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UNITED STATES TARIFF COMMISSION

TRACTOR PARTS

**Report to the President
on Investigation No. 337-22
Under the Provisions of
Section 337 of Title III of the
Tariff Act of 1930, as Amended**



**TC Publication 443
Washington, D.C.
December 1971**

UNITED STATES TARIFF COMMISSION

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UNITED STATES TARIFF COMMISSION
Washington, D.C.

December 14, 1971

In the matter of an investigation	I	Docket No. 22
with regard to the importation and	I	
domestic sale of tractor parts	I	Section 337
	I	
	I	Tariff Act of 1930, as amended

Introduction

On November 1, 1968, Albert Levine Associates of Jamaica, N.Y., filed a complaint with the Tariff Commission requesting relief under section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), alleging unfair methods of competition and unfair acts in the importation and sale of certain crawler tractor parts. The complainant alleges that these unfair methods of competition and unfair acts have the effect or tendency to restrain or monopolize trade and commerce in the United States. The specific unfair act is alleged to be a conspiracy or combination to boycott and cut off the complainant and others from importing and selling Berco ^{1/} crawler tractor parts in the United States. The parties to this alleged conspiracy are Bertoni & Cotti (hereafter referred to in this report as Berco) and the following U.S. importer-distributors of Berco parts: Jackson Tractor Parts Co., Inc., of Jackson, Miss.; Tupes of Saginaw, Inc., of Saginaw, Mich.; Wilson Parts and Equipment Co. of Raleigh, N.C.; Shaul Equipment and Supply Co. of Lemoyne, Pa.; International Steel Products, Inc., and the Tru-Rol Co.,

^{1/} Berco is the U.S. registered trademark applicable to crawler tractor parts and certain other products made by Bertoni & Cotti S.p.A. Officine Macchiniche of Copparo, Ferrara, Italy--the manufacturer of the tractor parts which are the subject of this complaint.

Inc., Baltimore, Md.; Burgman Supply Co., Jacksonville, Fla.; and Seaboard Equipment Co., Inc., Westbury, N.Y. ^{1/}

On December 12, 1968, in accordance with the provisions of section 203.3 of the Commission's Rules of Practice and Procedure (19 CFR 203.3), the Commission initiated a preliminary inquiry into the allegations of the complaint for the purpose of determining whether there was good and sufficient reason for a full investigation, and, if so, whether the Commission should recommend to the President the issuance of a temporary order of exclusion from entry of Berco crawler tractor parts into the United States by authority of section 337(f) of the Tariff Act of 1930 (19 U.S.C. 1337 (1964)). Notice of receipt of the complaint and initiation of a preliminary investigation were published in the Federal Register (33 F.R. 18638).

On May 14, 1969, the Commission ordered a full investigation of the complaint and designated July 15, 1969, as the date for the beginning of public hearings. All interested parties received notice of the Commission's decision to institute a full investigation and to hold public hearings.

The standard, informally adopted by the Commission, for deciding whether the issuance of a temporary exclusion order should be recommended (as indicated to the parties by letter notice) is whether the complainant has made a prima facie showing of violation of the provi-

^{1/} In addition to the importer-distributors named as respondents in the complaint, there are a number of other U.S. firms which import Berco parts.

sions of section 337 and whether, in the absence of a temporary order of exclusion, immediate and substantial harm would result. The request for a temporary exclusion order was implicitly denied until the Commission could definitively decide the merits of such a request through a full investigation and public hearing.

On February 20, 1969, the Commission had received an application to stay further proceedings filed jointly by all named respondents and on March 5, 1969, an application to dismiss proceedings for lack of jurisdiction. Briefs and answers to these applications were received by the Commission. The Commission indicated in its May 14 order that these procedural issues would be considered at the public hearing of July 15, prior to investigating the substantive matters of the complaint.

The hearing began on July 15, 1969, with all parties represented except for Seaboard Equipment Co., Inc. The hearing commenced with the procedural motions by the respondents for dismissal of the investigation by the Commission because of lack of jurisdiction and an application for stay of the proceedings. ^{1/} Both requests were denied by the Commission, with Commissioner Thunberg dissenting. At that time, respondents requested, and were granted, a motion for adjournment until 2:00 p.m. July 16 in order to permit them to petition the U.S. District Court for the District of Columbia to enjoin the Commission from continuing the investigation.

^{1/} Arguments by the respondents supporting these motions, as well as reasons for Commission denial of these requests, appear later in this report.

The suit for injunctive relief 1/ was denied, 2/ and the Commission resumed its hearing on July 16. The hearing continued on July 17 and 18, resumed again on July 24 and 25, went into recess on August 4, and concluded on October 19, 1970.

On June 24, 1971, the Commission published its report 1/ containing its findings and recommendations; notice thereof was published in the Federal Register on June 25, 1971 (36 F.R. 12567). 4/ A copy of the Commission's finding was sent to the respondents (19 U.S.C. 1337(c)). Commissioners Clubb and Leonard found violation of section 337(a) and recommended that the President order the exclusion of the tractor parts in question. Commissioner Sutton found that a violation of section 337(a) had occurred but also found that the combination and conspiracy in violation of section 337(a) no longer existed and therefore did not concur with Commissioners Clubb and Leonard in recommending that the President issue an order excluding the tractor parts involved from entry into the United States.

1/ Bertoni & Cotti, et al. v. U.S. Tariff Commission, Civ. Action No. 1923-69 (July 16, 1969).

2/ Judge Corcoran's order can be found in appendix B.

3/ TC Publication 401, June 1971.

4/ On January 25, 1971, the Commission voted on its findings and recommendation. The following Commissioners were present: Chairman Mize and Commissioners Sutton, Clubb, Leonard, Moore, and Young. Commissioners Clubb and Leonard voted affirmatively and constituted a majority of the Commission present and voting. Commissioner Sutton dissented from the findings and recommendation of the majority. Chairman Mize and Commissioners Moore and Young abstained from voting for the reason that the investigation had been substantially completed prior to their becoming members of the Commission. Chairman Mize's resignation from the Commission was accepted March 17, 1971, by the President. Commissioner Clubb filed no statement in support of his affirmative finding.

A motion for rehearing before the Commission (19 U.S.C. 1337(c)) was filed on July 16, 1971, on behalf of Bertoni & Cotti and certain U.S. importer-distributors of the tractor parts in question.

The Tariff Commission agreed on July 28, 1971, to reconsider its findings in the investigation upon the original complaint of Albert Levine Associates of Jamaica, New York, and did so reconsider these findings on August 2, 1971. By a vote of two to one, the Commission reversed its earlier recommendation that the President issue an order excluding from entry certain tractor parts manufactured by Bertoni & Cotti of Copparo, Ferrara, Italy. Upon reconsideration, Commissioner Sutton affirmed his original position in the above earlier decision. Commissioner Moore concurred. Commissioner Leonard reaffirmed his previous finding and recommendation. 1/

Notice of reconsideration of findings and recommendations was published in the Federal Register on August 12, 1971 (36 F.R. 15077).

1/ Commissioner Clubb's term expired on June 16, 1971, prior to the Commission's reconsideration.

FINDINGS OF THE COMMISSION

The Commission finds: 1/

(1) Unfair methods of competition and unfair acts in the importation into the United States of certain tractor parts, as described in finding (2), manufactured by Bertoni & Cotti of Copparo, Ferrara, Italy, and in their sale by the persons identified in finding (3), the effect or tendency of which was to restrain or monopolize trade and commerce in the United States, in violation of section 337(a) of the Tariff Act of 1930; and

(2) the articles manufactured by Bertoni & Cotti and shipped to the U.S. importer-distributors identified in finding (3) consisted of parts of the type used in the undercarriage of crawler (tracklaying) tractors, as follows: track chain, track chain components (such as pins, links, and bushings), track shoes, sprockets, idlers, track rollers, and assemblies of two or more of the foregoing; and

(3) the specific unfair method or act has been the combination and conspiracy of Bertoni & Cotti and the following U.S. importer-distributors of the aforementioned tractor parts: Jackson Tractor Parts Co., Inc., Tapes of Saginaw, Inc., Wilson Parts and Equipment Co., Shaul Equipment and Supply Co., Inc., International Steel Products, Inc., Tru-Rol Co., Inc., Burgman Supply Co., and Seaboard Equipment Co., Inc., the purpose

1/ Commissioner Leonard dissenting, and Chairman Bedell and Commissioner Young not participating in the decision. Vice Chairman Parker was not yet in office.

of which has been to boycott Albert Levine Associates, Jamaica, New York, and to prevent that firm from importing and selling tractor parts manufactured by Bertoni & Cotti; and

(4) the specific unfair method or act identified in finding (3) no longer exists.

Statement of Commissioner Sutton 1/

On the basis of the facts obtained in the Commission's full investigation, I find that section 337 of the Tariff Act of 1930 has been violated. Specifically, I find that Bertoni and Cotti, the Italian producer and shipper of Berco tractor parts, and the named United States importer-distributors of such parts 2/ combined and conspired to boycott Albert Levine Associates from also importing and selling such parts in the United States; and that this combination and conspiracy constituted an unfair method of competition or unfair act within the meaning of section 337, having the effect and tendency of restraining or monopolizing trade and commerce in the United States. I also find that the combination and conspiracy no longer exists, therefore, I do not recommend that the President issue an order excluding the tractor parts involved from entry into the United States.

