Trade Regulation Reporter - Trade Cases (1932 - 1992), United States of America v. National Peanut Cleaners and Shellers Association, et al., U.S. District Court, E.D. Virginia, 1932-1939 Trade Cases ¶55,220, (Jan. 16, 1939)

United States of America v. National Peanut Cleaners and Shellers Association, et al.

1932-1939 Trade Cases ¶55,220. U.S. District Court, E.D. Virginia, Norfolk Division. Filed January 16, 1939.

Dissolution of an injunction decree restraining acts in violation of the Sherman Anti-Trust Acts is warranted where the situation which necessitated imposition of the restraint, fourteen years previously, is no longer in existence, thereby precluding any recurrence of the prohibited monopoly, and the activities enjoined do not, in the absence of an unlawful conspiracy, constitute violations of the statute.

Before Way, District Judge.

Petition for the Dissolution of the Consent Decree Entered June 15, 1925 as Amended

[Statement of the case]

WAY, D. J.: The above styled suit was instituted in January, 1925, by the United States against National Peanut Cleaners and Shellers Association and about 50 members of said association, charging said defendants with violation of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." 15 USCA 1.

On June 15, 1925, the Court entered a consent decree, which decree, after reciting that certain of the purposes and objects of the defendants, as set out in the constitution and by-laws of said Association and in the rules and regulations thereof, if carried into effect by agreement among the members of the association would operate as a combination and conspiracy in restraint of interstate trade and commerce in violation of said Act of Congress, and that certain of the defendants had been operating under the rules, regulations, agreements, contracts, understanding and practices adopted by said association, perpetually enjoined 43 defendants and

> "their officers, agents, servants, and employees, and all persons acting under, by or in behalf of them or any of them, or claiming so to act, be and they are hereby perpetually enjoined, restrained and prohibited from directly or indirectly entering into, engaging in, or carrying into effect said combination and conspiracy, or any act, rule, regulation, resolution, agreement, contract, understanding or practice constituting a part thereof, or any similar combination or conspiracy having the same purpose or effect of restraining interstate trade and commerce in peanuts.
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> (II) That the defendants, their officers, agents, servants, and employees, and all persons acting under, through or in behalf of them or any of them, or claiming so to act, be and they are hereby perpetually enjoined restrained and prohibited from combining, conspiring or agreeing, expressly or impliedly, directly or indirectly, except as hereinafter provided, to do any of the following acts:
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> (a) To adopt or use a uniform sales contract, and/or acceptance or confirmation blank.
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> (b) To adopt or observe a uniform or maximum rate of commission allowed brokers or jobbers.
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> (c) To establish, use, or maintain rules, regulations, practices, or conditions of any character concerning the acceptance of orders, or sale by defendants of peanuts of any description, the effect of which may lessen competition between any of the defendants, and specifically the following, or any similar thereto:
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> 1. That sales of peanuts shall be made on terms of net cash ten days (no discount) from date of invoice, which shall be the actual date of shipment; or, on terms of net cash demand draft with bill of lading attached.
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> 2. That the purchase and sale shall be positive and not subject to countermand and that all prices shall be f.o.b. shipping point and not delivered at destination.

3. That prices shall not be guaranteed against declines of any character.

4. That prices shall not be guaranteed against inclines of any character.

5. That orders for future shipments shall not be booked for shipment later than sixty days from date of booking and that all bookings shall be made at the actual time of sale, whether made by home office or through representatives, brokers, or traveling salesmen,

(d) To sell peanuts f.o.b. factory with freight equalized with other factories by making rebates or allowances of differentials to purchasers, or otherwise.

(e) To refuse to sell to, or to discriminate in making terms and/or conditions to, any persons, co-partnerships, or corporations for any reason whatsoever.

(f) To address intimidating letters to purchasers for the purpose and/or effect of inducing said purchasers to submit to their demands.

(g) To establish, maintain or circulate a name or list of names, or other description, of a purchaser or purchasers with whom any of the defendants have had a dispute or disputes, who for any reason has or have not fulfilled his or their contract or contracts, or against whom discriminations of any character whatsoever are practiced.

(h) To adopt, establish, or maintain any rule or practice in relation to the arbitration of disputes between them and purchasers from them.

