley shortly after the acquisition.

227. In reporting the results of his field review of Denie's on August 29, 30 and 31, 1963, Mr. Forkin stated that his impression "as a non-engineer" was that all of the plants and ready-mix trucks of Denie's appeared to be "in substantially good condition," and that the central dispatching system was believed to "provide the ultimate in dispatching efficiency." He also reported with suggestions, but with generally favorable comments, upon Denie's brick manufacturing operations, its block manufacturing operations, its general line building materials and roofing operations, its sheet metal operations, its Denilite operations, its prestress concrete operations, and its precast operations. He concluded that his "review disclosed no unusual or significant developments which have a bearing on the financial condition of the Company" other than three items which he listed

and which were not specifically discussed in his testimony (CX 20K-Q).

228. Throughout the record it is abundantly clear that respondent initiated the acquisition of Denie's stock. Its purpose was solely to obtain a large captive outlet for cement in the Memphis market, and not to save a failing cement consumer. Mr. Manley was advised by a banker that Denie's was in a bad cash position and probably would not "make it" without outside help (Tr. 1140), but it is apparent that he considered that this afforded only a basis for approaching Denie's. Mr. Manley did not testify that Denie's was in a failing condition, and the banker was not called as a witness. On the contrary, respondent considered that Denie's represented "the sole remaining medium through which to secure a captive market of significant size in Memphis" (CX 21G). On September 19, 1963, following the acquisition, Mr. Manley wrote a letter to the president of Denie's advising that he was "enthusiastically optimistic over your earnings potential," and referring specifically to several of the company's departments (CX 96).

229. Respondent emphasizes the post-acquisition losses of Denie's, and respondent's infusions of cash into the company, as evidence of the incompetent management and failing condition of the company prior to its acquisition (RB pp. 63-5). In the circumstances here, however, that evidence is not persuasive. Respondent's interest in Denie's was because of its capacity as a cement consumer, and its operation of the company was directed with that in view. When respondent assumed control, it undoubtedly concentrated its efforts upon the ready-mix operations of Denie's, and had little interest in its operations which were unrelated to ready-mix concrete or cement.

230. Following the acquisition, respondent reversed the expansion program which Denie's had undertaken, and even discontinued certain operations in which the original Denie's had been engaged. It discontinued the sheet metal, brick, prestressed and precast operations of the company and terminated its ready-mix operations in Picayune, Mississippi. It also dropped from Denie's general line of building materials many product lines, retaining primarily products allied with ready-mixed concrete. These changes were made because the discontinued departments were operating at a substantial loss, and the dropped product lines were not profitable (Tr. 2761, 2684-7).

231. The record provides no satisfactory basis for determining

whether or not, without the intervention of respondent, the management of Denie's would have succeeded in its program of expansion, or whether or not it would have eventually developed profitable operations out of the projects which were dropped by respondent.

232. There is nothing to indicate that the management of Denie's considered that the company was in desperate financial circumstances, or that it sought the financial assistance of respondent. Nor is there anything in the record to indicate that such financial assistance as it may have needed could not have been obtained from banks or elsewhere. Officers responsible for the management of Denie's before the acquisition were not called to testify with respect to the condition or prospects of the company; and representatives of the bank which had a substantial outstanding loan to the company were not presented as witnesses. The record is also entirely lacking in any reliable evidence concerning the availability of other possible buyers of Denie's, or, indeed, any evidence indicating that there was any substantial reason for others to consider buying the company.

233. It is the opinion of the hearing examiner that the record does not establish that Denie's was in a failing condition when its stock was acquired by respondent.

CONCLUSIONS

1. Respondent, Mississippi River Fuel Corporation, now Mississippi River Corporation, and its subsidiaries, excluding a railroad company subsidiary, are engaged principally in exploring and drilling for, and in the production, transportation and sale of natural gas and oil, and in the production and sale of portland cement and ready-mixed concrete in interstate commerce.

2. In 1957, respondent acquired an interest in Missouri Portland Cement Company, which was later divested; in the latter part of 1962, it acquired an interest in a ready-mix company in New Orleans, Louisiana, which also was later divested; and, in December 1962, it acquired an interest in a small ready-mix company in Festus, Missouri, which has since become a wholly owned subsidiary. Otherwise it had not been engaged in the production and sale of portland cement or ready-mixed concrete before 1963.

3. In July 1963, respondent's Board of Directors authorized the construction of a portland cement plant and the acquisition of three ready-mixed concrete companies. During the period

from September 6, 1963, to January 31, 1964, respondent acquired stock or assets of Stewart in Kansas City, Missouri, Denie's in Memphis, Tennessee, and Richter in Cincinnati, Ohio, and since then has operated them as ready-mixed concrete producers. In July 1965, respondent's plant was completed and it began the commercial production and sale of portland cement. Respondent's cement plant has a production capacity of three million barrels annually, with provision for expansion to a capacity of six million barrels.

4. Respondent's entry into the portland cement industry was founded squarely upon its acquisition of ready-mix producers as captive outlets for a substantial part of its cement production. Its entry into the ready-mixed concrete industry, and its subsequent entry into the cement industry, did not constitute separate enterprises, but were simultaneously decided upon as mutually interdependent parts of a single, comprehensive project.

5. Respondent's acquisitions of the ready-mixed concrete producers challenged in this proceeding constituted an essential part of its decision to enter into the production of portland cement. Without those, or substantially equivalent assured outlets for cement, it would not have constructed a plant and entered the portland cement industry.

6. Portland cement and ready-mixed concrete each represents a relevant product market, or a relevant "line of commerce," in which to examine the competitive effects of the challenged acquisitions for the purposes of this proceeding.

7. Each of the areas defined in the complaint as the Kansas City area, the Memphis area, and the Cincinnati area, is an appropriate section of the country within which to examine the competitive effects of the challenged acquisitions in the ready-mixed concrete and portland cement lines of commerce; and, for the purposes of this proceeding, each area constitutes a relevant geographic market for consideration in connection with both the ready-mixed concrete and the portland cement product markets.

8. The record does not provide an adequate basis for finding that the effect of respondent's acquisition of Stewart, Denie's or Richter may be substantially to lessen competition in the ready-mixed concrete industry in the Kansas City, Memphis, or Cincinnati area.

9. The record does not provide an adequate basis for finding that the effect of respondent's acquisition of Stewart, Denie's

or Richter may be substantially to lessen competition in the portland cement industry in the Memphis, Kansas City or Cincinnati area. The record does not provide a basis for a meaningful or factually sufficient examination of the possible competitive effects of those acquisitions in the portland cement industry in any other areas or sections of the country.