The combination and conspiracy and certain other questionable trade practices, engaged in by the foreign shipper and the importer-distributors, occurred apparently because the persons involved were either uninformed or misinformed in regard to the illegality of their actions. In the meantime, they have received, and, in my

1/ Commissioner Moore concurs.

2/ The named importer-distributors are: Jackson Tractor Parts Co., Shaul Equipment and Supply Co., Inc., International Steel Products, Inc., Tru-Rol Co., Inc., Burgman Supply Co., Seaboard Equipment Co., Inc., Wilson Parts and Equipment Co., and Tupes of Saginaw, Inc.

opinion, have profited from competent legal assistance and are no longer in violation of section 337. It will be noted in this regard that the Italian shipper has reiterated, a number of times during the course of the Commission's investigation, his offer to sell tractor parts to Albert Levine Associates on the same terms and conditions offered to any other dealer in the United States. It is of interest, also, that Albert Levine Associates' private injury, resulting from the boycott, has been compensated for by the settlement of actions instituted by the firm in the federal court. By the terms of the settlement agreement of January 26, 1971, the firm received \$183,000 and the two actions were dismissed on the merits with prejudice and without costs.

Inasmuch as a violation of section 337 does not continue to exist in this case, the public interest will not be served by the exclusion of Berco tractor parts from entry into the United States. A different situation might exist if section 337 provided, as a remedy, the issuance against the conspirators of an order to cease and desist from their illegal acts. Such an order would allow business to continue, while also enjoining the continuation or resumption of the unfair methods or acts; section 337, however, provides only for an in rem action against the imported goods (i.e., exclusion from entry), and such action, if taken, would have the effect of terminating trade in the tractor parts in question.

My recommending against the issuance of an exclusion order is wholly consistent with the provisions of section 337. Section 337(g) provides that --

Any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to such refusal of entry no longer exist.

Clearly, if the violation of the statute no longer exists at the time the Commission reports on the full investigation, there is no justification for the Commission to recommend, or for the President to issue an order of exclusion. Reasoning to the same effect was given by the Commission in its report on Investigation No. 337-19 1/ as follows:

In view of . . . the fact that the remedy provided by section 337 does not operate in retrospect, it was manifest that, once section 337 proceedings had been initiated, the task of the Commission was to conduct an investigation which would fully develop the facts, and, on the basis of the record thereby established, to determine whether the alleged combination and conspiracy was viable and in violation of the provisions of section 337.

In view of the foregoing, I am of the opinion that no further action by the Commission or the President is required in connection with this investigation.

1/ Watches, Watch Movements, and Watch Parts, Inv. No. 337-19, T.C. Publication 345, pp. 7-8, June 1966.

Statement of Commissioner Leonard

On the basis of the facts obtained in the Commission's full investigation, I conclude that section 337 has been violated. The relevant provision of section 337(a) of the Tariff Act declares as being unlawful--

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is . . . to restrain or monopolize trade and commerce in the United States. . . .

The unfair method of competition

The specific unfair method of competition found by the Commission is the combination and conspiracy to boycott complainant Albert Levine Associates from importing and selling in the United States certain tractor parts from Bertoni & Cotti, S.p.A., the Italian manufacturer. The combination and conspiracy involves Bertoni & Cotti and the following U.S. importer-distributors of Berco Parts: Jackson Tractor Parts Co., Inc., Tupes of Saginaw, Inc., Wilson Parts and Equipment Co., Shaul Equipment and Supply Co., Inc., International Steel Products, Inc., Tru-Rol Co., Inc., Burgman Supply Co., and Seaboard Equipment Co., Inc.

The United States Court of Customs and Patent Appeals commented on the broad scope of the language of section 337 in In re Von Clemm, 229 F.2d 441, 443-444 (1955):

The statute here under consideration provides broadly for action by the Tariff Commission in cases involving 'unfair methods of competition and unfair acts in the importation of articles' but does not define those terms nor set up a definite standard. As was noted in our decision in In re Northern Pigment Co., 71 F.2d 447, 22 C.C.P.A., Customs, 166, T.D. 47124, the quoted language is broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions. The importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair.

Although there are no judicial precedents involving nonpatent cases arising under section 337, judicial determinations under other antitrust and unfair competition statutes are persuasive in determining what constitutes an unfair method or act under section 337.

The U.S. Supreme Court has held that a concerted refusal by some traders to deal directed against another trader is a group boycott and is per se illegal under section 1 of the Sherman Act. 1/

In Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959), the petitioner, a small retail appliance dealer, alleged that manufacturers and distributors of brand name appliances refused to deal with him on the basis of an agreement between them and large competing retailers.

1/ Section 1 of the Sherman Act provides:

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

The Supreme Court held that petitioner's allegations clearly showed a group boycott, which is forbidden by the Sherman Act, and stated:

This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its 'nature' and 'character' a 'monopolistic tendency.' As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations which 'tend to create a monopoly,' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.'

International Salt Co. v. United States, 332 U.S. 392, 396. 1/

United States v. General Motors, 384 U.S. 127 (1966) involved a civil action to enjoin General Motors Corporation and three associations of Chevrolet dealers in the Los Angeles area from participating in an alleged conspiracy to restrain trade in violation of section 1 of the Sherman Act by eliminating sales of new Chevrolets through "discount houses" and "referral services". This action was held to be a classic conspiracy in restraint of trade. The Court stated:

1/ 359 U.S. at 213-214.

There can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. Elimination, by joint collaborative action, of discounters from access to the market is a per se violation of the Act. 1/

The Court further stated:

where business men concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. . . . Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed. . . . 2/

Precedents arising under section 5 of the Federal Trade Commission Act 3/ are particularly helpful in interpreting section 337 because of the similarity in the language of the two statutes. The U.S. Supreme Court upheld a finding of violation of § 5 of the Federal Trade Commission Act in F.T.C. v. Brown Shoe Co., 384 U.S. 316 (1966), and stated:

it is now recognized . . . that the Commission has broad powers to declare trade practices unfair. This broad power of the Commission is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices may not actually violate these laws. 4/

1/ 384 U.S. at 145.

2/ 384 U.S. at 146-147.

3/ Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(6) (1964 ed.) provides that "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

4/ 384 U.S. at 320-321.

Frequently cited as establishing the per se rule for group boycotts is Fashion Guild v. Trade Commission, 312 U.S. 457 (1941). This case involved a combination of manufacturers of women's garments and manufacturers of textiles used in their making, who claimed that the designs of their products, though not protected by patent or copyright, were original and distinctive, and therefore sought to suppress competition by others who copied their designs and sold at generally lower prices. To this end, those in the combination systematically registered their designs and refused all sales to manufacturers and retailers of garments who dealt in the copies or would not agree not to sell them. To aid in effectuating the boycott, the combination employed "shoppers" to visit retailers' stores, established tribunals to determine whether garments were copies of designs registered, audited the books of its members, fined them for violations of its regulations, etc. In view of these things and the power of the combination and its effect upon sales in interstate commerce, the Federal Trade Commission concluded that the practices of the combination constituted unfair methods of competition tending to monopoly and issued a "cease and desist" order. The Supreme Court held that where the purpose and practice of a combination run counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition.

Based on the broad scope of the terms "unfair methods of competition and unfair acts" in section 337 and on the judicial interpretation of similar language in other antitrust statutes as encompassing combinations and conspiracies to boycott, it is concluded that such a group boycott as has existed in this case is an unfair method of competition and unfair act under section 337.

Effect or tendency to monopolize

Commenting on the nature of per se violations of the antitrust laws, the United States Supreme Court stated in Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958):

there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--an inquiry so often wholly fruitless when undertaken.

Just as by analogy to other antitrust statutes a group boycott can be declared an unfair method of competition and unfair act under section 337, so by the same analogy to other antitrust statutes it is concluded that a group boycott is per se unlawful under section 337. The effect or tendency of this type of unfair method of competition

and unfair act is necessarily to restrain or monopolize trade and commerce in the United States. No inquiry need be made into the economic motivation of the violators nor as to the precise harm resulting from their conduct. A group boycott such as is involved in the instant case under section 337 can be conclusively presumed to have the effect or tendency of restraining or monopolizing trade and commerce in the United States.

Subsidy or bounty

The question of whether the payment received by Berco, the Italian manufacturer of the tractor parts in question, from the Italian Government represented a subsidy or grant was raised during the course of this investigation. However, the Commission's public notices did not treat with this question, and the investigation of the issue by the Commission was incomplete. Therefore, at this time we cannot make any recommendation as to whether these payments constitute unfair methods of competition and unfair acts. This subject may be an appropriate one for a later investigation by the Commission.

Conclusion

Having found that a violation of section 337 has been established, I recommend to the President that he direct the Secretary of the Treasury to exclude from entry any Berco parts sold or consigned to the American distributors or for the benefit of these distributors who have been involved in the combination and conspiracy to boycott Albert Levine Associates.



Articles Covered by the Investigation

The articles which are the subject of this investigation are the undercarriage parts of crawler (tracklaying) tractors. These parts include both track and track-drive components. The track or revolving tread which supports and moves the tractor consists primarily of track chain (links, pins, and bushings) and track shoes (grousers); the track drive consists primarily of a sprocket or notched wheel which transmits power from the engine to the track, and idler and roller wheels which support and maintain the tension of the track as it revolves. These parts are subject to intensive wear and must be replaced at various intervals depending on how much a tractor is used and the conditions under which it is operated. Undercarriage components of tractors used in highly abrasive areas such as slagyards and sandpits must frequently be replaced after 4 to 6 months of service.

