SUMMARY of COOPERATIVE CASES

FARMER COOPERATIVE SERVICE
U. S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

SUMMARY NO. 69

NOVEMBER 1956

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Prepared by

RAYMOND J. MISCHLER, *Attorney*
OFFICE OF THE GENERAL COUNSEL, U.S.D.A.

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The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

PRICE FIXING BY FARMER COOPERATIVES LEGAL

(U.S. v. Maryland Cooperative Milk Producers, Inc., and Maryland and Virginia Milk Producers Association, Inc., U.S.D.C. for D.C., _____F. Supp_____)

A combination between two or more agricultural cooperatives to fix prices of their products is exempt from the antitrust laws provided that no other person who is not of such an organization or a member of such a group is a part of the combination. This is the holding of United States District Judge Alexander Holtzoff, in the case referred to above, which was decided on October 16, 1956.

The complete text of the court's opinion reads as follows:

> "THE COURT (Holtzoff, J.): This is the trial of an indictment charging violations of the Antitrust Laws. The trial is before the Court, a jury having been waived.
>
> "There are two defendants in this case, Maryland Cooperative Milk Producers, Inc., and Maryland and Virginia Milk Producers Association, Inc. Each defendant is an association of producers of milk. The Maryland Cooperative Milk Producers, Inc., is located in Baltimore, Maryland, and is composed of about 2,000 farmers who are producers of milk which they ship to distributors in the Baltimore metropolitan area. Maryland and Virginia Milk Producers Association, Inc., is located in Washington, D. C. and consists of about 1,950 members, who are producers shipping milk to distributors in the Washington metropolitan area.
>
> "The two defendants are charged with an unlawful combination and conspiracy to fix prices for milk sold to distributors which, in turn, is supplied by the purchasers to the Government at its military post at Fort Meade, Maryland.
>
> "The indictment consists of two counts. The first count charges a violation of Section 1 of the Sherman Act, 15 U. S. C. 1, namely, an unlawful restraint of interstate commerce. The second count charges a violation of Section 3 of the Sherman Act, 15 U. S. C. 3, namely, an unlawful restraint of commerce between the District of Columbia and several of the States.
>
> "It appears, in passing, that the prices charged for milk intended for resale to the Government at Fort Meade were actually lower than those exacted for milk destined for resale to the general public. It may be said perhaps, in a sense, that the defendants are accused of conspiring to undercharge the Government. In justice to counsel for the Government, it must be said, however, that they contend that,

in a free competitive market, prices on Government sales might have been even lower than those claimed to have been fixed by the defendants. Attention is called to the fact, by Government counsel, that milk intended for use at Fort Meade was surplus milk that had to comply merely with the standards prescribed by the United States Public Health Service instead of with the more rigorous and rigid requirements established by the Government of the District of Columbia.

"After the opening statements were made, the Government commenced to introduce evidence. It offered a stipulation of facts previously agreed upon by counsel. At that point, counsel for the defendants made a motion for judgment of acquittal.

"A word should be said about the procedural aspects of the matter. Ordinarily, such a motion, unless based solely on the opening statement of Government counsel, may not be entertained until the Government closes its case. An exception is proper, however, if at an earlier stage basic facts appear inescapably leading to the conclusion that, irrespective of whatever other evidence may be introduced, the prosecution must fail. In that event, it is proper to stop the further introduction of evidence and entertain a motion for judgment of acquittal. Such a course is in the interest of efficiency and expedition in the administration of justice. It is on this basis that the Court entertained the defendants' motion in this instance as soon as the stipulation of facts was tendered and admitted.

"The following facts appear from the stipulation that are pertinent to this discussion. Each defendant is a corporation without capital stock and is an association composed of milk producers. Each defendant is operated for the mutual benefit of its members and is not conducted for profit. In brief, the object of each association is to handle and market the milk produced by its members.

"It is well established that an agreement to fix prices is, in and of itself, an unreasonable restraint of trade and is illegal, per se, and therefore violative of the Sherman Act. This was held by the Supreme Court in the leading case of United States vs. Socony Vacuum Oil Company, 310 U. S. 150, 211 to 233.