(i) To report to any person, or collective agency, the condition, including quantity and quality, of their respective stocks on hand for the purpose and effect of bringing any of the defendants together to buy from and sell to each other, or to sell for the account of another, and/or of equalizing the stocks of any of the defendants.

(j) To interfere in any manner whatsoever with the free operation and conduct of the business of any individual, co-partnership, corporation, or association of individuals, engaged in the business of buying, cleaning and shelling, and selling, or marketing, peanuts such as refusing to clean and shell peanuts on contract for any such individual, co-partnership, corporation or association.

(k) To refuse to sell, to, or discriminate against in any manner, any person, co-partnership, or corporation which has sold or whose purpose it is to sell peanuts at auction; or to incite, persuade or obligate others to refuse to sell to or to discriminate against in any manner any such person, co-partnership, or corporation.

(III) That the defendants and their officers, agents, servants, and employees, and all persons acting under, by or in behalf of them or any of them, or claiming so to act, be and they are hereby perpetually enjoined, restrained and prohibited, except as hereinafter provided, from committing any of the following acts:

(a) To issue or circulate so-called credit warnings, or blacklists, or maintain or circulate so-called “cash in advance” lists, concerning purchasers who, because of past transactions with defendants, have been, or are, considered illegitimate dealers, or dealers against whom discrimination should be made.

(b) To give to each other in any manner information concerning, or to discuss with each other, by telephone or in person, by correspondence or by telegraph (a) the condition and quantities of crops or farmers' stocks on hand, quantities of farmers' stocks sold, prevailing prices for farmers' stocks, past or prospective prices for farmers' stock, past, present, or prospective supplies of farmers' stocks, and (b) the quality of cleaned and shelled stocks, the quantities of cleaned and shelled stocks on hand, actual sales, the demand, price' lists, prices actually obtained, prevailing prices, past and/or prospective prices, or analyses of future conditions.

(c) To make statements or arguments to each other, written or oral, directly or indirectly, inciting or having the effect of inciting, the defendants to maintain or decrease their rice offerings for farmers' stocks, or to maintain or increase their prices for cleaned and/or shelled goods.

(IV) That the defendant association may

1. Maintain an office under control and direction of its officers or board of directors, with a Secretary, and keep a record of all proceedings of any and all meetings, which record shall be open to the inspection of any of the departments, or their agents, of the United States Government, and to the inspection of any and all members of the Association.

2. Maintain a tariff bureau or committee and a traffic bureau or committee for the purpose of appearing before and communicating with any Federal body, legislative, executive or administrative, to assist or protect the American industry from disadvantages by foreign importations, and assisting the peanut industry in transportation and tariff matters before Federal, state and other bodies concerned in questions of tariff and transportation and furnishing upon request of any member any information relating to rates upon peanuts and regulations of transportation that may be contained in any public schedule or tariff.

3. Adopt and use a common insignia.

4. Advance or promote the use of peanuts by research, publicity, advertisement and similar activities.

5. Handle the insurance of its members, including fire, industrial, indemnity or group insurance.

6. Maintain a credit bureau for the sole purpose of furnishing upon specific request information as to the financial standing and the credit rating of persons and corporations purchasing or attempting to purchase peanuts, but not to create directly or by inference a list or class of so-called legitimate or preferred dealers or purchasers, or illegitimate or undesirable dealers or purchasers. The gathering of information, solely for the purpose of providing credit information on special request, shall not be considered a violation of any part of this decree.

7. Provide for the adjustment and arbitration of disputes of any character between sellers and purchasers by reference to a board of arbitration empowered to promulgate rules of procedure and to render final awards one of said arbitrators to be selected by the seller and one by the purchaser, and the third, or umpire, to be selected by the two so selected, the decision of the said arbitrators, or the majority of them, to be binding upon the parties to said arbitration, provided that any such provision, if made, shall not obligate any purchaser, in any manner, to refer any such dispute to arbitration, unless at the time said dispute arises such purchasers willingly agree so to do.

8. Openly and fairly gather and disseminate information as to costs, volume of past production, prices in past transactions, stocks on hand, and freight rates; and to meet and discuss such information and statistics so long as no attempt is made to reach any agreement or any concerted action with respect to prices or production or restraining competition.

9. Adopt, establish and maintain specifications defining the minimum sizes and minimum degree of quality that shall constitute the various grades of peanuts, provided such specifications do not result in the lessening of competition among defendants.