Virtually all undercarriage components of crawler tractors are made of iron or steel. These parts are generally formed by casting or forging and are further advanced by machining, heat treating, and surface hardening.

Crawler tractors when fitted with bulldozer blades, shovel loaders, or other attachments have many uses in the construction of roads, dams, airports, and pipelines; and in land reclamation projects, mining, and farming.

Complainant's Operations

The driving force behind the complainant--Albert Levine Associates--is Albert Levine. Before founding this firm, Levine had been associated with other concerns which imported and marketed tractor parts.

During the years 1958-64, Albert Levine and one David Levin ^{1/} each owned a 50-percent interest in Seaboard Equipment Co., Inc., one of the first importer-distributors of Berco crawler-tractor parts. Albert Levine was also President and co-owner with Mr. Levin of a firm known as Colonial Tractor Co., Inc. In 1958 Colonial became Berco's exclusive sales representative for all of the United States and Puerto Rico. Later, Colonial's area of responsibility was reduced to all States east of the Mississippi River.

Through the Colonial Tractor Co., Mr. Levine and his associates were responsible for finding and training new distributors, developing market acceptance of Berco parts, and resolving various problems between Berco and its distributors. In connection with Colonial's responsibilities, Mr. Levine made trips to Italy to confer with Mr. Bertoni. During such trips, Mr. Levine stated, he persuaded and assisted Mr. Bertoni in upgrading the quality of Berco parts to enable them to compete more favorably in the U.S. market. Mr. Levine also assisted Mr. Bertoni in selling tractor parts to English-speaking

^{1/} David Levin is the present owner of Seaboard Equipment Co. and is a respondent in this investigation.

executives of non-U.S. firms. For its services as sales representative, the Colonial Tractor Co. received a 5-percent commission (later reduced to 3 percent; then, 2 percent) on all sales of Berco parts to importer-distributors within Colonial's geographic area of responsibility. At the end of 1964, Bertoni & Cotti did not renew the sales agreement with Colonial Tractor Co., but instead hired an individual, William F. Porter, to represent the Italian firm in the Eastern United States. Mr. Porter represented Berco only during 1965; thereafter, Berco transacted business directly with importer-distributors.

On April 14, 1965, Albert Levine sold his shares in Seaboard Equipment Co., Inc., and Colonial Tractor Co., Inc., to David Levin and severed his relationships with each firm. On April 19, 1965, Albert Levine and his son founded a partnership known as Albert Levine Associates, which is the complainant.

The principal business of Albert Levine Associates has been the importation and sale of replacement parts for crawler tractors. In late 1965, Albert Levine Associates was no longer permitted to purchase from Berco, and thus Mr. Levine began soliciting orders for tractor parts from other exporters. Mr. Levine obtained imports from the Italian companies of O.M. Sirma and Ital-Tractor (formerly Tractor Tecnic Italiana) and the West German firm Tractor Tecnic. Mr. Levine advised the Commission that he had been unable to acquire any U.S. orders for tractor parts since late 1967, even though he had offered potential customers prices that were lower than those available to them from other sources, extended credit, and supplied merchandise

which was ready for pickup at the pier with insurance and duties already paid.

Albert Levine Associates maintains no warehouses and has no facilities or personnel for repairing tractors or for rendering services to its customers. ^{1/} However, it has made arrangements, with another company, for the performance of such services.

Respondents' Operations

Bertoni & Cotti, S.p.A. (Berco), Copparo, Ferrara, Italy

Berco is a large multiplant company with its headquarters and principal plants in Copparo, Ferrara, Italy. The firm was founded in 1918. The production of machine tools and undercarriage parts for crawler tractors accounts for the great bulk of Berco's total output. The firm's sales totaled about \$40 million in 1966.

Berco's plants as illustrated in its sales literature are modern, well-equipped, high-volume production facilities. They include foundries in Padova and Badia Polesine, a forge plant having a 300-ton-per-day capacity (complete with a die shop), extensive machining facilities, and various types of furnaces for gas-carburizing, heat-treating, surface-hardening, and stress-relieving metal parts.

Berco commenced selling its tractor parts in the United States in 1955. The company was originally represented in the United States by American Tractor Parts Co., a firm in Fargo, N. Dak., owned by

^{1/} Services include equipment repairs.

Mr. Cesar Mevorah. This firm was Berco's sole sales representative in the United States from April 1955 through 1957.

American Tractor Parts Co. was succeeded as Berco's U.S. sales representative by Colonial Tractor Co. of Jamaica, N.Y.; this firm served as Berco's U.S. representative during 1958-64.

Beginning in 1965, Berco sold parts to dealers throughout the United States without funneling such sales through an overall representative such as American Tractor Parts Co. or Colonial. Various dealers at one time or another have held distributorship contracts which assigned them exclusive geographic areas of responsibility. Some acted as intermediate distributors, supplying other dealers as well as selling directly to ultimate consumers.

Berco distributorship contracts are no longer being renewed as they expire, and as of March 4, 1969, only seven such contracts remained outstanding. Berco informed the Commission that in the future it does not plan to have a written contract with any dealer.

At the Commission's hearing, among the exhibits offered by Berco's counsel were several letters from certain nonrespondent Berco distributors (including a mail-order house). These letters, in effect, assert that--

(1) Berco's prices are attractive.

(2) Berco is reliable.

(3) Before the Berco line was available, U.S. manufacturers of tractors (i.e., original-equipment manufacturers (OEM)) charged "excessively high" prices for replacement parts.

(4) Competition from Berco induced the U.S. OEM concerns to reduce their prices.

(5) The continued availability of Berco parts is in the public interest.

Seaboard Equipment Co., Inc., Westbury, N.Y.

The Seaboard Equipment Co., Inc., along with Colonial Tractor Co., Inc., was founded by Albert Levine and David M. Levin in 1949. Mr. Levine sold his 50-percent interest to Mr. Levin in 1965.

Seaboard has or had a division called Supertec Products, which marketed crawler tractor parts (apparently, both Berco and non-Berco parts) and other products. On May 6, 1958, Seaboard Equipment Co. registered "Supertec" as a trademark, applicable to "parts and accessories for roadbuilding machinery and engines, agricultural machinery and engines, and automotive engines, namely undercarriage parts for tractors, power shovels and cranes, and sprockets, idlers, chains," and the like.

Seaboard became a Berco distributor in the late 1950's, and its exclusive territory was most of the northeastern part of the United States including New York State. Albert Levine stated that, when he was associated with Seaboard, it had no private warehouse and no facilities or personnel for servicing crawler tractors.

Seaboard handled Berco parts under written contracts (exclusive agency agreements), generally for 1 year each. As Berco has adopted a policy of not renewing distributorship contracts, Seaboard's last contract with Berco expired, on December 31, 1966. However, Berco continued to sell replacement parts to Seaboard.

At the Commission's public hearing, counsel for Berco announced that Seaboard was in bankruptcy and that David Levin was unable to participate in the hearing because of his financial difficulties. With the authorization of David Levin's attorney (not present at the hearing), Berco's counsel offered respondents' exhibits #15 and #16 (copies of which had been submitted to the Commission by Seaboard's counsel several months prior to the hearing), as follows:

#15--Seaboard's answer to an action for damages, initiated by Albert Levine Associates (against "Bertoni & Cotti . . . , et al.") in the U.S. District Court for the Southern District of New York.

#16--Seaboard's memorandum, to the Tariff Commission, constituting a preliminary answer to the Levine complaint to the Commission. 1/

Jackson Tractor Parts Co., Inc., Jackson, Miss.

The principal office and facilities of the Jackson Tractor Parts Co., Inc., are located in Jackson, Miss., where this firm is engaged primarily in the business of buying and selling replacement tractor parts and performing tractor repair work. At least since 1965, Jackson Tractor Parts Co. has had successive exclusive agency agreements with Berco for Mississippi and other States in the southeastern United States. Jackson apparently has at least one regional subsidiary.

1/ Apparently, Seaboard had initially intended to prepare a more detailed answer in the event that the Commission ordered a hearing.

Wilson Welding Service Co., Wilson Parts and Equipment Co.,
and Wilson-Finley Co., Raleigh, N.C.

Wilson Welding Service Co., a proprietorship, was established by George W. Wilson in 1951. Its work consisted of rebuilding under-carriage parts of crawler tractors, bulldozers, and related equipment. As the company's capacity grew, it solicited business from roadbuilding contractors, operators of quarries, and logging companies--or any owner of a tractor or bulldozer.

The Wilson company could have obtained parts from the Caterpillar dealer in Raleigh, N.C., but not at a discounted price. Consequently, the Wilson company bought parts (at a discount) from Westrac Corp., Torrence, Calif.; later, it arranged to be Westrac's exclusive distributor in North Carolina, but in order to do so it had to agree to buy parts from Westrac only.

In testifying before the Tariff Commission, Mr. Wilson stated that, in 1959 or 1960, he switched from Westrac to Berco "to get a complete line and a better price." ^{1/} When Mr. Wilson signed his first Berco contract--for North Carolina only--his company was obligated to purchase 100,000 dollars' worth of Berco parts a year. When he signed his second Berco contract, in 1962, which was for both North Carolina and Virginia, he obligated the Wilson Welding Service Co. to purchase 400,000 dollars' worth of Berco parts a year (both contracts obligated him to purchase only Berco parts).

^{1/} Transcript of the hearing, p. 670.