10. The record does not establish that Denie's was in a failing condition when its stock was acquired by respondent.

11. The record does not establish that respondent's acquisition of Stewart, Denie's or Richter, considered separately or collectively, violated Section 7 of the Clayton Act, as amended. The complaint should, accordingly, be dismissed.

ORDER

It is ordered, That the complaint herein be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

MAY 20, 1969

BY DIXON, *Commissioner*:

The complaint herein charges respondent, a cement producer, with having violated Section 7 of the amended Clayton Act by acquiring three companies engaged in the production and sale of ready-mixed concrete. The hearing examiner held that the evidence failed to provide an adequate basis for finding that the effects of the challenged acquisitions may be substantially to lessen competition in the lines of commerce specified in the complaint and ordered that the complaint be dismissed. The matter is now before the Commission on cross-appeals from the initial decision.

The following background information pertinent to the alleged violations is not in serious dispute. Respondent, Mississippi River Corporation¹ was organized in 1928 for the purpose of constructing, owning and operating a natural gas transmission line from northern Louisiana to St. Louis, Missouri, and for the purpose of marketing gas in the St. Louis area. Prior to 1963, respondent and its subsidiaries were engaged principally in exploring and drilling for, and in the production, transportation and sale of natural gas and oil, and in the operation of the Missouri Pacific Railroad. Respondent's total assets and revenues

¹The name of the corporation was changed on May 28, 1965, from Mississippi River Fuel Corporation to Mississippi River Corporation.

in 1963 (not including the Missouri Pacific Railroad except to the extent of capital stock owned and dividends received) were \$151,902,924 and \$72,328,315 respectively.

In 1953, respondent, as part of a diversification program designed to utilize its pipeline facilities more efficiently and economically, purchased a 4,500 acre tract of undeveloped land (known as the Selma tract) adjacent to its gas transmission lines about 30 miles south of St. Louis. Approximately 1,000 acres of this land was used for the construction of a nitrate plant, which was later sold to a fertilizer company, and for a community of homes to accommodate the employees of that plant.

In planning for the utilization of the remainder of the tract, respondent, as early as 1955, gave serious consideration to developing the land for the production of portland cement. A survey in that year disclosed sufficient deposits of limestone and silica sand for this purpose. Moreover, the site was immediately adjacent to river, rail, and truck transportation, and the large amounts of natural gas needed for the manufacture of cement could be provided by respondent. At first, respondent conceived of a cooperative development of the area with an established cement producer, but later decided to enter the industry by building its own cement manufacturing facility and acquiring captive outlets for its product.

In July 1963, respondent's board of directors authorized the construction of a portland cement plant on the Selma tract and, at the same time, authorized the acquisition of three ready-mixed concrete companies. Two of these companies, Stewart Sand and Material Company and John A. Denie's Sons Co., were acquired in the latter part of 1963. Subsequently Richter Concrete Corporation was acquired. These are the three acquisitions which are challenged in this proceeding.

In July 1963, respondent entered into contracts for the designing and engineering of the cement plant, located at Festus, Missouri, which was to have an annual production capacity of 3,000,000 barrels, with provision for subsequent expansion to a capacity of 6,000,000 barrels. This plant was completed in July 1965, and the first shipment of cement was made on the 15th of that month. Its marketing area included the entire state of Missouri, the eastern part of Kansas, the southern part of Illinois and Indiana, the southwestern part of Ohio, parts of western and northern Kentucky, the western part of Tennessee,

the western part of Mississippi, the northern part of Louisiana, and the eastern part of Arkansas.

On October 18, 1963, respondent acquired all of the outstanding stock of Stewart Sand and Material Company² (hereinafter sometimes referred to as Stewart), a Missouri corporation engaged in the production and sale of ready-mixed concrete, with its principal office located in Kansas City, Missouri. In October 1964, respondent transferred to Stewart all of its portland cement assets and operations which had previously been operated as a division of respondent under the name River Cement Company. Thereafter, Stewart, as a wholly owned subsidiary, owned and operated respondent's cement-concrete business.

On September 6, 1963, respondent acquired 50% of the outstanding stock of John A. Denie's Sons Co. (hereinafter sometimes referred to as Denie's), a ready-mixed concrete producer located in Memphis, Tennessee. Thereafter, respondent continued to acquire stock in this company which it transferred to Stewart. By June 1967, Stewart owned about 87% of Denie's outstanding stock.

On January 31, 1964, respondent acquired all the assets of Richter Concrete Corporation (hereinafter sometimes referred to as Richter), a ready-mixed concrete producer located in Cincinnati, Ohio, and certain of the assets of Richter Transfer Company which included ready-mixed concrete trucks and other vehicles.

I

The hearing examiner found that portland cement and ready-mixed concrete are relevant lines of commerce, as alleged in the complaint, and that the Kansas City, Memphis and Cincinnati metropolitan areas are appropriate sections of the country within which to examine the effects of the challenged acquisitions. He also found that respondent's entry into the ready-mixed concrete industry and its entry into the cement industry did not constitute separate enterprises but were simultaneously decided upon as mutually interdependent parts of a single, comprehensive plan.

He further found with respect to the competitive effects of the three acquisitions in the portland cement line of commerce that each acquisition gave respondent the power to foreclose competing cement companies from a substantial part, probably

² The name of this company was changed to Stewart Concrete and Material Company in October 1964.

20% or more, of the portland cement markets in each of the relevant geographic areas; that respondent's acquisitions and its entry into these market areas have caused competing cement producers to undertake counteractive strategies, such as acquisitions, loans, or other trade relationships, designed to tie cement consumers to them and to assure themselves of substantial outlets for their cement; and that its acquisition of Denie's and Stewart had in fact deterred another cement supplier from entering two of the relevant geographic markets. He also made the finding, however, that the acquisitions had certain beneficial effects on competition, holding specifically that respondent's entry into the portland cement industry would not have occurred without the ready-mix acquisitions, and that its entry added a strong and vigorous new competitor to the three relevant geographic areas and contributed substantially to deconcentration of the portland cement market in each area. He further held that the evidence does not provide any indication that any portland cement suppliers are likely to be eliminated as competitors in any of the markets or that there has been, or is likely to be, any diminution in the amount or vigor of competition in any of the markets as a result of respondent's entry.

The examiner also rejected complaint counsel's argument concerning the effect of the acquisitions upon competition in the sale of ready-mixed concrete. Complaint counsel had contended in this connection that respondent, by virtue of its ownership of ready-mixed concrete facilities, has acquired the capacity to transfer substantial cost advantages to its subsidiaries and is thus able to seriously impair the ability of nonintegrated ready-mix companies to compete. According to counsel supporting the complaint, the competitive advantages inherent in this situation have raised the barriers to entry and have significantly diminished the prospects for new entry by nonintegrated ready-mix companies in the Kansas City, Memphis and Cincinnati markets. In ruling on this argument the examiner held that there is no evidence that respondent has transferred any cost advantages to its ready-mix subsidiaries and very little indication of concern among ready-mix companies that it is likely to do so. To the contrary, he found "impressive" expert testimony that in the situation presented in this proceeding it would not be practical for respondent effectively to use this device. Having found insufficient evidence of probable injury in either of the relevant

lines of commerce, the examiner ordered that the complaint be dismissed.