(V) That nothing contained in this decree shall be construed as prohibiting any defendant from doing or performing any of the acts prohibited by Part II hereof if done individually and without combining, conspiring or agreeing with any other cleaner and sheller of peanuts."

[Retention of jurisdiction]

Jurisdiction of the cause was expressly retained by the Court for the purpose of enforcing the decree and for the purpose of enabling the United States to apply to the court for a modification or enlargement of its provisions on the ground that they were inadequate, and the defendants or either of them to apply for its modification "on the ground that its provisions have become inappropriate or unnecessary, or by reason of changed conditions, of law or fact, or by reason of any new or different activities other than those hereby enjoined or authorized to be maintained and deemed necessary or desirable by the defendants for the welfare of the peanut industry, or if for any other reason the injunction hereby signed has become inadequate or its provisions inappropriate or unnecessary to maintain competitive conditions in interstate trade and commerce in peanuts, or unduly oppressive to the defendants."

First Modification of Decree

On June 2, 1933, upon the application of some of the defendants and with at least the implied consent of the United States, the decree was modified. The pertinent portion of the modifying decree of June 2, 1933, read as follows:

> "And it appearing to the Court that the petition of the petitioning defendants and the exhibits filed therewith do not disclose sufficient grounds or alleged sufficient facts for the annulment or revocation of said Consent Decree of June 15, 1925, the Court doth refuse to annul or revoke the same. But the Court taking judicial knowledge of the changed conditions of the peanut industry, as alleged in said petition, and being of the opinion that certain of the provisions of the said Consent Decree are unduly oppressive to the defendants and are at this time inappropriate and unnecessary to maintain competitive conditions in interstate trade and commerce in peanuts, and that it is desirable for the welfare of the peanut industry that the Consent Decree entered herein on June 15, 1925, should be modified in certain respects, the Court doth overrule the motion, filed by the United States of America, to dismiss the petition, filed by certain defendants for the annulment or modification of said Consent Decree of June 15, 1925, should be granted.
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> IT IS THEREFORE ORDERED AND DECREED that the said Decree entered herein by consent on June 15, 1925, be and the same is hereby modified as follows:
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> 1. Part I of said Decree is modified to provide as follows:
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> 'That the defendants and their officers, agents, servants and employees, and all persons acting under, by or in behalf of them or any of them, or claiming so to act, be and they are hereby perpetually enjoined, restrained and prohibited from directly or indirectly entering into, engaging in, or carrying into effect any combination or conspiracy, or any act, rule, regulation, resolution, agreement, contract, understanding or practice constituting a part thereof, or any similar combination or conspiracy having the purpose or effect of illegally or unreasonably restraining interstate trade or commerce in peanuts.
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> 2. Paragraph (a) of Part II, To adopt or use a uniform sales contract and or acceptance or, confirmation blank, unless the same shall be, approved by the Department of Justice of the United States.
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> 3. Paragraph (b) of Part III of the said decree is modified to provide as follows:
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> (b) To give to each other in any manner information concerning, or to discuss with each other, by telephone or in person, by correspondence, or by telegraph, pursuant to any plan, arrangement, agreement or understanding to reduce, maintain, or increase buying or selling prices or terms or conditions.
>
> (a) the condition and quantities of crops or farmers' stocks on hand, quantities of farmers' stocks sold, prevailing prices for farmers' stocks, past or prospective prices for farmers' stocks, past, present, or prospective supplies of farmers' stocks;
>
> (b) the quality of cleaned and shelled stocks, the quantities of cleaned and shell-stocks on hand, actual sales, the demand, price lists, prices actually obtained, prevailing prices, past and/or prospective prices, or analyses of future conditions.
>
> (4) Paragraph (c) of Part III is revoked and removed in its entirety.
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> Provided, however, that the modification hereby granted may be revoked at any time on application of the United States upon a showing that the provisions of paragraphs (b) and (c) of Part III as contained in the original decree of June 15, 1925, are necessary for the proper enforcement of the law or of the other provisions of the said decree."

The decree of June 2, 1933, retained jurisdiction of the cause for the same purposes specified in the original decree of June 15, 1925.