Mr. Wilson also told the Tariff Commission that Albert Levine had told him (in 1962) that Berco was requiring its dealers "to have a shop, complete rebuilding equipment, and stock the parts." 1/ Consequently, Mr. Wilson leased a building in Richmond, Va., and acquired rebuilding equipment, including trucks and cranes.

Sometime after 1962, Mr. Wilson incorporated his company as Wilson Parts and Equipment Co. This company imported Berco parts through May 1967. During June 1967-August 1968 an affiliated company, Wilson Parts and Equipment Co. of Virginia, did the importing for the Wilson companies. Wilson-Finley Co. (a partnership in which George W. Wilson is the operating executive but not a partner) now has the Berco franchise referred to above, and it commenced importing Berco parts in 1968.

At the Commission's hearing, George W. Wilson stated that he is president and general manager of both Wilson Parts and Equipment Co. and Wilson-Finley Co. 2/ He told the Commission that Wilson-Finley was formed to do a wholesale business with subdealers and with concerns that are in the rebuilding business. It would appear that Wilson Parts and Equipment Co. and the Virginia concern of similar name now confine themselves to rebuilding undercarriages and parts and to retail sales.

Considered as a group, the Wilson companies have two facilities in Raleigh, N.C.; a service-shop-and-warehouse in Richmond, Va.; and

1/ Transcript of the hearing, p. 673.

2/ Transcript of the hearing, p. 840.

a warehouse arrangement with a subdealer, Flo-Weld Co., located in Germantown, N.Y. On any sales by Wilson-Finley out of the New York establishment, it pays a commission to Flo-Weld. As of August 1969, one of the Wilson companies had a warehouse and service facility under construction in Atlanta, Ga.

Until 1962, Mr. Wilson confined his operations to North Carolina, and until 1964, to North Carolina and Virginia. In 1964 he began to seek business in additional States, because "other people," including Supertec, a division of Colonial Tractor Co. (then, jointly owned by Albert Levine and David Levin), were "selling in our territories." As of August 1969, Wilson had 794 retail customers in North Carolina and Virginia (presumably, customers of the Wilson Parts and Equipment Cos.) and 235 dealer-customers in 32 States (presumably, customers of Wilson-Finley Co.).

In his testimony to the Commission, Mr. Wilson stated that when he shifted to Berco he was able to lower his prices "by as much as 25 to 30 percent overall." 1/ He also stated that when he became a franchised Berco distributor for Virginia as well as North Carolina, the requirement to have rebuilding facilities and service personnel was not written into his contract with Berco, but that Albert Levine told him (Wilson) that he must meet those requirements in order to have Virginia added to his territory. 2/

1/ Transcript of the hearing, p. 735.

2/ At that time (1962), Mr. Levine was speaking to Mr. Wilson in the former's capacity of president of Colonial Tractor Co., exclusive of sales representative for Berco.

Tupes of Saginaw, Inc., Saginaw, Mich.

Tupes of Saginaw, Inc., was incorporated in 1947 by Robert Tupes as successor to the Saginaw branch of a business started by his father in the 1930's. Tupes of Saginaw is engaged in the welding, repair and supply business and the crawler-tractor replacement parts business.

Tupes of Saginaw's original business consisted of the repair of automotive springs and agricultural tillage tools and the sale of acetylene cylinders. Later Tupes became a distributor for welding supplies and a contract welder that repaired track systems of crawler tractors. In developing his tractor-repair business, Mr. Tupes found he needed a source for replacement parts. At first he bought such parts from independent U.S. producers (non OEM suppliers); in the mid 1950's Tupes began purchasing Berco parts from Cesar Mevorah's firm, American Tractor Parts Co. After Colonial Tractor Co. became Berco's exclusive U.S. sales representative, Colonial offered Tupes an exclusive Berco distributorship for the State of Michigan. Tupes' first Berco contract in 1960 obligated it to purchase 300,000 dollars' worth of parts from Berco annually. Tupes signed a new contract in 1965 which obligated the firm to buy 1.5 million dollars' worth of Berco parts annually; this contract gave Tupes "exclusive sales rights" in the States of Ohio and Michigan. Based on this exclusive agreement with Berco and other factors, Tupes decided to expand operations significantly by building a 70,000-square-foot facility in Saginaw and acquiring other warehouse and welding repair facilities in the Great

Lakes States. As a result of a dispute with Berco over special terms and conditions being offered other distributors, Tupes canceled the contract with Berco in late 1965 but continued to be a **distributor** of its parts.

In 1968 Tupes had repair shops in five States and 173 dealers in 29 States, five in Canada, and one in South America. Since then Tupes has closed shops in two States. As of July 3, 1969, Tupes had 43 employees in its repair shops in Michigan, Minnesota, and Illinois; the company's investment in capital equipment in these facilities totaled \$470,000 and that in buildings, \$350,000.

Shaul1 Equipment and Supply Co., Inc., Lemoyne, Pa.

Shaul1's headquarters and main facility are at Lemoyne, Pa. (near Harrisburg), with branches near Pittsburgh and Philipsburg, Pa. Its principal activity is the sale and service of heavy construction equipment. Sales and service of Berco parts are a small part of its total operations.

Shaul1 first signed an exclusive agency agreement with Berco in 1965 and today continues to be a Berco distributor. The agreement granted Shaul1 a territory consisting of all of Pennsylvania and eight counties in southern New Jersey.

International Steel Products, Inc., and the Tru-Rol Co., Inc.,
Baltimore, Md.

In 1961, International Steel Products, Inc., signed an exclusive agency agreement with Berco for the territory of Maryland and the District of Columbia, excepting sales to the U.S. Government and any

foreign government. In 1966, International became inactive, and its Berco contract was taken over by Tru-Rol. Although no written contract is in effect between Tru-Rol and Berco, the former continues to purchase parts from Berco.

Considering the present and former corporations as a single entity, they have been in the replacement parts and welding business for some 20 years. From 90 to 95 percent of Tru-Rol's sales are made to tractor owners rather than dealers. Although Tru-Rol considers these sales to be retail transactions, they are made at discounted prices. At the Commission's hearing, John Gurley, 1/ who spoke for Tru-Rol, said that everything Tru-Rol sold it sold at a discount since this was the only way it could compete with OEM's.

Tru-Rol's only business is in replacement parts for crawler tractors, and 75 percent to 80 percent of its business was in Berco parts at the time of the hearing.

The company has a large warehouse and a large inventory, and it tries to provide a complete service to its customers.

Burgman Supply Co., Jacksonville, Fla.

Burgman's business consists chiefly of repairing and selling replacement parts for tractors. The bulk of the company's earnings are derived from the sale of Berco parts. Burgman has at least one branch operation, located in Miami, Fla.

1/ John Gurley is a son of Gordon Gurley, a cofounder of both of the corporations discussed here. The other cofounder is Paul G. LeRoy, who was secretary at the Detroit meeting of the respondent distributors held in 1965.

For at least 4 years Burgman has had successive exclusive agency agreements with Berco covering Florida and certain other southeastern States.

Prehearing Motions by Respondents

Two procedural motions by the respondents--a motion for dismissal and a motion for stay of proceedings--were denied by the Commission prior to the commencement of the public hearing on July 15, 1969.

Respondents' motion for dismissal for lack of jurisdiction

The respondents contended that the Commission should dismiss the complaint for lack of jurisdiction because--

(1) The complainant has not alleged an unfair method of competition or unfair act which occurred in the importation of Berco parts or in their sale in the United States, since the alleged conspiracy to boycott the complainant is not an act occurring in the importation or sale of such parts;

(2) The complainant has not claimed that the effect or tendency of the alleged boycott conspiracy has been to destroy or substantially injure an industry in the United States, but rather has admitted that the domestic industry is not injured; there is, therefore, no claim of a violation of the provisions of section 337; and

(3) The purpose of section 337, construed in terms of its remedy and its legislative history showing an intent to protect the public interest in terms of free, fair enterprise, does not encompass the case in hand because an overall exclusion order with respect to Berco parts would in effect restrain more trade than it would free when viewed in its totality.

Respondents' motion for stay of further proceedings

The respondents presented seven arguments giving reasons why the Commission should stay the proceeding. These seven are briefly outlined below:

(1) The Tariff Commission proceeding should be postponed until action is taken by the Federal District Court of New York, since the complainant's allegations before the Tariff Commission parallel its allegations before the District Court.

(2) Section 337 of the Tariff Act was intended to protect and to preserve U.S. industries, and not to be used as a vehicle for the resolution of private controversies between individual distributors. Complainant's obvious objective is to use the Commission proceeding for wholly private purposes and to gain leverage in the pending Federal court action. The complaint does not serve to promote trade and commerce in the replacement-tractor-parts market nor does it protect an American industry, but on the contrary brings injury to tractor parts distributors and their customers.

(3) An exclusion order would harm the public interest by seriously injuring many tractor parts distributors irrespective of the lawfulness or unlawfulness of their conduct. An exclusion order would harm all distributors of Berco parts and their respective customers, contrary to the public interest.

(4) The relief the complainant seeks from the Tariff Commission cannot remedy the alleged injury to the complainant. An exclusion order

would not remedy any past conspiracies perpetrated by the respondents nor would it achieve any future remedy for the complainant, since it would prevent the complainant, as well as all past Berco distributors, from securing Berco tractor parts.

(5) The Tariff Commission is an improper forum for the complainant since it can grant only partial relief. The proper forum is the Federal District Court, for it alone can give the complainant complete relief. The Federal District Court alone can give monetary damages through treble damages, as well as equitable relief through its injunctive powers. In this situation the public and tractor parts distributors would not be prejudiced by the court action, but would be prejudiced if an exclusion order were to be issued.