II

In their appeal from the initial decision complaint counsel are in substantial agreement with virtually all of the hearing examiner's findings of fact. They take exception, however, to his conclusion that the record does not provide an adequate basis for finding that the challenged acquisitions had the prescribed effect on competition, contending in this connection that the examiner applied improper Section 7 standards in making his analysis of the impact of the acquisitions. For the following reasons we agree with counsel supporting the complaint that the hearing examiner erred in holding that the allegations of the complaint with respect to the effects of the acquisitions have not been sustained by the evidence.

In holding that the record does not support a finding of probable competitive injury in the portland cement line of commerce, the hearing examiner was obviously influenced by the fact that the acquisitions were made to enable respondent to enter the cement industry. While he did not, and indeed could not on the basis of this record, find that respondent was unable to make a successful penetration of the relevant geographic markets without acquiring captive customers, he made the finding that respondent *would not* have entered without the assured outlets. This finding is, however, completely irrelevant to the issue of whether respondent's acquisitions had the prescribed effect on competition since respondent did in fact enter by making the acquisitions in question and these acquisitions will in fact have certain effects on competition. In the circumstances shown to exist, the probable consequences of the mergers would have been no different had respondent actually been engaged in the manufacture of cement when it acquired the ready-mix firms.³ Moreover, in finding that the acquisitions had beneficial effects on competition the examiner limited his analysis to the time period surrounding the acquisitions and respondent's entry into

³ As found by the hearing examiner, respondent made its acquisitions as part of a single, comprehensive plan to enter the cement industry. Insofar as the relevant geographic markets are concerned, therefore, respondent's entry by acquisition is precisely the same as a forward vertical acquisition by an established cement manufacturer who had not previously sold in a particular market and who acquired a ready-mix firm to facilitate entry. To hold that such an acquisition is permissible because the manufacturer otherwise would not have entered the new market is tantamount to granting a license to all cement producers to acquire at least one outlet in any market or submarket in which they are not already doing business regardless of how great the resulting foreclosure may be.

the cement industry and failed to give due consideration to the probable future effects of the acquisitions on competition. The basic error in the examiner's decision, we believe, stems from his preoccupation with the short-run effects of the mergers and his failure to consider what the long-range results may be.

As stated above, the examiner held that the Kansas City, Memphis and Cincinnati metropolitan areas are the relevant geographic markets within which to examine the competitive effects of the acquisitions.⁴ And, as he also found, at the time of the acquisitions, both the portland cement and ready-mixed concrete markets in each of the relevant areas were highly concentrated.

In 1963, the Kansas City area was served by nine cement suppliers with two firms accounting for 53% of all shipments of cement into that market and with the top four firms accounting for 81%. About 75% of these shipments were made to fifteen ready-mixed concrete companies serving the area. Stewart, by far the largest, consumed 31.3% of all the cement consumed by these companies and 23.5% of all cement consumed in the entire market. Stewart also accounted for 30.4% of concrete sales in the Kansas City area which was more than double the sales of its largest competitor. The top four firms, including Stewart, accounted for 64.7% of ready-mixed concrete sales.

The Memphis area, during that same year, was served by seven cement producers, with two firms accounting for 79% of all shipments into the market and four firms accounting for 96%. Over 60% of these shipments were made to twelve ready-mixed concrete companies. Denie's consumed over 29% of all cement consumed by these companies and accounted for about 20% of the total portland cement consumption. Denie's also accounted for over 27% of ready-mixed concrete sales in the Mem-

⁴ Although respondent has taken exception to this holding by the hearing examiner, it does not appear to question the findings upon which the holding is based other than to contend that the examiner failed to delineate precisely the outer limits of the markets. It argues, in this connection, that all ready-mix producers located within each of the geographic areas defined by the examiner do not sell exclusively within that area and that some sales are made within each area by ready-mix producers located beyond its perimeter. There is nothing in respondent's brief to indicate error in the examiner's conclusion as to the competitive significance of these sales, however, and no attempt has been made by respondent to establish that the acquisitions will not have a direct and immediate effect on competition in the geographic markets found by the examiner. The term "section of the country" does not require a "delineation . . . by metes and bounds as a surveyor would lay off a plot of ground." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966). "The crucial question . . . is whether a merger may substantially lessen competition anywhere in the United States." *Ibid.* at 550. All of respondent's arguments on this issue were made to the hearing examiner and have been effectively answered in the initial decision.

phis area and, together with three other firms, accounted for over 78% of such sales.

In 1963, the Cincinnati area was served by nine cement producers with the top three firms accounting for 52% of the total shipments and the top four firms accounting for 66%. Twenty-three ready-mixed concrete companies purchased 66% of the portland cement sold in this market. Richter accounted for 37% of the purchases by ready-mix companies and for over 24% of the total shipments into the Cincinnati area. Richter also accounted for 33.5% of ready-mixed concrete sales and, together with the second largest ready-mix firm, accounted for about 54% of such sales.

Prior to the acquisitions, the three ready-mix producers acquired by respondent bought portland cement from many different suppliers. In 1963, for example, Stewart spread its purchases fairly evenly among seven suppliers, while Richter bought from eight, with only one supplying as much as 20% of Richter's total requirements. Denie's purchases were divided between Marquette Cement Manufacturing Company and Missouri Portland Cement Company. After these acquisitions, respondent became the principal supplier to each of the three ready-mix companies. In 1966, it supplied 67.4%, 89.1%, and 65% of the requirements of Stewart, Denie's, and Richter, respectively.

As stated by the Supreme Court in *Brown Shoe v. United States*, "The primary vice of a vertical merger * * * is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangements may act as a 'clog on competition,' * * * which 'deprive[s] * * * rivals of a fair opportunity to compete'"⁵ and that "an important consideration in determining whether the effect of a vertical arrangement 'may be substantially to lessen competition, or to tend to create a monopoly' is the size of the share of the market foreclosed."⁶

Each of the acquisitions challenged herein gave respondent the power to foreclose competing cement companies from a substantial part, probably 20% or more, of the cement market in each of the relevant geographic areas. And, as the hearing examiner found, no larger foreclosure by a single acquisition could have been accomplished in any of these markets.

The market shares thus foreclosed were so substantial that

⁵ 370 U.S. 294, 323-24 (1962).