Second Modification

The original decree was further modified by an order entered with the consent of the United States on April 2, 1934, to permit the defendants to subscribe to the N. I. R. A. Code of Fair Competition for the Raw Peanut Milling Industry and the A. A. A. Marketing Agreement and License for Peanut Millers.

The order of April 2, 1934, after reciting that provisions of the decree of June 15, 1925, and the modifying order entered June 1, 1933, "conflict with certain of the provisions of the Code of Fair Competition for the Raw Peanut Milling Industry, as approved January 12, 1934, pursuant to Title I of the National Recovery Act, and with certain of the provisions of the Marketing Agreement and License for Peanut Millers approved and promulgated January 23, 1934, pursuant to the provisions of the Agricultural Adjustment Act," provided as follows:

> "That nothing contained in the aforesaid decree entered June 15, 1925, and the order modifying said decree entered June 1, 1933, shall be deemed or construed to prevent the defendants, or any of them, from doing the acts required of, or permitted to, said defendants as members of the raw peanut milling industry, by the provisions of the aforesaid Code of Fair Competition for the Raw Peanut Milling Industry as approved on January 12, 1934, or by the provisions of the aforesaid Marketing Agreement and License for Peanut Millers, approved and promulgated January 23, 1934, so long as the same shall remain in effect."

The Present Petition to Dissolve

On December 3, 1937, twelve of the defendants named in the original decree, filed a petition for the complete dissolution of the decree of June 15, 1925, and on August 15, 1938, a supplemental petition, seeking such dissolution.

[Factors in support of dissolution]

The grounds urged in the petitions for the dissolution of the decree of June 15, 1925, are as follows:

[Increased competition]

> 1. That because of greatly increased competition, both in the Virginia-Carolina area and in the nation at large, the defendants now control only a small portion of the nation's peanut business and their combined efforts to control it could have not material effect upon the peanut industry;

[Price-fixing impossible]

> 2. That it is no longer possible for defendant and other processors of peanuts to affect the prices paid to growers, because, among other things, of the action of the Government in pegging the prices to growers;

[Personnel change]

> 3. That the personnel of the defendants has so changed since June 15, 1925, the decree should no longer be in force;

[Continuation of decree inequitable]

> 4. That the decree has become inequitable, unjust, and oppressive and the ends of justice will be served by its dissolution;

[Change in complainants' attitude]

> 5. That those who prompted the proceedings which result in the Consent decree no longer favor its Continuance and it is asserted that many of the growers are not in favor of the decree. This ground has reference to the alleged changed attitude of the growers towards the defendants.

[Revised anti-trust concepts]

> 6. That there has been a definite change in the concept of the Anti-Trust laws since 1925. In this connection, it is asserted that the Government is now fostering and in many instances actually performing many of the practices outlawed by the consent decree.

[Dissolution of defendant association]

Following the entry of the consent decree the National Peanut Cleaners and Shellers Association developed into a social club which state of inactivity continued until 1933 when the association was finally dissolved and its constitution and by laws the features of which in 1925 were particularly objectionable to the Government went into the discard.

[Organization under NIRA]

In the same year, 1933, the Virginia-Carolina Peanut Association was formed at the suggestion of officials representing the Government for the purpose of co-operating with the Government in promoting the objects of the National Industrial Recovery and the A. A. A. acts of Congress. All peanut processors or millers in the Virginia-Carolina area were invited to join the new Association, without regard to whether they had or had not been members of the enjoined National Association. Many who had not been members of the old joined and are now members of the new association.

[Parties to injunction proceeding]

As will appear from some of the stipulations hereinafter quoted, 43 of the 50 defendants named in the bill of complaint filed by the Government, were enjoined. Of that 43, 17 were corporations and 26 individuals, and in most instances, the individuals enjoined were officers of the corporations that were enjoined.

[Changes in personnel]

As a result of deaths or permanent retirements from business since the decree the control and management of American Peanut Corporation, Columbia Peanut Corporation, Suffolk Peanut Company Lummis and Company, four of the larger, if not in fact the largest, concerns enjoined, have passed into the hands of officers who, so far as the evidence discloses, had no connection with the National Peanut Cleaners and Shellers Association or any of its activities.

[Compliance with decree]

In the period of more than thirteen years that has elapsed since the consent decree, no defendant has been cited for any alleged violation of the consent decree, or, so far as the evidence discloses, ever charged with the violation of any of its provisions, or charged with having violated any provision of the anti-trust laws of the United States.