(6) A stay will not prejudice the complainant as it **still** retains its right to the district court forum. This was made possible by the foreign party's willingness to submit to U.S. jurisdiction. The complainant has already delayed over 3 years in seeking any form of relief and therefore the complainant is hardly in a position to press for an immediate determination by the Commission that it is entitled to the extraordinary remedy of a temporary exclusion order. Even if there were a sense of urgency to the complainant's case, it could seek appropriate injunctive relief from the Federal court without concurrently prejudicing others.

(7) Any action by the Commission would be superfluous to findings by the district court and would bring irreparable harm to the distributors in question and the public.

Complainant's Replies to Motions 1/

The complainant's replies to the two motions were interwoven and essentially as follows.

Section 337 vests jurisdiction in the Tariff Commission to make investigations to determine, among other things, whether "unfair methods of competition and unfair acts" are occurring "in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either" These provisions clearly authorize the Commission to investigate allegations of conspiracy among importer-distributors and their foreign supplier, made for the purpose of boycotting shipments to another importer-distributor. The respondents' argument that the alleged conspiracy even if proven would not be an unfair method or act "in the importation" or "sale" of Berco parts is patently fallacious. Such a conspiracy would be directly related to the importation and sale of Berco parts in the United States; it would "taint" every importation and sale of Berco parts handled by each conspirator.

Section 337 also vests jurisdiction in the Tariff Commission to determine whether the tainted importation or sale of Berco parts has the effect or tendency--

- (1) To destroy or substantially injure an industry, efficiently and economically operated, in the United States, or
- (2) To prevent the establishment of such an industry, or
- (3) To restrain or monopolize trade and commerce in the United States.

1/ The Commission's replies to these motions appear in appendix A.

An affirmative finding of an unfair act, coupled with an affirmative finding under any one of the three criteria set out above, is all that is required to warrant an exclusion order. No claim was advanced that either of the first two conditions existed or was necessary for remedial action in this case. Reliance on the existence of the third condition was the basis for its complaint.

The Tariff Commission proceedings are not adversary in nature and are vested with the public interest. A combination or conspiracy in restraint of trade is a matter charged with the public interest and actionable under section 337, even though it may be directed at only one person, following judicial precedents under our unfair trade laws.

The private suit by the complainant in the Southern District Court of New York for treble damages and an injunction does not reach the public interest and, in any event, does not afford a proper basis for the Commission to stay its proceedings. Since all laws in the nature of antitrust laws are concerned with promoting fair and free competition in all lines of commerce, the public interest is served whenever the Government prevents any illegal act which has the tendency to restrain or to monopolize commerce. A conspiracy to boycott is such an act. Because the act, if allowed to continue, may cause serious injury to competition in a distinct line of commerce, the conspiracy is more than a private wrong. It is within the public interest and consequently a matter needing attention under section 337.

Alleged Violation of Section 337

The conspiracy--complainant's contentions

The complainant alleges, inter alia, that the respondents through their respective officers and agents--

(a) Have all participated in and acted in unlawful combinations or conspiracies in restraint of the trade and commerce in imported Berco tractor parts in the United States; and

(b) Have all participated in a joint and collaborate action and agreement whereby the foreign manufacturer and the U.S. importer-distributors conspired to and did effect a complete boycott, thereby preventing the complainant from importing and selling Berco tractor parts in the United States.

Specifically, Albert Levine states that Colonial Tractor Co., of which he was co-owner with respondent David Levin, was approached by Berco of Italy in 1957 in regard to becoming its U.S. distributor for tractor-undercarriage replacement parts. At that time, Berco had an American distributor but had not been successful in capturing a significant portion of the U.S. market for tractor parts, a market which was in its early period of growth. In the initial stages of the arrangement, foreign-manufactured parts were not of high quality or reputation and parts made by the original-equipment manufacturers (principally Caterpillar, International Harvester, and Allis Chalmers) dominated the "after" market.

In 1960 or 1961 Mr. Levine began soliciting welding shops and companies which had previously been customers of Colonial Tractor and Seaboard Equipment (which was also owned by Levine and Levin) to become exclusive distributors of Berco parts; some of these firms are respondents in this investigation.

Mr. Levine began negotiating contracts with U.S. distributors (using a form furnished to him by Berco) in which that firm granted an exclusive distributorship to each respondent in a defined territory. Each distributor was required to purchase a minimum amount of parts each year; its exclusive dealership would be subject to cancellation by Berco if the minimum amount was not purchased. These contracts were sent to Italy for approval by Berco. Once in effect, they were renewable on a yearly basis.

Mr. Levine expressed the opinion during the hearing that the contracts he obtained for Berco were illegal in that they prohibited the selling of competitive products. 1/ Moreover, he negotiated the contracts without discussing with the parties the meaning of the exclusive distributorship and territorial provisions. 2/

Mr. Levine received a 5-percent commission (a so-called override) for all Berco products sold in the United States, in payment for his efforts in recruiting the exclusive distributors and for advertising

1/ Transcript of the hearing, p. 475.

2/ Transcript of the hearing, p. 380.

Berco products throughout the United States. This 5-percent override was credited to Colonial Tractor Co., Inc. In the meantime Mr. Levine and David Levin operated an exclusive distributorship for the New York area through Seaboard Equipment.

On September 22, 1961, Mr. Levine sent a memo to exclusive Berco distributors in which the following statement was made:

Gentlemen, as you know, your BERCO distributorship gives you an exclusive sales territory, so that each distributor can fulfill his contract with BERCO and at the same time obtain the maximum sales from his territory. It is expected that each distributor will respect the territory of the other BERCO distributors.

In the years 1961-64 the exclusive distributors sold in all parts of the country and did not honor the assigned territories. Complaints about such cross selling were frequently made to Mr. Levine, who was still Berco's U.S. representative. Although Mr. Levine did not think that the territorial provision in the contracts was legally binding, he answered distributors' complaints by "saying not to worry," and assured his distributors that "geography takes care of itself." Mr. Levine urged them to make "gentlemen's agreements" and to honor each other's territories. Meanwhile, Mr. Levine's Seaboard Equipment Co. continued soliciting orders in all territories.

Mr. Levine maintains that his memo of 1961 only identified areas in which another distributor would not be located and that each distributor could and did sell outside such areas when higher freight costs could be overcome. According to him, the only significance of an "exclusive" distributorship was the fact that Berco would not

place another distributor in the same geographic area. 1/

In 1964 Berco ended its policy of paying Colonial Tractor a commission on sales of Berco parts and began to give all exclusive distributors a quantity discount on parts. Mr. Levine made no protest.

In April 1965, Mr. Levine sold his 50-percent interest in each of the two firms, Seaboard and Colonial, to his associate, David Levin. The two parties agreed by resolution that one of the conditions of disassociation was that Albert Levine "would be free to engage in any and all business activities without any restrictions whatsoever" (complainant's exhibit No. 28).

Mr. Levine formed the firm of Albert Levine Associates on April 19, 1965, and proceeded immediately to request from Berco the latest prices and credit terms available for the new firm (complainant's exhibit No. 5) and an extra 5-percent discount with prices being c.i.f. by sight draft. 2/ Correspondence continued between the two firms with Berco cabling on May 14th: "We are inclined to offer you at same conditions granted Seaboard including commission. We are awaiting for your orders" (complainant's exhibit No. 7). Three days later, on May 17, Berco cabled that price lists had been airmailed to Levine Associates (complainant's exhibit No. 8). However, on May 28 Berco wrote a letter declining

1/ Transcript of the hearing, p. 508.

2/ Mr. Levine advised that this 5-percent discount was given to all distributors in 1965 (T-93).

to sell to Mr. Levine because the New York State territory was under exclusive contract to Seaboard. The letter added that if a new territory not covered by any exclusive agreement was desired then something might be worked out (complainant's exhibit No. 10). By June 9, 1965, the parties had cabled agreement that Levine Associates would represent the Nebraska area. Shortly thereafter, Mr. Levine transmitted an order to Berco; this order and a later order totaling \$17,000 were subsequently filled by Berco. Throughout the summer, Mr. Levine repeated his request to Berco that he be given an extra 5-percent discount plus c.i.f. port of entry (complainant's exhibits Nos. 13-16, T-103-104).

After repeated request by Mr. Levine during the summer months for replies to his queries, Berco answered on September 14 by stating that it was unable to forward price lists because David Levin and other American dealers objected to Mr. Levine's selling parts to their customers at prices lower than they offered. Berco told Mr. Levine that he must agree to sell only to customers of Lemco and Letts, who were competitors of Berco (complainant's exhibit No. 21).

Mr. Levine sent a letter to Berco on October 5, 1965, which included two new orders for Berco parts and a restatement of Berco's alleged plan to send the parts by different forwarders and consigned with different markings to disguise the shipments so other Berco distributors would be unaware of Berco's continued dealings with Mr. Levine. Mr. Levine assured Berco that the new orders were not for

customers of Seaboard or any other Berco dealer. 1/ At this time, Mr. Levine asserted that the territorial restrictions set up by Berco were being violated by Jackson, Tupes, Wilson, Seaboard, and Burgman. Mr. Levine also declared that the reason these dealers wanted him removed as a Berco distributor was to keep him out of business even though this would deprive Berco of additional sales through Levine's deferred financing program 2/ (complainant's exhibit No. 22). Four days later Berco informed Mr. Levine of the receipt of his orders, agreed to try to execute these orders as quickly as possible, and encouraged Mr. Levine to postpone visiting Italy until the early part of November (complainant's exhibit No. 23). It was prior to Mr. Levine's trip to Italy that the alleged conspiracy to boycott occurred.