⁶ *Ibid.* at 328.

the immediate consequences of each acquisition could have been readily predicted. Competing cement suppliers in each market promptly reacted to the acquisitions by attempting to tie cement consumers in order that they might be assured of outlets for their product. In the Kansas City area, Ash Grove Lime & Portland Cement Company acquired the third and sixth largest ready-mix firms, and Missouri Portland Cement Company, through a subsidiary, acquired the second largest. The purchases of these three companies in 1963, 480,000 barrels, represented 21.4% of all portland cement shipped into the Kansas City area. These acquisitions, together with respondent's acquisition of Stewart, resulted in the foreclosure of cement suppliers from over 40% of the market. In Memphis, Marquette Cement Manufacturing Company responded to acquisitions by respondent and Texas Industries, Inc.,⁷ by guaranteeing a loan for the owner of the tenth largest ready-mixed concrete company and by leasing the facilities of the seventh largest ready-mix firm, resulting in a foreclosure of about 40% of the market.⁸ In Cincinnati, Marquette entered into a lease arrangement and guaranteed an obligation of Hilltop Concrete Corporation, the second largest ready-mix company "to protect what [it] thought was reasonable volume in the Cincinnati market."⁹ This firm and Richter together consumed over 37% of the cement shipped into the Cincinnati market.

Thus, contrary to the examiner's holding that the relevant cement markets had become less concentrated after respondent's entry, the record shows that as a direct consequence of the challenged acquisitions, a substantial segment of each market was foreclosed to competing suppliers and that these suppliers had begun taking steps to obtain their own captive outlets. Furthermore, it may reasonably be expected that as the foreclosed segment of the market becomes larger, other disadvantaged suppliers will also attempt to "protect" their market by acquiring or otherwise tying their customers. As vertical integration is extended there may, of course, be more aggressive competition for the remaining "open" portion of the market. But this would merely be the short-run response to the foreclosure. The long-range effect

⁷ Fischer Lime & Cement Co., the second largest ready-mix firm in the Memphis area, was acquired by Texas Industries in June 1963. Divestiture of this firm has been required by a consent order entered into with the Federal Trade Commission on December 3, 1965.

⁸ It was stipulated by counsel that during relationships of the above-mentioned type between a cement consumer and a cement manufacturer the "consumer was . . . likely to be influenced to buy a significant part of its cement requirements from such manufacturer."

⁹ Tr. 1327-1330.

may well be that those suppliers who are unable to procure guaranteed outlets will eventually withdraw completely from these areas rather than engage in aggressive rivalry for the remaining unintegrated segments of the relevant markets.

Moreover, the foreclosure resulting directly and indirectly from each of the acquisitions has also raised the barriers to entry into the affected markets. The greater risks involved in effecting entry into a market which is tied to a significant degree by integration, coupled with the high capital requirements for entry, would tend to discourage potential entrants. See *In the Matter of United States Steel Corporation*, Docket 8655 (1968) [74 F.T.C. 1270], and *In the Matter of Marquette Cement Manufacturing Company*, Docket 8685 (1969) [p. 32 herein]. While entry barriers were high prior to respondent's mergers, they were not insurmountable, as respondent would have us believe. Entry by internal expansion was, of course, possible as successful market penetration by other cement producers has demonstrated. But the vastly increased difficulty of entering those areas in which respondent had made its acquisitions is disclosed most graphically in the testimony of Mr. Raymond Chase, Vice President of Marketing of Dundee Cement Company. The record shows, in this connection, that in April 1967 Dundee completed a large manufacturing plant at Clarksville, Missouri, from which it intended to ship cement along the Mississippi River as far south as the Gulf Coast. A survey made prior to construction of the plant revealed that Memphis and Kansas City were desirable markets, and Dundee planned to construct distribution terminals in each of these areas. As a result of the subsequent acquisitions by respondent and Texas Industries, Inc., Dundee decided not to enter the Memphis market. Mr. Chase testified that he changed his mind about Dundee's prospects about selling cement in Memphis because " * * * the market changed in its character from one of what we would consider an open market, open to our efforts to sell, to one in which a substantial amount of cement consumption would be foreclosed to our efforts through the acquisition route." (Tr. 1374) He also abandoned plans to build a terminal in Kansas City, testifying in this connection that " * * * much the same situation developed in Kansas City as did in Memphis where acquisition became apparent in the form of the Mississippi River Fuel Corporation acquiring the interest of the Stewart Sand & Gravel who, according to our information, was the largest buyer

of cement and largest producer of ready-mix concrete in Kansas City. And there, again, it was a question of measuring the possibility of selling cement to the balance or the remainder of that market, because we assumed we would not be able to sell too much to Stewart." (Tr. 1378-1379.)

The effects of vertical integration on new entry have been described as follows:

* * * Since the cement industry is already one in which the number of potential entrants is limited because of scale requirements and capital costs, any structural change which makes entry more difficult is likely to enhance the market power of established firms. Adverse effects are especially likely to occur if there are no significant offsetting efficiency advantages in integration accomplished through acquisition. Additionally, vertical forward acquisitions adversely affect potential competition insofar as they eliminate directly significant potential entrants. Since 1950, three ready-mixed concrete companies entered cement manufacturing by internal growth. If vertical forward acquisitions proceed freely, it is likely the leading potential entrants into some markets would be eliminated. Adverse effects on potential competition are of particular concern in an industry like cement where the number of firms is diminishing, since, in such circumstances, reliance on potential competitors as a force encouraging good industry performance increases.¹⁰

In summary, the record reveals that in each of the relevant geographic markets the mergers in question involved the largest possible foreclosure by acquisition; that the purpose of these mergers was essentially anticompetitive, since they were designed to fence off competition and provide assured outlets for respondent's cement; that these acquisitions triggered similar acquisitions or other vertical arrangements intended to tie cement consumers to cement suppliers; and that further vertical foreclosure by competitors is likely. The record also establishes that barriers to entry into the relevant markets have been substantially increased, thereby enhancing the market power of firms selling in those areas. It is our opinion, therefore, that the effect of respondent's acquisitions of Stewart, Denie's and Richter may be substantially to lessen competition or to tend to create a monopoly in the manufacture and sale of portland cement in the Kansas City, Memphis and Cincinnati markets.

III

In dismissing the charge that the challenged acquisitions may have the effect of substantially lessening competition in the relevant ready-mixed concrete markets, the hearing examiner

¹⁰ Staff Report to the Federal Trade Commission, *Mergers and Vertical Integration in the Cement Industry*, 108 (1966) (hereinafter referred to as "Cement Report").

relied primarily on the testimony of an economist called by respondent. The complaint had alleged, in this connection, and complaint counsel argued that such injury may result from the decisive competitive advantage achieved by respondent as an integrated manufacturer and seller of portland cement and ready-mixed concrete over nonintegrated ready-mix companies. More specifically, complaint counsel have contended that portland cement is the largest single item of cost in ready-mixed concrete, that respondent as a result of its acquisitions has the ability to reduce the price of portland cement which it transfers to its ready-mix subsidiaries, that respondent can, therefore, sell below the cost of independent ready-mix firms and continue to make a profit on its overall operations, and that it thus has acquired the capacity and potential to adversely affect competition in the sale of ready-mixed concrete.