"The question presented here, however, is whether the defendants in this case are exempt from this broad rule. Defendants claim that they are. It will be recalled that the Sherman Act became law in 1890. In 1914, its broad provisions were, in part, limited and, in part, supplemented by the Clayton Act.

"Section 6 of the Clayton Act is pertinent to the question involved in this case, 15 U. S. C. 17. The relevant provisions of the Clayton Act read as follows:

> "'Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organization or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.'

"Thus, farmers and farmers' cooperatives became a favorite of the law, in a sense. They were granted an express exemption and received a special dispensation from the antitrust laws. They may lawfully combine with impunity and may legally agree to fix prices on their products.

"Some years ago, an attempt to prosecute an agricultural cooperative as an unlawful monopoly met with failure; United States vs. Dairy Cooperative Association, 49 Fed. Supp. 475. In that case, Judge McColloch for the District of Oregon made the following pungent observations:

> "'It may be that the acts of the defendant cooperative in this case, tested without regard to the provisions of the Clayton Act, are monopolistic in character. I have not given serious thought to that question, for it seems to me when Congress said that cooperatives were not to be punished, even though they become monopolistic, it would be ill-considered for me to hold to the contrary.'

"It must be observed that to be sure the exemption of agricultural associations from the prohibition of the antitrust laws does not extend to a combination between agricultural associations and persons or entities that are not in this category. This was held by the Supreme Court in United States vs. Borden Company, 308 U. S. 188. Chief Justice Hughes, in writing for a unanimous bench, emphatically called attention to the fact that the conspiracy charged in that case was not that of merely forming a collective association of producers to market their products but a conspiracy between producers and distributors and allied groups with labor officials, municipal officials, and others.

"The Government argues that the exemption contained in the Clayton Act does not apply to a combination of two or more agricultural cooperatives and urges that such a combination is within the rules of the Borden case.

"This Court is of the opinion that this contention cannot be sustained. The obvious purpose of the Clayton Act was to liberate combinations of farmers and their cooperative organizations from the prohibitions of the antitrust laws as long as they do not combine with others who are outside of this category. It seems immaterial whether a large group of farmers organizes a single organization or divides itself into several organizations. Their joint activity, whether in the form of a single association or two or more associations, is not an illegal combination in restraint of trade in the light of the provisions of the Clayton Act. Surely, the legality of the actions of a group of farmers should not depend on such a nebulous consideration as the question whether they found it convenient to organize a single large cooperative or two smaller groups. The effect of the joint action is the same in either event and should be tested by the same yardstick. The exemption should be construed as applicable to a group of farmers irrespective of whether they are joined into a single cooperative or into several cooperative associations acting jointly. Any other construction would result in partially defeating the intent of the Congress and frustrating the meaning of the Act.

"We were admonished centuries ago that, 'The letter killeth but the spirit giveth light.'

"Even a strict construction of the statute, however, leads to the same conclusion. It provides, in part, that:

> "'Nor shall such organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade.'

"It will be observed that the plural, as well as the singular, are included.

"This discussion might reasonably end at this point were it not for the fact that later statutes affirmatively support the construction of the Clayton Act which this Court has just reached.

"In 1922, eight years after the passage of the Clayton Act, the so-called Capper-Volstead Act became law, 7 U. S. C. 291. The pertinent provisions of that statute read as follows:

> "'Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary

> contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> "'First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> "'Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> "'And in any case to the following:
>
> "'Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.'

"The stipulation of facts in this case shows that these defendants comply with the proviso of the Capper-Volstead Act. It will be noted that the Act permits agricultural cooperatives to have marketing agencies in common. Obviously, it must have been contemplated that a common marketing agency would fix the same prices for the products of all of its principals and would not discriminate among them. Consequently, it must have been foreseen that this provision would, in some cases, lead to the fixing of prices of agricultural commodities.

"The conclusion is inescapable that Congress had no intention to prohibit agreements between two or more cooperatives fixing prices for their products. It should be noted, in passing, that to prevent possible abuses the Secretary of Agriculture was empowered to issue cease and desist orders if he found that such an association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced thereby. Such an order is subject to judicial review, 7 U. S. C. 292.