During October 15-17, 1965, at a meeting in St. Louis of the Associated Independent Rebuilders and Parts Suppliers (A.I.R.P.S.), 3/ certain respondent distributors informally decided to take further action against Berco because of alleged unfair prices afforded to Export Union Witten, Albert Levine Associates, and others. These distributors agreed to meet in Detroit in 10 days to plan their future actions (interrogatories of William F. Porter, pp. 11-15).

1/ Mr. Levine stated at the hearing that they were destined for customers in North Dakota and Pennsylvania.

2/ Mr. Levine's deferred payment program called for no down payment and 6 months or more in which to pay his firm for the merchandise.

3/ A trade association composed of manufacturers and distributors of crawler-tractor parts.

On October 23, 1965, the U.S. distributors for Berco parts-- Gus Gurley and Paul LeRoy of International Steel, Bob Tupes of Tupes of Saginaw, John Gunther and Manny Crystal of Jackson Tractor Parts, and J. Giannini of Shaul Equipment--met in Detroit with W. F. Porter to discuss mutual problems in handling the Berco line. 1/ The unanimous opinion of all present, as well as Wilson and Shaul Equipment, which were contacted by telephone, was to send a cablegram to Berco stating that unless its representative, Gianni Bertoni, came to the United States within 10 days to discuss the operations of "Witten et al". (Export Union Witten, Albert Levine Associates, Earnest Machine Products, and D'Agistini, distributors without exclusive agency agreements which were allegedly violating the sales territories of the respondents) the above-named distributors would cancel all back orders and process no new orders. Prior to Bertoni's visit to New York on October 30, 1965, to discuss these problems, the U.S. distributors and William F. Porter met on October 29, 1965, to decide how to present their case to Bertoni, which involved alleged unethical selling by Bertoni, unethical pricing by Witten et al., and a possible redefining of the territories. 2/ The purpose of the proposed meeting with Bertoni was to stop Witten et al. from continuing the alleged unethical selling and so forth. It was decided that Bertoni would be requested to give to the association a letter stating that Witten et al. could not purchase from Berco (complainant's exhibit No. 31--minutes of New York Berco Association meeting).

1/ Transcript of the hearing, p. 132.

2/ Transcript of the hearing, p. 140.

The second New York meeting of Berco distributors occurred on October 30, 1965. This meeting was attended by Gianni Bertoni, William F. Porter, and officers of 10 Berco distributors. Bertoni agreed with all the distributors that Berco would no longer sell parts to Witten et al. At this time, Mr. Porter assured the distributors that no dealer would be set up on a preexisting territory, and new territories would be offered only to those dealers having office and warehouse facilities. Also at this meeting Gianni Bertoni informed the dealers that their contracts would be cut off if they did not meet their quotas and/or if they sold competing lines of tractor repair parts, but they would be permitted to place emergency orders with U.S. manufacturers (complainant's exhibit No. 32).

Following the October 30 meeting in New York, Mr. Levine visited Gianni Bertoni in Italy on November 17th. Subsequent to this meeting, Mr. Levine wrote to Berco stating:

In line with our discussion at your offices, you confirmed again to us that because of the united pressure from Berco exclusive distributors to prevent you from selling me or my firm; that you would be unable to supply us with any parts whatsoever.

Mr. Levine also mentioned to Berco the possibility of selling parts on the west coast and keeping the sales confidential 1/ (complainant's exhibit No. 25).

1/ Letter of Nov. 29, 1965, to Berco in which Mr. Levine referred to a suggestion by Berco that confidential orders be sent in the name of the customers on the west coast and credited as Mr. Levine's sales.

On December 7, 1965, Gianni Bertoni wrote to Mr. Levine: "I regret to inform you that I cannot withdraw what I told you in Copparo [Italy] regarding the impossibility of providing you with our spare parts" (complainant's exhibit No. 26). On December 18, Bertoni sent another letter to Mr. Levine stating: "I confirm what I told you verbally that it is impossible to provide you with Berco spare parts on account of the present sales organization in the U.S.A. which in some definite states is based on exclusive distributors" (complainant's exhibit No. 37).

The same day Berco mailed to its U.S. representative, William F. Porter, a letter stating: "As agreed upon with Mr. Bertoni in New York we enclose herewith copy of the letter mailed out to Albert Levine Associates." This letter was later sent to all the Berco distributors to assure them that Albert Levine Associates was no longer receiving Berco parts. Since this cutoff, Mr. Levine has not received any tractor parts from Berco. Shortly thereafter Mr. Levine filed a complaint with the Antitrust Division of the Justice Department; in January 1969 he filed a treble damage suit in the Southern District of New York. 1/

Mr. Levine asserts that the boycott prevents him from participating in the replacement-parts market in any form. Berco is the only complete

1/ Albert Levine Associates v. Bertoni & Cotti et al., No. 68 Civ. 4238, United States District Court, S.D. New York, Jan. 21, 1970.

source of replacement parts and any secondary line that he might carry cannot match Berco for quality or price. Also, Mr. Levine's old customers would not buy from him after the boycott by Berco for fear of being cut off from their supply of Berco parts.

Respondents' contentions

I. The respondents' views are that no conspiracy or restraint of trade existed before or after the meetings of the Berco distributors in October 1965. These meetings were called for the purpose of airing grievances about price discriminations and contract violations by Berco in selling to distributors that were not under contract. The meetings did not result in an agreement to boycott Albert Levine Associates but were principally concerned with apparent price discriminations in favor of Export Union Witten, Earnest Machine, D'Agistini, and Albert Levine.

II. Mr. Levine relinquished all contractual rights with Berco when he sold his interest in Seaboard Equipment to David Levin, and no permanent business relationship or distributorship existed between Levine and Berco prior to the meetings in October 1965.

III. The importation of Berco parts has been material in establishing new competitive distributorships for replacement parts in the United States. Berco parts have caused replacement parts made by the original-equipment manufacturer to be offered at prices much lower than those that existed prior to the importation of Berco parts, thus benefiting the U.S. consumer who is the end user of these products.

IV. Exclusion of Berco parts would virtually destroy fast-developing, highly competitive distributorships for replacement parts. Berco has stimulated competition in the best American tradition rather than restraining trade as the complainant contends. Exclusion would not serve the public interest, but would have the opposite effect.

V. In the respondents' brief filed November 20, 1970, the view is presented that even if a violation of section 337 occurred, which the respondents deny, there is no existing violation which can be rectified by an exclusion order. Section 337 was intended only to eliminate and prevent continued injury from unlawful activities. The crux of the complaint in the instant case is a conspiracy to boycott, and this boycott no longer exists because Berco has, since its initial submission to the Commission March 4, 1969, continued to offer to sell Berco parts to the complainant on the same terms and conditions that it offered parts to any other dealer in the United States.

Berco related that Mr. Levine sold out his interest in Seaboard and then attempted to induce a breach of contract between Berco and Seaboard. Specifically, the submission by Berco stated that David Levin of Seaboard was informed by his customers that they were being solicited by Mr. Levine, and by letter and cable in May 1965 Mr. Levin complained to Berco that sales to Mr. Levine would violate the exclusive territorial contract of Seaboard. Berco then notified Mr. Levine that he could not make sales in Seaboard's area but tentatively agreed to allow him to organize and promote sales in Nebraska. David Levin was concerned that this arrangement would result in

Mr. Levine's sales to New York State customers and wrote a letter of June 9 to Berco so stating. After Berco assured Seaboard that the agency agreement would not be violated, David Levin wrote on August 24 that he knew of specific imports of Berco parts that were sold to a Seaboard customer by Mr. Levine. 1/ On September 14, 1965, Berco sent a letter to Mr. Levine informing him that no sales could be made to him unless they were for customers of non-Berco dealers. Berco stated that it had made every effort to accomodate Mr. Levine without violating the contract with Seaboard but that Mr. Levine's conduct made such an accommodation impossible.

The respondents stated that Mr. Levine could not prove his assertion that his customers would not buy his second and incomplete line of parts after he had been cut off by Berco for fear of Berco's also refusing to supply them. Mr. Levine attempted to support this contention by referring to a statement said to have been made to that effect by Hardy Couch, a customer of the respondent Jackson Tractor Parts. 2/ Mr. Levine did not produce a name of any other customer who had made such a statement. At the hearing Mr. Couch denied having made such a statement to Mr. Levine and said that he offered no reason to Mr. Levine for refusing to buy from him. He then stated to the Commission that he refused Mr. Levine's offer on

1/ Mr. Levine stated that his two shipments of Berco parts in 1965 were for buyers in North Dakota and Pennsylvania.

2/ Transcript of the hearing, p. 543.

advice of counsel that Mr. Levine's credit arrangements were too complicated. 1/

The respondents offered lengthy testimony by distributors Mr. Wilson and Mr. Tupes, who are two of the largest and oldest Berco dealers recruited by Mr. Levine. Their testimony revealed that Mr. Levine had originally promised them that they would have an exclusive right to the territories for which they had contracted. They soon realized that such territorial rights were not being honored and began competing throughout the entire country. Both men dwelt at length on the facts that the size of their minimum purchase requirements had been increased greatly when Berco increased the geographic areas of their distributorships and that this caused them to suffer great inconvenience and added expense to meet the minimum requirements of the Berco contract.