The economist called by respondent, Dr. Martin H. Seiden, testified that an integrated cement-concrete producer would not as a practical matter have any competitive advantage over an independent ready-mixed concrete producer. He stated, in this connection, that although the profit margins of independent ready-mix companies are too low to permit them to engage in price competition with an integrated producer, the cement companies supplying the independents would promptly come to their assistance and match the price at which the integrated firm sells cement to the subsidiary whenever this lower price is reflected in the latter's concrete prices. Thus, according to Dr. Seiden, it would not be possible for the integrated firm to impair the ability of the independent to compete, even though it reduced the price of cement to its subsidiary and the subsidiary, in turn, reduced the price of concrete to reflect this cost advantage. It was Dr. Seiden's position, therefore, that the integrated company would be unable to dominate the market or to exercise control over the practices or behavior of its independent competitors.

We agree with counsel supporting the complaint that the examiner gave far too much weight to the economist's testimony. The examiner himself commented on Dr. Seiden's lack of "intimate knowledge of the cement and ready-mixed concrete industry prior to his employment as an expert in this proceeding." (Tr. 3305.) Dr. Seiden was not a recognized expert in this field, and there is virtually nothing in his background to suggest that he could speak authoritatively as to the reactions of independent ready-mix or cement firms to price reductions by an integrated

cement-concrete producer.¹¹ Moreover, his testimony is based upon a factual premise which has absolutely no support in the record. He merely assumed, despite evidence to the contrary, that independent ready-mix and cement firms would be constantly aware of the prices at which both cement and concrete were sold by integrated competitors.¹² The hearing examiner attempted to fill this evidentiary gap by quoting the following statement from the Cement Report to support his conclusion that the prices at which integrated companies sell cement to their subsidiaries are known to competitors:

In all regions for which data are available the patterns of concentration are sufficiently high so that each seller [of cement] will tend to be acutely aware of the competitive strategies employed by competing sellers.¹³

This statement, however, does not mean that a price reduction granted by an integrated cement supplier to its ready-mix subsidiary "would be immediately known and met by other suppliers," as the examiner indicated. When read in context, it means that since the cement market is oligopolistically structured sellers are directly affected by, and hence tend to be very conscious of, the activities of their rivals. Elsewhere in the Report, conclusions directly opposite those of the hearing examiner and Dr. Seiden are reached both with respect to the independent's knowledge of price cuts by integrated firms and with

¹¹ With respect to the testimony that independent cement companies would reduce prices to their customers to match the prices at which an independent cement firm sold to its subsidiary, the hearing examiner found that "This concept is consistent with the testimony of a competitive ready-mixed producer, at least to the extent that a cost advantage to a subsidiary of respondent could be substantiated." (Initial Decision, Par. 166) The testimony relied upon by the examiner fails to support this finding, however. When asked by respondent's counsel whether cement companies would meet a 50% discount on cement granted by respondent to Stewart, the vice president of a ready-mix competitor of Stewart testified ". . . Yes, sir, they would meet it if I had written quotation or evidence in the form of an invoice to me that the price was available to me, *whether it is available to Stewart is of no consequence.*" (Emphasis added.) (Tr. 1736.)

¹² There is testimony that ready-mix companies could not even ascertain the price at which their competitors were selling concrete. For example, the president of a Memphis ready-mixed concrete company testified "The majority of the time—and I'd say this is almost a hundred percent—he [the contractor] will not name any price; he'll just say 'You are high.' He leaves it up to you, I guess. 'If you want the job, you will have to get your price down.'" (Tr. 1797.) Not knowing the price at which a ready-mix firm sells concrete, it is difficult to understand how a competitor will know the price at which that firm purchased its cement. There is also testimony that cement producers could not ascertain the price at which respondent sold cement to *non-captive* customers. The president of Louisville Cement Company testified "We go on prices on the basis of cement invoices of customers, because this is the price we must meet to be competitive. And there are certain companies who actually didn't put out invoices at the time, particularly this year, and I am looking right at the representatives of them, and this makes it very difficult protecting ourselves against these fellows. . . ." (Tr. 2059-60.)

¹³ Cement Report 31.

respect to the advantage of the integrated firm over its non-integrated competitor. The Report states, on pages 108-109:

Beyond the fact of foreclosure which protects outlets from the inroads of aggressive actual or potential rivals, captive markets may provide opportunities for indirect price discrimination in the marketing of cement. To practice price discrimination successfully in selling cement requires market segmentation and imperfect knowledge. It may be easier to conceal price reductions on cement when incorporated into concrete than when sold unprocessed. Moreover, concessions on ready-mixed concrete contracts can be selective and need not apply to all contracts on which bids are made. * * *

* * * * *
It is probable, therefore, that cement manufacturers who are vertically integrated will have greater freedom to engage in discrimination on a selective basis than those which are not. Since concealment also is easier, the prospects of matching offsetting responses, making such discrimination unprofitable, are diminished. As it is more difficult to ascertain whether or not discrimination has actually occurred, nonintegrated firms are likely to be cautious in modifying price policies for bids on any succeeding contracts whatever the protestations of their customers. If, therefore, the integrated manufacturer is selective in its ready-mixed price cutting, the responses of unintegrated rivals are less certain. This is particularly true if the loss of business by unintegrated firms is widely diffused among them. If, for example, cement sales by the integrated firm could be increased by 100,000 barrels, but the losses in sales by rivals were diffused among several firms, nonintegrated firms might prefer to accept such losses even if their cause were clearly evident, rather than risk reduced prices on all cement sold in the affected market area.

The examiner has also concluded that there is "very little impressive indication of concern among the ready-mix companies" that respondent may transfer cost advantages to its subsidiaries. We do not agree. Not only does the record establish that the independent ready-mix companies were "concerned" but, as the president of one cement company testified, "they were in a complete state of jitters." (Tr. 2078.) According to this witness "the independent ready-mix people were coming to us * * * and saying, 'What are you going to do? Should we sell out to some cement company? You are an independent, we are an independent, what is going to happen to us? We think the best solution is that we had better get out while the getting is good.'" (Tr. 2077.) A ready-mix producer testified that he was so concerned that there might be a price war after respondent's acquisition of Stewart that he sold his business to a cement company. Another testified that he was concerned about the "possibility these people could come in and sell cement rather than ready-mixed concrete, and I don't think there is any producer in my position

who would not have this feeling or state of mind." (Tr. 1805.) Another testified that "* * * in other areas I had heard that ready-mix companies had become integrated with cement companies, there had been price wars in concrete, and some of the smaller companies couldn't compete, and they were out of business. And I was concerned with whether this would happen to us." (Tr. 2255.) Obviously, the mere presence of respondent as a rival in the sale of ready-mixed concrete would tend to discourage smaller independents from engaging in aggressive price competition.