"In 1926, these provisions were further fortified by the Cooperative Marketing Act, 7 U. S. C. 455 which provides as follows:

> "'Persons engaged, as original producers of agricultural products, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate, and/or foreign commerce such products of such persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange

between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them.'

"It will be observed that again the use of a common agent is expressly permitted although, of necessity, the use of a common agent may inevitably lead to a fixing of prices. It will also be noted that this statute applies expressly to federations of cooperatives as well as to cooperatives.

"The Court concludes that a combination between two or more agricultural cooperatives to fix prices of their products is exempt from the antitrust laws provided that no other person that is not of such an organization or a member of such a group is a part of the combination.

"Accordingly, the motion of defendants for judgment of acquittal is granted and an order will be entered accordingly."

It is well to remember that this is a district court decision in a criminal case and may not be subject to appeal. It is not binding on any other court or on the Department of Justice except in the jurisdiction of this court. Nevertheless, this is the first case in which a court has passed on this specific question.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION COMPLAINT AGAINST THE DENVER UNION STOCK YARD CO. UNDER PACKERS AND STOCKYARDS ACT

(P. & S. Doc. No. 2176)

On June 18, 1956, the Judicial Officer of the Department of Agriculture issued a decision in a proceedings under the Packers and Stockyards Act brought by the Producers Livestock Marketing Association against the Denver Union Stock Yard Co. This complaint was brought to test the validity of a regulation issued by the stockyard which the complainant charged has the effect of precluding the cooperative from engaging in buying and selling at country points for livestock growers except for movement to the Denver yards, and from giving market advice or service to growers, except to ship to the Denver yards. Hearing was held, before submission of evidence, on the sole issue of whether the regulation was invalid on its face. The Judicial Officer held that the regulation was not invalid on its face and dismissed the complaint. The case is being appealed.

"WILLIE WIREDHAND" SYMBOL HELD NOT AN INFRINGEMENT OF "REDDY-KILOWATT"

(Reddy-Kilowatt, Inc. v. Mid-Carolina Electric Cooperative
142 F. Supp. 851)

"Willie Wiredhand," an animated cartoon-like character, was used by the defendant rural electric association in advertising, promotional and public relations work. Plaintiff, which owned and licensed the use of the "Reddy-Kilowatt" symbol by private power companies, sued for an injunction and damages based upon an alleged infringement of trade-mark and service mark and unfair competition. The District Court dismissed the suit, holding that the two symbols were not "confusingly similar" and that there was no competition between the rural electric association and the plaintiff.

The court stressed the fact that the symbols were distinctively different. "Willie Wiredhand" was composed of an electric plug for hips and legs, wire for body, socket for head, and push button for nose. "Reddy-Kilowatt" is made up of jagged lines simulating electricity, with round head, electric light bulb for nose and plug-in sockets for ears. It said:

> "The names Reddy Kilowatt and Willie Wiredhand are entirely different. The two figures themselves do not look alike. Reddy Kilowatt is made up of a body, arms, and legs of jagged lines simulating lightning, to symbolize electricity, and with a round head having a nose made up from an electric light bulb, and plug-in sockets for ears. Willie Wiredhand is made up of a male plug for the hips and legs, a wire for the body, and a socket for the head, with the push button thereof representing the nose. It suggests the practical application of electricity through the plug, wire and socket, rather than the abstract idea of electrical energy suggested by the lightning-like lines Reddy Kilowatt. The names of the two characters are entirely different in spelling, appearance and sound, and the meaning is about as different as could be imagined, having any electrical significance. The name Reddy Kilowatt suggests the idea of electric energy which is always ready. The name Willie Wiredhand is a play on the conventional term used in rural communities to designate a farm worker, namely a 'hired hand', and suggests electricity through the substitution of the Wired for Hired. It suggests that the rural electrification program, by bringing the electric wires to the farm has provided the farm with a Hired Hand or Wired Hand, a definite rural connotation. The two figures are not confusingly similar.
>
> "The only similarity in the illustrations results from pose, costume or action, but this similarity is understandable in view of the fact that both characters are promoting and advertising

> electric service and are used in public relations work in the business of distributing electric power. The similarity of certain selected poses is also explained by the fact that Reddy Kilowatt has appeared in thousands of poses doing almost everything humanly possible and in every conceivable activity. Most any pose in which a cartoonist would draw Willie Wiredhand in advertising and public relations work relating to distribution of electricity would be somewhat similar to one of the several thousand poses in which Reddy Kilowatt has appeared."