[The industry]

Peanuts are produced in three areas in the United States viz; the Virginia-Carolina area, the Georgia-Alabama or Southeast area and the Southwest or Texas-Okla, area. The quantities produced in other sections of the country are not sufficient materially to affect the market in any way.

[Changes in production]

The nation's crop the decree year, 1925, was 791,355,000 pounds and 381,000,000 pounds of that or about 48 per cent of the crop, was produced in the Virginia-Carolina area. Since that year there has been an irregular but marked decline in the percentage of the nation's total crop, produced in the Virginia-Carolina area. For instance, that area produced in 1935 about 32.2 per cent, in 1936, 30.5 per cent and in 1937, 35.5 per cent, in 1938, 28.1 per cent, of the entire crop. This decrease in percentage resulted from greatly increased production in the Southeast and Southwest areas. The total 1937 crop was 1,291,655,000 pounds of which the Southeast area produced 54.8 per cent as against 46.5 per cent in 1925; the Southwest area *9.7* per cent, as against 5.4 per cent in 1925, while the Virginia-Carolina area dropped from 48.1 per cent in 1925 to 35.5 per cent in 1937.

Figures recently released by the Department of Agriculture with respect to the 1938 crop show the total crop to be 1,424,825,000 pounds, divided between the three great producing areas as follows: Virginia-Carolina 401,285,000 pounds; Southeast area 852,630,000 pounds; Southwest area 170,910,000 pounds. In other words, the current crop is nearly twice that of the consent-decree year, 1925, The Virginia-Carolina percentage of the total crop dropped from about 35.5 per cent in 1937 to about 28.1 in 1938 and the Southeast and

Southwest areas increased from 46.5 per cent and 9.7 per cent, respectively, to 59.8 per cent and 12/1 per cent, respectively. The rise in the percentage of the two latter areas resulted entirely from greatly increased production in those areas.

[Factual stipulations]

The following facts, among others, have been stipulated by the parties:

[Extent of operations]

In 1925 there were 17 peanut cleaners, operating 32 plants, in the Virginia-Carolina area (12 operating *27* plants, were subject to the decree). In 1925 there were *6* cleaners in the southwest area operating 7 plants, and 9 cleaners in the southeast operating 14 plants.

In 1938 there are 20 cleaners, operating 35 plants, in the Virginia-Carolina area (8, operating 22 plants, are subject to the decree). There are 10 cleaners in the southwest operating 14 plants, and 44 cleaners in the southeast operating 57 plants.

In 1925 the mills subject to the decree handled 191,176,215 pounds of peanuts, more or less, of the 1937 crop those subject to the decree handled 208,801,485 pounds in the Virginia-Carolina area.

[Government program in industry]

Pursuant to the provisions of the Agricultural Adjustment Act as amended February 29, 1936, (Sec. 32 Pub. No. 320, 74th Congress, 7 U. S. C. A. 512c) the Secretary of Agriculture placed in effect a Peanut Diversion Program for the crop grown in 1937 and marketed in the winter of 1937 and the spring of 1938. The program authorized purchases of peanuts from peanut growers by cooperative association of peanut growers of fixed prices ranging from $53 to $65 per ton, depending solely upon the type and classification of the peanuts. The Virginia Peanut Growers Cooperative was incorporated in Virginia and the Peanut Stabilization Cooperative was incorporated in North Carolina. A certificate of incorporation of the former marked “Exhibit A with Stipulation” may be admitted in evidence, if revelant and material. These cooperative associations authorized certain certified warehouses in various towns in the peanut belt to buy peanuts from the farmers and in payment for same, to issue to the farmers drafts on the Federal Commodity Credit Corporation. The cooperative associations ultimately sold the peanuts under an agreement by which the purchaser undertook to crush the peanuts into oil or by-products on or before July 21, 1938. Any loss incurred by the cooperatives was made up by the Federal Government; any profit was distributed to the individual members of the cooperatives. During the season ending April 1, 1938, the cooperatives throughout the United States purchased 172,538,000 pounds of peanuts.