We find, therefore, that in each of the relevant ready-mix markets respondent enjoys a decisive competitive advantage over its independent rivals, and that the latter are fully aware that respondent possesses this advantage and may utilize it to their detriment. Whether or not respondent has actually exercised this advantage or leverage by cutting prices is not the crucial question in this proceeding, as the hearing examiner apparently believed.¹⁴ Nor can the probable consequences of respondent's acquisitions on competition necessarily be determined or measured by, or equated with, injury to, or absence of injury to, individual competitors. "The test of a competitive market is not only whether small competitors flourish but also whether consumers are well served * * * small companies may be perfectly content to follow the high prices set by the dominant firms, yet the market may be profoundly anticompetitive."¹⁵ We pointed out in a somewhat similar factual setting in the matter of *Marquette Cement Manufacturing Company*¹⁶ that it is unlikely that integrated companies will attempt to drive independent ready-mix firms out of the market. "This kind of overt exercise of market power is unnecessary. * * * All that is required is that unintegrated firms and prospective entrants be made aware of the ability of the integrated oligopoly group * * * to utilize its leverage. The net effect would be to keep any of the independents from competing too aggressively, to maintain prices above competitive levels, to keep out new entrants—in short, to permit the ready-mixed market to function as a highly concentrated oligopoly."

¹⁴ "The Commission is not required to establish that the . . . acquisition . . . did in fact have anti-competitive consequences. It is sufficient if the Commission shows the acquisition had the capacity or potentiality to lessen competition." *Reynolds Metal Co. v. F.T.C.*, 309 F. 2d 223, 230 (D.C. Cir. 1962).

¹⁵ *United States v. Philadelphia National Bank*, 374 U.S. 321, 367, n. 43 (1963).

¹⁶ Docket No. 8685 (1969) [p. 32 herein].

It is in the interest of respondent in this matter to avoid price competition in the sale of ready-mixed concrete, and the record establishes that because of the high degree of concentration in the relevant markets respondent has the capability to adversely affect such competition within those markets. There is also evidence in the record of the actual utilization of this power. For example, in the Cincinnati area there was sharp price competition between respondent's subsidiary, Richter, and its largest ready-mix competitor, Hilltop Concrete Corporation, before respondent began shipping cement into the area. After respondent began shipping cement, Richter's prices for ready-mixed concrete were reduced sharply. They were described as "abnormally" low, "outstandingly" low, and in some instances below Hilltop's cost. It is significant in this connection that Richter's prices were \$1.40 to \$1.50 below the price at which Hilltop had been selling at a time when customers were so price conscious that many would have switched suppliers when the price difference was "a matter of pennies." (Tr. 2249.)¹⁷ Thereafter, in early 1967, there was an increase in ready-mix prices even though there was a reduction in home building beginning in August 1966. This price increase, however, was not an indication that no injury had occurred, as the initial decision implies (Paragraph 168). Under the circumstances, it would appear to be a manifestation of a lessening or diminution of price competition.

For the foregoing reasons, we find that the examiner erred in holding that the evidence failed to sustain the allegations of the complaint concerning the impact of the challenged acquisitions in the relevant ready-mixed concrete markets. We agree with counsel supporting the complaint that respondent's acquisition of Denie's, Stewart and Richter may tend to substantially lessen competition or tend to create a monopoly in the production and sale of ready-mixed concrete in the Memphis, Kansas City, and Cincinnati areas.

IV

Turning next to respondent's appeal from the initial decision, we note that certain of its arguments do not take issue with any of the examiner's rulings but are directed instead at the complaint. We will consider them at the outset. The first is that the Commission's complaint frustrates the purpose of the Clayton

¹⁷ The president of Hilltop testified ". . . We had the feeling that our major competitor, with its new cement mill on stream, was interested in selling more volume of concrete in order to move cement that was coming off the line." (Tr. 2166.)

Act by protecting an entrenched oligopoly, *i.e.*, cement producers, from a new competitive enterprise. In support of this argument, respondent asserts that its entry into the cement industry has benefitted competition, that it has promoted the industrial development of the St. Louis area, and has injected a new competitive entity into the concentrated cement market of the nation. Respondent further contends that it could enter the industry only by acquiring ready-mix facilities, and that its entry is no different from that of other integrated firms whose entry has not been challenged by the Commission.

The evidence fails to establish that respondent's entry into the relevant geographic areas through the acquisitions in question substantially benefitted competition in the sale and distribution of portland cement.¹⁸ It is true that respondent's entry into each of these areas increased the number of cement suppliers by one. It is also apparent that the immediate effect of its entry by acquisition which foreclosed a substantial segment of the market was to increase competition for the remaining "open" portion of the market. But beyond this there is no specific evidence to indicate that even the initial impact of respondent's entry could be regarded as "pro-competitive." To the contrary, the record shows that respondent made its acquisitions for the purpose of fencing off competition and that in selling its product to consumers, other than its captive outlets, it was unwilling to initiate price reductions but was content to follow the pricing of its competitors. In any event, the test to be applied in determining the legality of an acquisition is whether the effect thereof may be substantially to lessen competition, and the resolution of this question "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future."¹⁹ And, as found above, the ultimate effect of respondent's acquisitions in the portland cement line of commerce may be a diminution or lessening of competition brought about by the eventual reduction in the number of effective competitors in the relevant markets.

With respect to respondent's contention that its entry into the cement industry by acquisition has had beneficial effects in the St. Louis market and in the nation as a whole, the Supreme Court,

¹⁸ Nor is there any evidence that respondent's integration of cement and ready-mix facilities in the relevant geographic markets would result in any significant cost savings, or a higher quality end product, or lower prices to consumers, or that it would produce any other economic or social advantages.

¹⁹ *Philadelphia National Bank*, *supra*, at 362.

in rejecting a somewhat similar argument in *Philadelphia National Bank, supra*, held that the anticompetitive effects of an acquisition in one market could not be justified by pro-competitive consequences in another. And the court also held in the same case that an acquisition having the prescribed effect on competition may not be permitted because of the social or economic benefits which may result therefrom, stating in this connection:

* * * We are clear, however, that a merger the effect of which "may be substantially to lessen competition", is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.²⁰

Respondent has also failed to prove that it could not have entered the cement industry except by acquiring captive outlets for its product. The record shows, and respondent in fact concedes, that both Arkansas Cement Company and Dundee Cement Company have made successful entries without acquiring ready-mix facilities. Respondent's argument that it did not have sufficient financial strength or backing to attempt a similar entry appears to be based primarily on the fact that it has not been included in the list of "Fortune's 500." This argument is not persuasive. Respondent, with assets in 1963 of over \$151,000,000 and revenues of over \$72,000,000, was by almost any standard a large, financially powerful corporation. We cannot make the finding that it was unable to enter the industry without captive outlets.