The court also pointed out that the use of animated, cartoon-like characters symbolizing or personalizing electricity as a willing servant was in the public domain prior to regristration of the "Reddy-Kilowatt" symbol, so that defendant had no exclusive right to the use.

On the issue of competition, the court said, in part:

> "Since plaintiff deals only with privately owned public utilities and the cooperatives are prohibited by law from serving anyone who is already receiving central station power there is no competition between plaintiff and the defendants. No privately owned power companies have sought to use Willie Wiredhand. The areas in which cooperatives may extend their lines are limited by Act of Congress under which they receive their loans and by state laws. Cooperatives are only permitted to serve customers who cannot get electric power from a private utility. There is also an economic limitation as the cooperatives which buy power from privately owned companies cannot extend their lines into areas which private power companies want to serve.
>
> "It has happened that when a power load grows up in the area served by a cooperative, the private power company will extend its lines to take over that load. This means the loss of the better customers of a cooperative to a private company and is called pirating by the cooperative officials. There is no evidence of a cooperative having taken customers from a private utility. In cases where a new house is built in a fringe area, between the areas served by a cooperative and a private utility, the factors which will determine who shall serve them are (1) the price differential and (2) whether or not the cooperative is purchasing its power from the power company. There is little or no competition for customers between the cooperatives and the licensees of plaintiff, even in the so-called fringe areas. Each has its particular area. The members of the public buy their electric power from the only source available.
>
> "While there may be unfair competition, even though there is no actual competition in rare cases, the presence or absence of actual competition is of importance in determining whether there is likelihood of confusion."

FEDERAL TRADE COMMISSION ACTION AGAINST FLORIDA CITRUS EXCHANGE

(In the Matter of Florida Citrus Exchange - F.T.C. Doc. No. 6255)

A Federal Trade Commission complaint is pending against Florida Citrus Exchange charging that the Exchange has violated section 2(c) of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. 13) by paying or allowing brokerage fees, or commission or discount in lieu thereof, to various buyers of citrus fruit in commerce, who buy either for their own account, as brokers for other buyers, or through a wholly-owned subsidiary for their own accounts. In an Initial Decision filed May 14, 1956, the Hearing Examiner found that--

> ". . . the record herein establishes, by reliable, probative and substantial evidence, many instances of transactions wherein Respondent, while engaged in commerce subsequent to January 1, 1951, has, directly or indirectly, granted and allowed commissions or brokerage fees, or other compensation or discounts in lieu thereof, to buyers who were in fact purchasers of Respondent's citrus fruit for their own accounts, for resale at a profit. Each such transaction constitutes a violation by Respondent of Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act."

The Exchange is a regional cooperative marketing corporation with forty-five fruit packing cooperatives as its members.

In its answer, the Exchange alleged that the portion of its business which was challenged had to do with pool-car or drugstore sales of citrus fruit, which was a widespread method of sale in the citrus fruit industry.

With respect to this and other statements of the Exchange, the Initial Decision states:

> "Respondent affirmatively states that prior to September 1, 1954, that portion of its business which the complaint herein purports to challenge 'had to do with' pool-car or drugstore sales of citrus fruit, which is a wide-spread method of sale in the citrus fruit industry. Respondent explains that a pool-car sale of citrus fruit is simply a transaction wherein two or more relatively small buyers in a given market collectively buy from Respondent through Respondent's broker the contents of a car or truck of citrus fruit and take their agreed pro rata share thereof. Having effected such a pool-car sale, Respondent's broker notifies Respondent as to the various and varying grades, sizes, varieties and containers required in the car or truck to meet the various and varying needs and demands of the multiple buyers involved. When the order is filled by Respondent, the car is shipped to the broker,

who, as Respondent's agent, attends to distribution of the contents among the buyers involved, and remits to Respondent the sales price for the fruit, less the customary brokerage; or, in the alternative, remits to Respondent the entire sales price for the fruit, and Respondent pays such broker the customary brokerage due him.