Other Federal peanut programs were in effect in 1934 and in 1935, but they were less formal and less successful than the program for 1937. The Weekly Peanut Report, No. 1003, an official publication of the Department of Agriculture, dated September 14, 1938, marked “Exhibit B with Stipulation”, may be admitted in evidence if relevant and material. An official publication of the Department of Agriculture, marked “Exhibit C with Stipulation” and entitled “Offer by the Secretary of Agriculture in Connection with the Removal and Disposition of Surplus Peanuts (Fiscal Year 1939)” may be admitted in evidence if relevant and material.

[Dissolution of defendant association]

The National Peanut Cleaners and Shellers Association was dissolved in 1933. In order to formulate an N. R. A. Code and an A. A. A. Marketing Agreement, the members of the industry formed, on July 20, 1933, the Virginia-Carolina Peanut Association. The Charter and By-Laws of the Virginia-Carolina Peanut Association, marked Petitioners' Exhibits I and II, may be admitted in evidence if relevant and material.

[Changes in corporate structure]

Of the 22 corporate defendants named in the original bill, 6 were not subject to the decree; of the balance 3 have merged with the American Peanut Corporation (which is subject to the decree), one has merged

with the Barnhart Mercantile Company (which is subject to the decree) and 3 are dissolved and out of business.

Of the 31 individual defendants named in the original bill, 5 were not subject to the decree; of the remaining 26, nine are dead, 17 are alive and subject to the decree. Of these 17, 4 are known to have no connection with the peanut industry and 2 are believed to have no connection.

Under the 1938 Agricultural Conservation Program the Department of Agriculture has allotted peanut acreage by state, county and individual farm. For 1938 the national goal for peanuts is from 1,500,000 to 1,600,000 acres.

[The product]

The Virginia type peanut is grown commercially only in the Virginia-Carolina area. The quantity of the other types of peanuts grown in the Virginia-Carolina area is not more than 10% of the total quantity grown in that area. The Virginia type peanut is regarded as a superior type and is the only type sold commercially to consumers in the shell. The percentage of the Virginia type peanuts sold to consumers in the shell has ranged from approximately 25% to 50%. For the past few years the percentage has been approximately 25%.

[Classifications of peanuts]

Peanuts are classified as follows:

A. Virginia Type; (1) Jumbo, (2) Bunch, and (3) Shelling Stock;

B. Spanish Type; and

C. Runner Type.

The Virginia type is larger than either the Spanish or the Runner, except that the Runner may depending upon the rainfall in the Southeast area, be as large as the Virginia Shelling Stock but not as large as the Jumbo or Bunch.

[Differentiations]

There is a distinct difference in shape and a slight difference in color of skins between the three major types of peanuts.

There is a difference in flavor between all three types of peanuts.

The Spanish type peanut has a larger oil content than either the Virginia or the Runner, the Runner containing more oil than the Virginia. Under normal conditions it is unprofitable to crush Virginia peanuts into oil.

There is a distinct and separate consumer demand for the Virginia type salted nut. There is a distinct and separate consumer demand for the Spanish type salted nut. Runner peanuts are never salted.

Some candy manufacturers use only the Virginia type peanuts, others only the Spanish type, and others use either of the two. A small quantity of Runners are also used in candy, and this use is increasing.

Peanut butter can be made from any of the three types of peanuts, or from any combination thereof; but peanut butter made exclusively from Runners has a beany flavor, that made exclusively from Virginias is too dry, and that made exclusively from the Spanish is too oily. The best peanut butter is made from a mixture of the Virginia and Spanish types, the mixture varying from 50-50 to 60-40 either way.

Peanut brittle is made with the Spanish type peanut only.

Govt's Exs. 1, 2 and 3, entitled “Form MS-18 Peanut Data, Preliminary, U. S. Department of Agriculture,” “Department of Agriculture, Cleaned and Shelled Peanuts: Monthly Average Prices for Prompt Shipment,” and “Department of Agriculture, Peanuts; Price of Farmers' Stock to Growers,” respectively, may be received in evidence if relevant and material.

It is usually more profitable to sell in the shell as many peanuts having the necessary size, color and appearance as the limited market (approximately twenty-five per cent of the Virginia type peanut) will take.

[Market for product]

The Bureau of Agricultural Economics of the United States Department of Agriculture reported that the total United States peanut production during the 1937-1938 season amounted to 1,291,655,000 pounds (Exhibit 3). It is estimated that this crop was consumed approximately as follows:

(a) From 375,000,000 to 400,000,000 pounds of farmers' stock were made in peanut butter.