Because of the great capital outlays necessary to provide warehousing and service facilities, to maintain inventories, and to hire a sales force, the respondents were alarmed when they found Export Union Witten soliciting their customers at the A.I.R.P.S. meeting in St. Louis in 1965 without the burden of a contract with Berco. Further inquiry revealed that Export Union Witten and Albert Levine Associates, among others, were operating without contracts and offering parts at prices which indicated that Berco was not honoring its exclusive distributorship contracts.

1/ Cross-examination revealed that Mr. Couch had declared bankruptcy in 1968 owing Jackson Tractor Parts \$200,000 but had since been discharged from bankruptcy.

Implications drawn from this information prompted the respondents to hold subsequent meetings in order to confront Berco. These meetings were not held for the purpose of conspiring to boycott Albert Levine, but rather to confront their foreign supplier and seek firm commitments on its part to deal fairly with all distributors.

In reference to the New York meeting of October 30, 1965, Berco's attorney stated at the Commission's hearing that Mr. Bertoni came at the request of various Berco dealers more than 1 month after the Berco decision was made not to supply Mr. Levine. ^{1/} At the meeting dealers expressed dissatisfaction over the sales practices of four firms: Earnest Machine Products, Export Union Witten, D'Agistini, and Albert Levine Associates. The dealers were also concerned about Berco's special terms and conditions available to these firms. Mr. Bertoni heard the complaints and emphasized the need for both sides to honor their contractual obligations. Berco's attorney related at the hearing that subsequent to the meeting Berco continued to supply parts to Earnest Machine Products and Export Union Witten despite complaints voiced at the meeting.

The respondents further declared that Mr. Levine was not an adequate representative for Berco parts in that he did not maintain warehousing, service, inventory, and a sales force. The "after" market stresses economy on parts and also savings on service. Most of the distributors could offer faster service on tractor undercarriages

^{1/} Transcript of the hearing, p. 110A.

than the original-equipment manufacturers because the respondents and Berco specialized in such parts, whereas Caterpillar and other major original manufacturers supplied replacement parts for the complete tractor unit. Specialized undercarriage service which reduces "down" time on expensive tractors was one of the factors which had allowed the replacement-parts distributorships to grow in the face of competition from the original-equipment manufacturers. Since Mr. Levine did not offer these advantages, it was to the benefit of the whole Berco system to refuse a distributorship or partial supply of parts to him under his unique "credit plan," which depressed prices at the expense of the convenience and service of the ultimate users. In this regard, Berco stated that had Mr. Levine provided the requisite services for customers and not demanded special terms, his firm would have been considered for an exclusive distributorship in a new territory. One respondent, Tru-Rol Co., Inc., indicated in a letter to Berco that it had no objection to the appointment of Levine Associates as a Berco distributor. Finally, the respondents claim that Mr. Levine's past record of causing friction in the Berco organization made a denial of parts to him appear to be sound business judgment by Berco.

The respondents presented price lists of the original-equipment manufacturers to show that Berco has caused the prices of domestic undercarriage replacement parts to decrease from 30 to 50 percent in the last decade, while the upper parts of tractors, which do not have extensive competition in the replacement-parts market, increased 128 percent in the same period. The price decreases were attributed to

the fact that Berco parts are much lower in price than domestic parts. Despite its low prices, the respondents state, Berco offers the highest quality and most complete line of non-original-equipment tractor undercarriage parts of any line in the "after" market, domestic or foreign.

The respondents contend that the evidence shows markedly sharp competition between the respondents, as well as with other foreign manufacturers and U.S. replacement-parts manufacturers. They further contend that the exclusion of Berco from the market will cause competition in this industry to lessen, and the end result will be felt by the ultimate U.S. consumer, who will not be able to find other parts of the same quality for comparable prices.

The respondents indicated that they employ hundreds of people and also make it possible for many subdealers to operate. Thus, they contend that exclusion would cause many people to be unemployed. Albert Levine was said to employ only four or five people and to be seeking redress for what is purely a private wrong, if a wrong at all, and thus the respondents argue that the public interest is not to be served by a finding for the complainant in a case built on such facts as these are. Moreover, if a wrong has been done, it is purely a private wrong and the district court is the proper place for its redress. Money damages (which cannot be given by the Tariff Commission) are described as a more suitable solution than exclusion of imports of Berco parts.

In conclusion, they contend that to find unfair competition or restraint of trade the Commission must show that the manufacturer responded to an illegal pressure from the dealers. The minutes of the New York meeting of the respondents, which are the primary evidence in this investigation, are said to show plainly that the only pressure placed on Berco was for it to live up to its contractual obligation to its dealers. Moreover, the respondents assert that the manufacturer has the right to choose whomever it wants for a dealer, and the law does not prevent it from discussing the suitability of prospective distributors with its existing distributors.

Relevancy of Other Possible Unfair Acts Not Covered
by Notice of Investigation

During the course of the public hearing, certain statements were made alluding to other practices in the trade and commerce dealing with Berco tractor parts. Such other activities of possible unfair character relate to (1) apparent price discrimination by Berco in its sales to the various U.S. importers, (2) the possible efforts of some U.S. distributors to enforce or create geographical boundaries in which customers must be situated before sales are made to them, which boundaries may have been established in part in the contracts with Berco, and (3) a provision in the Berco contracts preventing U.S. distributors from purchasing and selling competitive lines of tractor parts. In regard to these factors in the case, it should be noted that Berco has ceased renewing its written contracts and may no longer be involved in any of the three activities. Moreover, it appears that neither Berco nor the distributors, by design or otherwise, have achieved any significant success in such activities.

In addition to the aforementioned practices, mention was made in the hearing of Italian Law No. 639 which authorizes the payment of subsidies to Berco in connection with the promotion of its sales of tractor parts to U.S. firms.

None of the foregoing practices was made a formal part of the Commission's investigation, and so findings with respect thereto have not been made.

Background of U.S. Market for Tractor Parts

U.S. producers and their shipments

There are eight known U.S. producers of crawler tractors, 1/ all of whom are believed to manufacture the undercarriage parts considered here, both for use as original equipment in the manufacture of tractors and for the replacement market. In addition to the aforementioned producers, an unknown number of other concerns produce these parts exclusively for the replacement market. During the Commission's hearing, various witnesses reported that the following U.S. firms produced limited lines of replacement parts for crawler tractors during the 1960-69 period: Westrac Corp., Torrance, Calif.; Pettrac Corp. (division of Pettibone Mulliken Corp.), Chicago, Ill.; Schnake Mfg. Co., Evansville, Ind.; Lempco Automotive Inc., Cleveland, Ohio; and Letts Industries Inc., Detroit, Michigan. It was also reported during the hearing that Westrac and Pettrac have merged their tractor parts operations to form a single firm, that Lempco and Schnake have discontinued producing tractor parts, and that Letts Industries has become primarily an importer.

Independent of this investigation, the Commission also received correspondence from two other firms--a manufacturer of roller and final-drive seals for crawler tractors and a manufacturer of track rollers for crawler tractors--advising that production and employment

1/ The principal domestic producers of crawler tractors and parts thereof are Caterpillar Tractor Co., International-Harvester Co., and Allis Chalmers Mfg. Co.

in their facilities had been sharply reduced as a result of imports of these parts, most of which were from Italy.

It is estimated that U.S. producers' shipments of replacement parts of the type considered here increased annually during 1964-69 and in the latter year were valued at about \$80 million.

Imports

The great bulk of the imports of the tractor parts considered here are classified under TSUS item 692.30, covering tractors suitable for agricultural use and parts thereof, and item 692.35, covering tractors other than those suitable for agricultural use and parts thereof. Articles entered under item 692.30 are duty free ^{1/} and those entered under item 692.35 are dutiable at the trade-agreement rate of 6.5 percent ad valorem. As a result of concessions granted by the United States in the Kennedy Round of trade negotiations, the 6.5 percent rate is scheduled to be reduced to 5.5 percent on January 1, 1972.

Data are not separately reported in the official statistics with respect to U.S. imports of undercarriage parts for crawler tractors. The value of imports of all agricultural tractor parts (both wheel and crawler types) reported under TSUSA item 692.3060 rose from \$21.6 million in 1964 to \$81.6 million in 1969. If the share of these

^{1/} Since January 1948, the duty-free status of these articles has been bound in concessions granted by the United States in the General Agreement on Tariffs and Trade.

imports composed of undercarriage parts for crawler tractors remained unchanged during 1964-69, the value of such imports during the 6-year period would have increased at an annual average rate of about 25 percent. During the same period, the combined value of imports of nonagricultural tractors and parts thereof reported under TSUSA item 692.3500 increased from \$13.2 million to \$31.0 million, or at an annual average rate of about 15 percent.

The principal sources of U.S. imports of all tractor parts entered under TSUSA items 692.3060 and 692.3500 during 1964-69 were Canada, the United Kingdom, Italy, Belgium, and West Germany. An analysis of customs entry papers indicates that Italy and West Germany were the principal sources of imports of undercarriage components for crawler tractors.

Data reported to the Commission show that annual imports of Berco parts increased significantly during 1964-68 and that the importers who were named as respondents in the complaint accounted for the bulk of the imports of Berco parts.