"Respondent further avers that it is without knowledge as to whether any of its brokers, in connection with such pool-car sales, has ever rendered any service to any buyer or buyers of a pool-car of fruit from Respondent, for which such broker was entitled to and received from such buyer or buyers any brokerage, commission or other thing of value. Respondent denies that it has any right or duty to police or regulate any relationship or transaction between such broker and such buyer or buyers, so long as Respondent confines its transactions with brokers to the paying of brokerage, commission or other thing of value for a service actually rendered by such brokers to Respondent.

"In conclusion, Respondent states that at no time and in no respect, prior to September 1, 1954, did it ever pay or allow to anyone brokerage, commission or other thing of value or discount in lieu thereof, except to a responsible and duly licensed broker for services actually rendered to Respondent in connection with the sale of its citrus fruit. Respondent further alleges that, such being the case, it is clearly within the exception contained in subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, and therefore has not violated Section 2(c) of the Clayton Act as amended."

The Initial Decision has been appealed to the full Commission.

FEDERAL TRADE COMMISSION ACTION AGAINST WILSON, N.C., TOBACCO MARKET PRACTICES

(In the Matter of Wilson Tobacco Board of Trade, Inc., et al., F.T.C. Doc. No. 6202)

An initial decision was filed on December 20, 1955, pursuant to a complaint filed by the Federal Trade Commission against the Wilson Tobacco Board of Trade, Inc., and its members, including one cooperative. This complaint charged that the warehousemen respondents, as dominant members of the Wilson Tobacco Board of Trade, Inc., adopted rules governing the sales of leaf tobacco at Wilson, North Carolina, which:

"1. Excluded would-be traders on that market from trading thereon;

"2. Prevented the erection of new tobacco auction warehouses thereon;

"3. Prevented the expansion of existing warehouses thereon;

"4. Changed the method of allocating selling time to the warehouses on that market to a system which is discriminatory and in restraint of trade;

"5. Limited to an arbitrary figure the amount of resale tobacco which may be traded; and

"6. Prevented the rental or lease of existing warehouse facilities on that market by the owners thereof without the approval of their competitors and then only if any rental be paid into the Wilson Tobacco Board of Trade, Inc."

The initial decision held as follows:

"1. That under the exigencies and unchangeable market conditions, generally, and at Wilson, North Carolina specifically, the performance system of allocating sales time is per se a reasonable regulation and therefore not illegal because,

(a) it promotes rather than hinders competition among warehousemen by putting a premium on additional sales effort--solicitation, advertising, etc. and increases the area of that competition,

(b) puts the competitive emphasis solely on the warehouseman's economic function--service,

(c) penalizes laziness and other inefficiency in that service;

"2. That such allocation on a poundage rather than a basket basis is an unreasonable restraint of trade;

"3. That the tolerance limit of 6.8% or any other limit, on speculator's resale tobacco is an unreasonable restraint of their trade;

"4. That the regulation of December 5, 1952, applying to a new entrant on the market is an unreasonable restraint of trade;

"5. That these unreasonable restraints of trade are not necessarily an integral or inseparable part of the performance system but can be abolished or modified so as not to be unreasonable, as found."

Both parties cross-appealed from the Initial Decision to the full Commission. The Commission entered an order on August 23, 1956, denying both appeals and affirming the Initial Decision, with one modification. The order against the respondents was modified to run against the individual respondents only in their capacities as officers and directors of the corporate respondents and not in their individual capacities.

The decision of Commissioner Mason is quoted, in part, as follows:

". . . Specifically, the order to cease and desist contained in the initial decision prohibits respondents on the Wilson market from collectively (a) allocating selling time to tobacco auction warehouses on a 'poundage' rather than on a 'basket' basis; (b) restricting the marketing time of, or the amounts of tobacco to be resold by, independent speculators or rehandlers; and (c) basing the sales time allowed a new warehouse on the past performance of only one other warehouse in the market.