(b) From 120,000,000 to 130,000,000 pounds of farmers' stock were turned back into seed.

(c) Approximately 85,000,000 pounds (or 23% of the Virginia-Carolina crop marketed) of farmers' stock were sold in the shell.

(d) From 325,000,000 to 350,000,000 pounds of farmers' stock were used for salted nuts and candy.

(e) From 160,000,000 to 200,000,000 pounds of farmers' stock were converted into peanut oil.

(f) From 40,000,000 to 50,000,000 pounds were removed from farmers' stock in the form of dirt and trash.

(g) Approximately *76,*000,000 pounds cannot be accounted for.

[Extent of competition]

The peanuts raised in the Virginia-Carolina area and those of the Southeast and Southwest areas are in active competition in the market at all times with the exception of the peanuts that are sold in the shells, usually for the purpose of roasting. Only the Virginia-Carolina peanuts are used for that purpose, so that in that particular part of the market the peanuts grown in the Southeast and Southwest areas are not in competition with the Virginia-Carolina peanut.

Approximately 25 per cent of the crop in the Virginia-Carolina area is sold in the shells. The defendants subject to the decree handle about 45 per cent of the entire crop in this area. If it may be fairly assumed that these percentages are substantially accurate when applied to the unshelled peanuts handled by the defendants, (and there is nothing in the proofs to indicate the contrary), it would appear that defendants handle about 12 per cent of the entire Virginia-Carolina crop in a manner (unshelled) that such 12 per cent does not have to face the competition of the peanuts of the Southeast and Southwest areas. But such 12 per cent handled by defendants is in competition with the remaining 55 per cent of the Virginia-Carolina crop not handled by defendants. The evidence shows that the quantity of peanuts thus sold in the shell is decreasing.

[Decrease in defendants' operations]

In 1925 the defendants subject to the decree handled about 23.5 of the nation's total crop and slightly over 50 per cent of that raised in the Virginia-Carolina area. In 1937 this had dropped to 16.1 per cent of the total crop and to 45.5 per cent of the Virginia-Carolina crop. The percentage of the total 1938 crop handled by defendants will be about 14 per cent or approximately one-seventh of the entire crop of the nation.

[Invalidity of NIRA]

The N. I. R. A. Code of Fair Competition became effective January *17,* 1934, and the A. A. A. Marketing Contract January 27, 1934. The acts of Congress upon which the Code and Peanut Marketing Contract were based were held unconstitutional May *27,* 1935, and January 6, 1936, respectively, 295 U. S. 495 and 297 U. S. 1. The Code was in force about 16 months and the marketing agreement nearly 2 years.

[Effect of NIRA codes]

An examination of Exhibits 9, (the code), and 11 (the Marketing Agreement), discloses that these two acts of Congress and the interpretations placed upon them by the authorities charged with their enforcement, and the modifying decrees of June, 1933, and April, 1934, above quoted and referred to, resulted in modifying the injunction decree in many important respects and to such an extent as to render it very difficult not only for a

layman conducting a peanut milling or processing business, but for the legal profession as well, to determine what could or could not be done without violating the injunction.

The following quotations from the Marketing Agreement Exhibit 11, pp. *6-7,* are illustrative of the extent of the modification of the injunction by the decree of April 2, 1934, entered with the approval of the Government and largely at its instance:

"Article VII—Sales

Section 1. Sales of cleaned or shelled peanuts shall be made on the following terms only: Net cash ten (10) days from date of shipment, or net arrival draft, bill of lading attached, inspection allowed.

Section 2. No miller shall purchase from any person any farmers' stock peanuts which have been sold by the Grower after the effective date hereof, unless the seller submits to the Miller evidence, in form to be prescribed by the Control Board, that the Grower received for said peanuts the minimum price fixed pursuant to this agreement prevailing at the time the Grower sold said peanuts. This section shall not apply to the purchase by Millers of peanuts obtained pursuant to execution of legal process.

Section 3. No Miller shall sell peanuts in less than twenty-five (25) bag lots except at a price of not less than one-fourth cent *(1/4¢)* per pound above his carload price for the same variety and grade.