In the same vein, respondent also contends that it was forced to acquire cement-consuming facilities because such a large share of the market was foreclosed to it by reason of *de facto* integration, *i.e.*, tie-ins between cement suppliers and cement consumers based on credit arrangements or other arrangements short of acquisition. Its attempt to establish the pervasiveness of this practice in the relevant geographic markets prior to its own acquisitions in these areas, however, was for the most part unsuccessful. In Memphis, ready-mix companies indebted to cement manufacturers accounted for only 6% of all portland cement shipped into the area in 1963. In Kansas City, debtor ready-mix companies purchased 23% of the cement shipped into the area in

²⁰ 374 U.S. at 371.

that year and, in Cincinnati, they accounted for 20%. But even if respondent could have established that non-ownership methods of tying customers had in fact constituted a substantial barrier to entry, this would not be justification for its own acquisitions. To paraphrase the court in *Philadelphia National Bank, supra*, if respondent's argument were valid, then once a market had become unduly concentrated, further concentration through vertical integration by acquisition would be legally privileged. "On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." Note 42 at 365.

With respect to respondent's contention that it has been treated differently from other entrants, the answer is that of the various cement firms mentioned in respondent's brief, respondent is the only one that acquired captive customers as part of its entry. And it is only the method by which respondent has entered the relevant markets, and not the fact of its entry, which is challenged in this proceeding.

Respondent next contends that the examiner erred in failing to find that Denie's was in a failing condition at the time it was acquired and that the acquisition, therefore, is not prohibited by Section 7. This argument is also without merit. The record discloses that respondent was interested in acquiring as large an outlet in Memphis as possible and that Denie's was the logical choice. It regarded Denie's as "the sole remaining medium through which to secure a captive market of significant size in Memphis." (CX 21 G.) While there is evidence that Denie's had experienced some business reversals the year before it was purchased, there is little in the record to suggest that the acquisition was made because of these reversals. As a matter of fact, an executive of respondent commented at the time in a letter to Denie's that he was "enthusiastically optimistic over your earnings potential." It appears that respondent's awareness of Denie's "failing condition" developed only after the acquisition had been consummated.

We also agree with the examiner's holding that respondent failed to prove that Denie's was in a failing condition at the time it was acquired. To establish this defense, respondent relied almost entirely upon the testimony of three witnesses: Mr. Morrie A. Moss, former majority stockholder in Denie's; Mr. W. J. Jenne, an independent contractor; and Mr. Patrick J. Forkin, treasurer and secretary of Stewart, Denie's and Richter. All three

of these witnesses were highly critical of Denie's management operations before the acquisition, and two of them, Mr. Moss and Mr. Forkin, expressed the opinion that the company was failing when it was acquired by respondent.

After carefully considering the testimony of these witnesses, the examiner concluded that their opinions as to the financial condition of the acquired company were virtually worthless. Mr. Moss had been president of the original Denie's. His firm had been acquired in 1961 by a newly-organized company which had adopted the name of John A. Denie's Sons Co., and which was the corporation acquired by respondent in September 1963. Mr. Moss continued as president until February 1962, and thereafter was retained as a consultant for a period of five years. After February 1962, he owned no stock in Denie's and did not participate in any of its operations. He did not participate in management decisions and did not have personal knowledge of the considerations upon which these decisions were based. Many of his views concerning the operation of the company were based upon hearsay information. He was uncertain about the significance and meaning of figures in the company's reports and financial statements concerning maintenance expenditures, and he was in error in his impression that in 1963 Denie's had dropped to third or fourth position in the Memphis ready-mix market. For these reasons, the examiner concluded that Mr. Moss did not have sufficient knowledge of the specifics and details of Denie's operations and financial condition to support his opinion as to the company's financial condition.

The testimony of Mr. Jenne, president of S & W Construction Company, was given no weight, since his appraisal of Denie's condition was based on his experience in dealing with the company while it was being operated by Mr. Moss and not during the period when respondent claimed that it was failing. Mr. Forkin's testimony was deemed to have little probative value, primarily because it was inconsistent with observations concerning the financial condition of Denie's that he had made when reporting the results of a field review of that company in August 1963. He had concluded that his review "disclosed no unusual or significant developments which have a bearing on the financial condition of the Company" other than three items not specifically discussed in his testimony.

Nothing in the record or in respondent's brief indicates that

the examiner's appraisal of these witnesses or his evaluation of their testimony was in error.

We also find that respondent has failed to meet another requirement of the failing company defense as set forth in *International Shoe Co. v. Federal Trade Commission*.²¹ This requirement is the showing that at the time of the acquisition respondent was the only available prospective purchaser.²² Although respondent argues in its brief that "No one else wanted to acquire Denie's for any reason" it has failed to adduce any credible evidence in support of this assertion.

In summary, therefore, we hold that respondent has not proved that the acquired company was failing, nor has it established any of the other elements of the "failing company" defense.

Respondent also makes the argument that the Federal Trade Commission has no jurisdiction over the acquisition of Richter, because that firm was not engaged in commerce within the meaning of Section 7 of the Clayton Act. Although respondent's brief is not entirely clear on this point, it appears that the basis for the argument is the alleged failure of complaint counsel to prove that Richter sold ready-mixed concrete in interstate commerce. Since there is no dispute concerning interstate transactions by respondent, and since counsel have stipulated that Richter regularly purchased portland cement in interstate commerce, the jurisdictional requirements of Section 7 have been satisfied, *i.e.*, that both the acquiring and acquired firms be engaged in interstate commerce. Consequently, it would seem that respondent's argument boils down to the contention that "line of commerce" under Section 7 means line of interstate commerce and that the statute, therefore, does not prohibit acquisitions which may adversely affect only local or intrastate competition.

This argument is rejected. The words "line of commerce" as used in Section 7 of the Clayton Act refer to a relevant product market, *Brown Shoe Co., supra*, and are not used as jurisdictional words of art for the purpose of restricting the scope of the section, as respondent contends. "Like other sections of our anti-trust laws, section 7 does not contain the word 'market.' It is clear, however, that 'line of commerce' signifies a product market and 'section of the country' refers to a geographic market." *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 588 (D.C.N.Y. 1958). As we held in *Foremost Dairies, Inc.*, FTC Docket 6495 (1962) [60 F.T.C. 944, 1078], "Section 7 does require that

²¹ 280 U.S. 291 (1930).