"Respondents' appeal is limited to inhibitions (a) and (b) above, on the merits. They assert also that the conclusion of the hearing examiner that the acts and practices of respondent warehousemen are 'in' interstate commerce is in error.

"Counsel supporting the complaint, in effect, appeals from the failure of the initial decision to find (with appropriate subsidiary findings) that respondents engaged in an over-all unlawful conspiracy to monopolize the Wilson tobacco auction warehouse business by discouraging construction of new warehouses or by preventing expansion of existing warehouse facilities, which over-all conspiracy counsel contends is illegal per se. Counsel in support of the complaint seeks reversal on the ground of such failure so to find and excepts to specified rulings by the hearing examiner on the admissibility of certain evidentiary matters and to dismissal of the allegations of the complaint as to certain respondents.

* * * * * * *

"In effect the hearing examiner's ultimate finding is that the performance system is not an unreasonable restraint of trade in that it is promotive of competition and was adopted for that purpose; in that it was decided upon to prevent economic waste and not to deter entry of newcomers on the Wilson market; in that it is generative of competition in services rendered the farmer in handling his tobacco and getting the best price for him; and in that it 'has forced the warehousemen to get out and hustle for business--to contact farmers and sell them on bringing their tobacco to that particular warehouse.'

* * * * * * *

"Weighing and judging the reasonableness of the performance system in the light of its intent and effect, and in the framework of realities of the market place, as established on the record here, there remains no alternative but for us to conclude on the whole record that the initial decision is correct in upholding the reasonableness of the performance system.

"The hearing examiner struck from the record all testimony and exhibits relating to action in 1947 by the respondent Board looking to adoption of a definition of the Wilson market in terms of a geographic area bounded by an imaginary line one-half mile beyond the city limits for the purpose of limiting membership on the Board to warehouses within the bounded area. This was five years prior to the adoption of the 'performance system' and the hearing examiner's action in this respect is predicated on the ground that '* * * it resulted in nothing * * *.' The record in this connection discloses a number of warehouses as having been built in 1947, some of which were outside the city limits. Also every warehouseman, including government witnesses, testified that no warehouseman ever had been excluded from the market. The hearing examiner also struck all evidence with reference to a nonexpansion agreement offered to establish an intent by respondent to monopolize the market by excluding new entrants therefrom. He did this on the ground that it was not in interstate commerce within the meaning of the Federal Trade Commission Act.

"Counsel supporting the complaint contends both rulings were erroneous and that the testimony and exhibits on market area limits and on the nonexpansion agreement are material to the issue of whether respondents had engaged in a conspiracy illegal per se. The Commission has weighed and considered that evidence as being material as an aid in finding the effect of the alleged over-all per se conspiracy and has concluded on the basis of the whole record, that respondents' intent and purpose clearly was to promote competition and that that was the effect. The alleged over-all conspiracy has not been established by the evidence as illegal per se.

* * * * * * *

"Respondents, on appeal, first attack the conclusion of the hearing examiner that allocation of sales time on performance, on a poundage rather than on a basket basis, is an unreasonable restraint. The record shows that baskets brought to warehouses from the farms vary from 20 to 300 pounds although each basket requires the same amount of space and time to sell. The hearing examiner reasoned, therefore, that one warehouseman 'may sell the same number of baskets in the same amount of time as another, but have to its credit only one-half as many pounds.' He further found that the over-all allocation to the Wilson market is expressed in terms of baskets.

"The hearing examiner pointed out that respondents advanced two reasons in support of a retention of the poundage basis, namely, that sales are reported to federal and state authorities in pounds; and that a basket allocation basis would encourage warehousemen to split baskets. These the hearing examiner rejected as being invalid, stating:

> "'No reason appears in this record as to why a basket count cannot be made--as a matter of fact, Government graders are paid by the basket, and the floor sheets record this, hence there must already be a count record kept--or that such basket count be made by the weighmaster or some independent clerk at the door, so that splitting can be prevented . . .'