A-41-42

Appendix A



Commission Ruling on Motion for Dismissal
for Lack of Jurisdiction
Inv. No. 337-22

(Tractor Parts)

The respondents' motion for dismissal for lack of jurisdiction in this case is premised on the following arguments:

1. The complainant has not alleged an unfair method of competition or unfair act which occurred in the importation of Berco parts or in their sale in the United States, that is, a conspiracy to boycott the complainant is not an act occurring in the importation or sale of such parts;

2. The complainant has not claimed that the effect or tendency of the alleged boycott conspiracy has been to destroy or substantially injure an industry in the United States, rather it has admitted no injury to the domestic industry, therefore there is no claim of a violation of the provisions of section 337; and

3. The purpose of section 337, construed in terms of its remedy and its legislative history showing an intent to protect the public interest in terms of free fair enterprise, does not encompass the case in hand because an overall exclusion order with respect to Berco parts would in effect restrain more trade than it would free when viewed in its totality.

After reviewing the motion and the reasons therefor, the Tariff Commission reaffirms its denial of the motion for the reasons stated hereinafter.

The jurisdiction of the Tariff Commission in this investigation under section 337 of the Tariff Act of 1930 may be readily found in the following restatement of the section which quotes the statutory portions relevant to the issues raised:

1. The unlawful act described

"Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is * * * to restrain or monopolize trade and commerce in the United States" are unlawful (par. (a)).

2. Concurrent jurisdiction

Violations under section 337 shall be dealt with, "in addition to any other provisions of law", as provided for in that section (par. (a)).

3. Jurisdiction to investigate

"* * * the Tariff Commission is hereby authorized to investigate any alleged violation" described in section 337 "on complaint under oath or upon its initiative" (par. (b)).

4. Scope of exclusion order

An exclusion order is directed against the articles concerned in such unfair methods or acts when "imported by any person violating the provisions" of section 337. When an article is imported and/or sold by an importer under circumstances not involving an unfair act, no exclusion order can lie against the importation.

Having restated the provisions of section 337 relevant to the issues raised by the respondents, the Commission finds as follows with respect to the three premises for the motion:

1. Group boycotts, or concerted refusals to deal, have long been regarded as per se unreasonable restraints of trade. ^{1/} Thus, there is an appropriate allegation in this case of an unfair act within the meaning of section 337. The claim that a conspiracy between the respondent-distributors and the foreign manufacturer would not constitute an act occurring in the importation or sale of the articles the subject of the conspiracy is patently fallacious. The alleged conspiracy is directly aimed at stopping both imports and sales of tractor parts by the complainant.

2. The allegation that the complainant must claim and prove injury to a domestic industry is untenable. Section 337 directs the imposition of an exclusion order in a case where an unfair method or act has the effect or tendency "to restrain or monopolize trade and commerce in the United States" irrespective of whether a domestic industry is experiencing injury. Indeed, section 337 could apply whether or not there is a U.S. industry producing the article involved in an unfair method or act. It is a statute designed to protect the "public interest" in maintaining fair practices in trade.

3. The allegation that action should not lie under section 337 because an overall exclusion order would not be in the public interest ignores the limited authority under the section. Exclusion orders can only relate to articles brought into the United States by importers

^{1/} Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1958); United States v. General Motors Corp., 384 U.S. 127 (1966).

who commit an unfair act in connection with the importation or sale of such articles. Tractor parts imported by persons not a party to the alleged conspiracy cannot be excluded from entry under any existing provision in section 337. Thus, the public interest in terms of free fair enterprise is not inhibited by the complainant's claims. Non-conspirators could import the tractor parts to meet the needs of the public should an exclusion order be imposed.

Commission Ruling on Motion for Stay
of Further Proceedings
Inv. No. 337-22

(Tractor Parts)

The respondents' motion for stay of further proceedings in this case is premised on the following arguments:

1. The Tariff Commission proceeding should be postponed until action is taken by the Federal District Court of New York since complainant's allegations before the Tariff Commission parallel his allegations before the District Court.

2. Section 337 of the Tariff Act was intended to protect and to preserve United States industries, and not to be used as a vehicle for the resolution of private controversies between individual distributors. Complainant's obvious objective is to use the Commission proceeding for wholly private purposes and to gain leverage in the pending federal court action. The complaint does not serve to promote trade and commerce in the replacement tractor parts market nor does it protect an American industry, but on the contrary brings injury to tractor parts distributors and their customers.

3. An exclusion order would harm the public interest by seriously injuring many tractor parts distributors irrespective of the lawfulness or unlawfulness of their conduct. An exclusion order would harm all distributors of Berco parts and their respective customers, contrary to the public interest.

4. The relief complainant seeks from the Tariff Commission cannot remedy the alleged injury to complainant. An exclusion order will not remedy any past conspiracies perpetrated by respondents nor will it achieve any future remedy for complainant, as it will prevent complainant, as well as all past Berco distributors, from securing Berco tractor parts.

5. The Tariff Commission is an improper forum for complainant since it can grant only partial relief. The proper forum is the Federal District Court for it alone can give complainant complete relief. The Federal District Court alone can give monetary damages through treble damages as well as equitable relief through its injunctive powers. In this situation the public and tractor part distributors will not be prejudiced by the Court action, but would be prejudiced if an exclusion order were to be issued.

6. A stay will not prejudice the complainant as he still retains his right to the District Court forum. This was made possible by the foreign party's willingness to submit to American jurisdiction. Complainant has already delayed over 3 years in seeking any form of relief and therefore complainant is hardly in a position to press for an immediate determination by the Commission that he is entitled to the extraordinary remedy of a temporary exclusion order. Even if there were a sense of urgency to complainant's case, he could seek appropriate injunctive relief from the Federal Court without concurrently prejudicing others.

7. Any action by the Commission would be superfluous to findings by the District Court and would bring irreparable harm to the distributors in question and the public.

After reviewing the motion and the reasons therefor, the Tariff Commission reaffirms its denial of the motion for the reasons stated hereinafter. The premises for the motion are discussed in like order.

1. Section 337 clearly states that violations thereunder are to be dealt with "in addition to any other provision of law". The section is primarily a public interest statute. Actions against illegal restraints of trade and commerce under the provisions of the statute are aimed at protecting the public interest; any remedies afforded to private parties such as the complainant in this case are incidental to the main objective of the section, to maintain fair practices in trade and commerce. In this investigation the complainant appears in the posture of a witness to an alleged violation of a provision in section 337 and serves to aid this Commission in determining the facts.

The legislative history of various Federal statutes relating to restraints of trade shows that these acts both complement and supplement each other; this dual relationship is clearly identifiable as between section 337 and the other statutes. Some statutes focus on private relief, some on protection of the public interest. The Commission perceives no vested jurisdiction under section 337 or

any other statute to rule in any set of circumstances that the provisions of one statute must take precedence over another or that proceedings under section 337 must be stayed pending the outcome of a proceeding under another statute. This is particularly evident from the mandate in section 337 that violations thereunder are to be dealt with "in addition to any other provision of law".

2. As stated above, section 337 is primarily a public interest statute the provisions of which cannot be ignored because a complaining witness may be seeking a private remedy in another forum involving the same matter.

Section 337 provides that an exclusion order shall lie against articles concerned in unfair methods of competition or unfair acts when "imported by any person violating the provisions" of the section. If the Commission were to find a conspiracy to boycott in this case, tractor parts imported by non-conspirators would appear in this case not to be "imported by any person violating the provisions" of section 337. Thus, the premise that the complaint cannot serve to promote trade and commerce in the replacement tractor parts market is fallacious. Indeed, the stopping of unfair restraints of trade serves to promote trade and commerce.

3. As indicated above, an exclusion order would not stop imports by non-conspirators. Therefore, it is untenable to argue that the public interest would be seriously injured by such an order.

Unfettered trade in fair-dealing hands is the aim of section 337. The allegation that, if an unfair method or act is found in this case, an exclusion order should not issue because it would be prejudicial and bring irreparable harm to the respondent-distributors in this case has no standing in this proceeding. It is tantamount to a claim that conspirators should be allowed to retain ill-gotten gains.

4. See responses to 2 and 3.

5. Any incidental relief afforded to the complaining witness by reason of the issuance of an exclusion order under section 337 would be "in addition to any other provision of law". Such relief would be both complementary and supplementary in nature. There is no basis in law for not enforcing the provisions of section 337 because they do not afford every form of remedy an aggrieved party may wish to obtain. The availability of the subject tractor parts to non-conspirator importers, should there be a finding of conspiracy in this case, would, as explained above, obviate any argument of possible prejudice to the public.

6 & 7. Section 337 states that violations thereunder shall be dealt with "in addition to any other provision of law". No argument or evidence has been submitted showing that irreparable harm will ensue from our proceeding in this investigation.



A-53-54

Appendix B



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BERTONI & COTTI, et al.,

Plaintiffs,

v.

UNITED STATES TARIFF COMMISSION,
et al.,

Defendants.

Civil Action

No. 1923-69

JUDGMENT

This cause having come before the Court on plaintiffs' motion for temporary restraining order, and defendants having suggested that the Court lacks subject-matter jurisdiction; the matter having been argued by counsel; and the Court having reviewed the papers, and considered the argument,

It is by the Court this 16th day of July, 1969,

ORDERED AND ADJUDGED:

1. That defendants' suggestion is adopted; and this action is hereby dismissed for lack of subject-matter jurisdiction.
2. Plaintiffs' motion for temporary restraining order, and motion for preliminary injunction, are denied as moot.

Judge Corcoran
UNITED STATES DISTRICT JUDGE