²² *Citizen Publishing Company, et al. v. United States* 394 U.S. 131 (March 10, 1969).

both the acquired and acquiring corporations be engaged in commerce * * *. Having met this requirement, adverse competitive effects resulting from the activities of such interstate companies, whether such effects be local or interstate, are within the scope of Section 7." See also *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), wherein the court construed similar language in Section 2(a) of the Clayton Act as protecting local, intrastate businesses from intrastate transactions by a corporation otherwise engaged in interstate commerce.

Respondent's final argument concerns a ruling by the hearing examiner which prevented respondent's counsel from conferring with Mr. A. E. Manley, respondent's vice president, during a recess called at the conclusion of direct examination and preceding cross-examination of that individual. Mr. Manley had been called as a witness by complaint counsel. The examiner, at the request of complaint counsel, instructed respondent's counsel not to discuss the case with Mr. Manley during any recess while the latter was testifying on cross-examination. Respondent contends that this ruling by the examiner constituted a denial of Mr. Manley's right to counsel under the Administrative Procedure Act and the due process clause of the Fifth Amendment.

Contrary to respondent's contention that the disputed ruling "is based almost wholly on the contention that no prejudice has been shown," it is clear both from the transcript of the hearing and from the initial decision that the basis for the ruling was simply that Mr. Manley was not represented by counsel. The examiner has pointed out, in this connection, that Mr. Manley was not an individual respondent in this proceeding; that counsel for respondent had neither filed an appearance as counsel for this witness, nor had he asserted, as a ground for his opposition to the examiner's ruling or otherwise, that he was counsel for the witness; that neither respondent's counsel nor the witness had asserted that the witness was represented by counsel or that the witness desired to consult with counsel; and that there is nothing to indicate that consultation between the witness and respondent's counsel was desired for the benefit or protection of the witness.

The examiner also pointed out that throughout the proceeding non-party witnesses who were accompanied by counsel were allowed to confer with their counsel, but not with counsel for either party, during recesses in their testimony. According to the examiner, the basic purpose of the rulings which prevented counsel from either side from consulting with a witness after he had

taken the stand was to avoid influences which might improperly affect the testimony of that witness. He has taken the position, in this connection, that a private conference between counsel and a friendly witness is preparation for cross-examination would be far more objectionable than leading questions to a friendly witness in open hearing since it would afford an opportunity for the witness to be made aware that his direct testimony may have been damaging in certain respects and to be guided in framing answers calculated to repair the damage. Such a conference, if undertaken over objection, in the examiner's opinion, would have provided a basis for suspicion concerning the credibility of the testimony on cross-examination. Thus, it is apparent that the examiner wished to make sure that after the witness had taken the stand his testimony would be entirely his own and that even the appearance of improper influence would be avoided.

The examiner's ruling restricting counsel's freedom to confer with Mr. Manley was in effect only during the time that individual was testifying as a witness for complaint counsel. The record shows that approximately one month after giving testimony during the presentation of the case-in-chief in support of the complaint, Mr. Manley was called as a witness for respondent. During this period respondent's counsel had ample opportunity to confer with Mr. Manley and to prepare for the presentation of defense evidence through him.

We find no error in the examiner's ruling. There is no showing that Mr. Manley was deprived of his right to counsel. Respondent's request that the hearing be vacated and the record expunged is denied.

V

The evidence establishes that in the respective geographic markets the effect of the challenged acquisitions may be substantially to lessen competition in both the portland cement and ready-mixed concrete lines of commerce. To restore the competitive structures of the relevant markets our order requires respondent to divest the acquired corporations as going concerns. The order also prohibits respondent for a period of ten years from making any other acquisition of a ready-mix firm without prior approval of the Commission.

The appeal of counsel supporting the complaint is granted and respondent's appeal is denied. To the extent that it is inconsistent with this opinion, the initial decision is vacated and set aside.

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Order

Our order providing for appropriate modification of the initial decision is issuing herewith.

Commissioner MacIntyre did not participate.

ORDER

This matter has been heard by the Commission on cross-appeals of respondent and counsel supporting the complaint from the initial decision of the hearing examiner, filed January 29, 1968, holding that the complaint charging respondent with violation of Section 7 of the Clayton Act, as amended, had not been sustained by the evidence and ordering that the complaint be dismissed. The Commission has determined that the appeal of counsel supporting the complaint should be granted and respondent's appeal denied, and that the findings of the hearing examiner should be adopted to the extent consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be vacated and a new order issued by the Commission as its final order. Accordingly,

It is ordered, That respondent, Mississippi River Corporation, a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, within one (1) year from the date this order becomes final, divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, as going concerns, all stock, assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, machinery, inventory, customer lists, trade names, trademarks and goodwill, acquired by respondent, as a result of the acquisitions of the stock and/or assets of Stewart Sand and Material Company, John A. Denie's Sons Co., Richter Concrete Corporation, and Richter Transfer Co., together with all additions and improvements thereto of whatever description, and replacements thereof.

It is further ordered, That pending divestiture, respondent shall not make or permit any deterioration or changes in any of the plants, machinery, equipment, buildings or other property or assets to be divested which would impair their present capacity or market value, unless such capacity is restored prior to divestiture.

It is further ordered, That none of the stock, assets, properties,

rights or privileges to be divested be sold or transferred, directly or indirectly, to any person who is at the time of the divestiture an officer, director, employee or agent of, or under the control or direction of, Mississippi River Corporation or any of its subsidiaries or affiliates, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of voting stock of Mississippi River Corporation, or any of its subsidiaries or affiliates.

It is further ordered, That for a period of ten (10) years respondent shall cease and desist from acquiring, directly or indirectly, without the prior approval of the Federal Trade Commission, the whole or any part of the share capital or other assets of any corporation engaged in the sale of ready-mixed concrete or concrete products within respondent's present or future marketing area for portland cement or which purchased in excess of 10,000 barrels of portland cement in any of the five (5) years preceding the merger.

It is further ordered, That respondent shall, within sixty (60) days from the date of service of this order and every sixty (60) days thereafter until divestiture is fully effected, submit to the Commission a detailed written report of its actions, plans, and progress in complying with the divestiture provisions of this order, and fulfilling its objectives. All reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with potential purchasers of the stock, assets, properties, rights or privileges to be divested under this order, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

Commissioner MacIntyre not participating.

IN THE MATTER OF

J. C. BEST, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS
IDENTIFICATION ACTS

Docket C-1535. Complaint, May 22, 1969—Decision, May 22, 1969

Consent order requiring a Braintree, Mass., retailer of rugs and carpeting to cease misbranding and falsely advertising its textile fiber products.