"Respondents on appeal admit that the 'question relates only to a mechanical detail,' but contend that it makes for considerable difference on a seasonal basis, including so-called 'blocked-market' time. The record is not clear on this latter point and we are constrained to accept the hearing examiner's evaluation of the evidence thereon since he heard the pertinent testimony and had full opportunity to observe the demeanor of witnesses on the subject. Likewise, we are impressed by our observation that changing over to a basket from a poundage basis will discourage what appears to be, from the record, a fairly prevalent practice of warehousemen removing small baskets from the floor and reimbursing the farmers for them on a private basis, thus depriving the farmer of the benefit of the competitive auction system of selling his tobacco. There was considerable testimony on this so-called 'small basket' issue and we think the benefit to be derived from resolving it weighs heavily in favor of a basket basis of time allocation. And, here again, the hearing examiner had the benefit of hearing the testimony and observing the demeanor of witnesses testifying on the small basket issue. We defer to his finding thereon. In conclusion, on this point, we agree with the hearing examiner's finding that the poundage basis for time allocation is inequitable, unnecessary, and unreasonable, and that, since it is a separable mechanical provision, it does not in and of itself vitiate the performance system per se. Respondents' appeal on this point accordingly is denied.

"Secondly, respondents appeal from the hearing examiner's finding that the tolerance limit of 6.8%, or any other limit, on speculators' resale tobacco is an unreasonable restraint of trade. Speculators make selective bids at auction sales for tobacco that in their judgment will bring a higher price on resale. After purchase, the speculators rework the leaf, repack it and offer it for resale.

"When the performance system of allocating selling time was inaugurated, respondents placed a limit on the amount of resale tobacco that could be counted in total sales figures used in computing next year's selling time. In July 1952, this was set at 6.8% of total sales. When that figure of total sales is reached, warehousemen will refuse to accept speculators' tobacco for resale preferring instead to sell the farmers' leaf and there is considerable respectable testimony that this occurred often, particularly at rush times. Some speculators had to haul their tobacco to other markets and some even had tobacco spoil because they were unable to get it down on the floor. Several speculators testified that the total amount of their sales under the performance system with the 6.8% tolerance had been considerably less than would have been the case under the floor space system and that they had been unable to sell all of their tobacco. And even warehousemen admitted that the tolerance operated to discriminate against speculators. The evidence with regard to the question of the effect of the 6.8% tolerance is detailed in the initial decision and we conclude that the weight of the evidence supports the hearing examiner in his finding that it is an unreasonable restraint.

"The hearing examiner further found that the tolerance is 'not necessarily an integral or inseparable part of the performance system but can be abolished or modified so as not to be unreasonable.' Respondents fully agree with this further finding, as do we. Respondents' appeal on the question of 'tolerance' is without merit.

"Finally, respondents vigorously contended before the hearing examiner, and on appeal, that they are not engaged in interstate commerce and that the acts and practices alleged are not 'in' interstate commerce and, therefore, the Commission has no jurisdiction in this proceeding over such acts and practices.

"On this point, the hearing examiner made the following finding of fact:

> "'Tobacco sold at auction on the Wilson market in the warehouses of these warehouseman respondents is transported thereto from North and South Carolina and Virginia -- 99.03% from North Carolina, .07% from Virginia and South Carolina in 1954. When sold, 65% of it is transported from Wilson

> to other states of the United States and to foreign countries for manufacture into smoking mixtures. There is a constant flow from the grower's farm to the tobacconist, and such a flow is found as a fact to be in interstate commerce, and the sales at Wilson to be an integral part thereof and in interstate commerce.'

and, in arriving at his conclusion of law on this point, the hearing examiner stated he was convinced:

> "'. . . that the auction transaction is an inherent part of interstate commerce in tobacco -- certainly grading before sale is more of an "incident" than the sale itself, in which these warehousemen respondents consistently take an active part. Furthermore, they buy and sell for their "leaf account" as well as offer space for the sale, and directly participate therein.'

"In Federal Trade Commission v. Pacific States Paper Trade Association, 273 U.S. 52 (1927), the Supreme Court laid down the controlling principle of law when it stated:

> "'Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. Swift & Company v. United States, 196 U.S. 375, 398. And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction. Dozier v. Alabama, 218 U.S. 124, 128. Such commerce is not confined to transportation, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. And it includes the buying and selling of commodities for shipment from one State to another. Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 290; Lemke v. Farmers Grain Co., 258 U.S. 50, 55.'

"It is our opinion that the hearing examiner's findings and conclusion are amply supported on the record and that the sale at auction is an integral and indispensable part of interstate commerce in tobacco, not a mere facility or dispensable adjunct to that commerce, affecting, but not in, commerce. This conclusion is inescapable in the light of the provisions of the Tobacco Inspection Act of 1955 (7 U.S.C.A. 511), and in view of the Supreme Court's holding in Currin v. Wallace, 306 U.S. 1 (1938)."

RECENT INTERNAL REVENUE SERVICE RULINGS OF INTEREST TO COOPERATIVES

1. Transportation Tax - Application to Fertilizer Hauling and Spreading (Rev. Rul. 56-378; I.R.B. 56-32, p. 40)

> "A person engaged by a distributor of limestone, fertilizer, and similar products, to haul such products and spread them on the purchasers' premises is a 'person engaged in the business of transporting property for hire' within the meaning of section 4272(a) of the Internal Revenue Code of 1954, and the amount paid for hauling is subject to the tax on transportation of property. However, spreading the limestone, etc., is not accessorial to its transportation and the amount paid for spreading is not taxable if the hauling charge and spreading charge are separable.

"Advice has been requested whether a person engaged by a distributor of limestone, fertilizer, and similar products, to haul such products and spread them on the purchasers' premises is a 'person engaged in the business of transporting property for hire' within the meaning of section 4272(a) of the Internal Revenue Code of 1954, and, if so, whether the spreading service is accessorial to the transportation.

"Under the terms of a contract entered into between A and a company which sells limestone, fertilizer, and similar products to farmers, A agreed to deliver and spread on the purchasers' premises all the bulk linestone, etc., sold by the company for distribution. A furnishes specially equipped trucks for this service and drivers for the trucks. The company furnishes the labor and equipment for loading the material in the trucks. After the spreading operation has been completed, the company pays A for his service according to the number of tons spread, the rate per ton being determined by the kind of material spread, the pounds per acre of spread material, and, in some cases, the distance of the haul.

"Section 4271(a) of the Code imposes a tax upon the amount paid for the transportation of property by motor vehicle from one point in the United States to another. Under the provisions of section 4272(a) of the Code, the tax applies only to amounts paid to a person engaged in the business of transporting property for hire.

"Section 143.1(d) of Regulations 113, made applicable to the Internal Revenue Code of 1954 by Treasury Decision 6091, C.B. 1954-2, 47, defines the term 'transportation' to include accessorial services furnished in connection with a transportation movement, such as loading, unloading, and similar services and facilities.

"It is held that in performing the hauling of the limestone, etc., A is a 'person engaged in the business of transporting property for hire' within the meaning of section 4272(a) of the Code. Accordingly, the tax applies to the amount paid by the company for hauling these materials to the purchasers' premises. It is further held that the service of spreading limestone, fertilizer, and similar products is not accessorial to the transportation of such products. Therefore, the tax does not apply to the amount paid for the spreading service, provided the charges for spreading are billed separately from the charges for hauling.

"Since, in the instant case, A is paid on the basis of specified rates per ton which cover both the hauling and the spreading service, to enable him to bill the charges for the taxable and the nontaxable services separately, A may make an allocation of each contract price between the hauling and spreading service, provided such allocation is made on a fair and reasonable basis which can be supported by A's records. If such an allocation cannot be made, the tax is collectible by A on the total amount paid to him under the contract."

2. New Regulations on Depreciation Out in Pamphlet Form

The income tax regulations relating to depreciation under section 167 of the 1954 Code were set forth in Treasury Decision 6182. These regulations were published in the Federal Register and were reprinted in Internal Revenue Bulletin No. 1956-26, p. 10, dated June 25, 1956. For convenient reference purposes, Treasury Decision 6182, Regulations Relating to Depreciation, Publication No. 311, has been printed in a separate pamphlet which is for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington 25, D.C., at the price of 20 cents per copy.