Section 4. No Miller shall ship cleaned or shelled peanuts into any market to be sold by such Miller after arrival, except for sale in carload lots.

Section 5. Sales by Millers in the Virginia area shall be on the basis of f.o.b. mill or nearest seaport, except that freight rates may be equalized within the same region or area where competing mills are located. All invoices must show the freight differential, if any.

Section 6. The contracting Millers agree not to engage in destructive price cutting, and if in the opinion of the Control Board any Miller's prices indicate destructive price cutting tending to prevent effectuation of the purposes of this Agreement or the declared policy of the Act, the Control Board shall so notify the said Miller. If after due notice, hearing, and investigation, in accordance with Article VI, Section 2(d), the Control Board determines that such Miller has or is engaged in destructive price cutting, it may order, discontinuance, subject to the right of appeal provided in said Article VI, Section 2(d). In the event of noncompliance with any such order, the Control Committee shall notify the Secretary."

Conclusions of Law

[Continuation of decree unnecessary]

From the foregoing findings of fact the Court concludes as a matter of law that the provisions of the decree of June 15, 1925, have by reason of changed conditions become inappropriate and unnecessary to maintain competitive conditions in interstate trade and commerce in peanuts and are unduly and unnecessarily oppressive to the defendants who still remain subject to its terms, and that said injunction should be dissolved.

Memorandum by the Court

A case cited and apparently relied on by counsel for both the government and the defendants as controlling in disposing of the motion to dissolve is *United States v. Swift & Co., et al.* 286 U. S. 106. The rules announced in that decision which are deemed applicable to the instant case are summarized in headnote 5 of the opinion, as follows:

"(1) The question is not of reviewing the decree to determine whether it was right or wrong originally, but is whether, having been made to include the collateral lines of trade with the consent of each defendant, it should now be relaxed because of changed conditions.

(2) The changes that would justify removing this restraint would be such as did away with the reasons upon which it was founded.

(3) In the absence of proof that the reasons for the restraint have vanished, or that the hardships of the decree amount to oppression, the injunction should not be modified."

In the *Swift* case the consent decree, among other things, prohibited the defendants from trading in groceries. Upon an application to modify the decree, the lower Court entered an order modifying the injunction and permitting defendants to trade in groceries. With respect to that action the Supreme Court said:

"The defendants, controlled by experienced business men, renounced the privilege of trading in groceries, whether in concert or independently and did this with their eyes open. Two reasons, and only two, for exacting the surrender of this adjunct of the business were stated in the bill of complaint. Whatever persuasiveness the reasons then bad, is theirs with undiminished force today.

The first was that through the ownership of refrigerator cars and branch houses as well as other facilities, the defendants were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead. There is no doubt that they are equally in that position now. Their capacity to make such distribution cheaply by reason of their existing facilities is one of the chief reasons why the sale of groceries has been permitted by the modified decree, and this in the face of the fact that it is also one of the chief reasons why the decree as originally entered took the privilege away.

The second reason stated in the bill of complaint is the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated.

Whether the defendants would resume that practice if they were to deal in groceries again, we do not know. They would certainly have the temptation to resume it. Their low over-head and their gigantic size, even when they are viewed as separate units, would still put them in a position to starve out weaker rivals."

[Cause of restraint non-existent]

In the instant case the reasons for the restraint have vanished and the decree instead of serving the purpose for which it was originally intended now operates as a hardship upon those still subject to its terms. Changed conditions make it manifest that it is impossible for such defendants as remain subject to the decree to control or monopolize the peanut industry as a whole or any important branch or phase of that industry. To assume that they can do so, is to assume that processors who handle approximately 1/7 of the total crop can so control or affect the remaining *6/7* of the crop as virtually to have a mononpoly of the industry as a whole or in one or more of its important branches. At the time the decree was entered about half the peanuts produced in the United States were produced in the Virginia-Carolina area and defendants handled over half of the crop in that area. Now that are produces substantially less than 1/3 of the total crop and the defendants subject to the decree handle less than half of the Virginia-Carolina crop. At least half of the individual defendants, who were enjoined are no longer in the peanut business. The National Association, the soul of the combine enjoined, went out of existence years ago along with its objectionable constitution, by-laws and rules and the official personnel of the leading, corporations which largely dominated the National Association has changed to a marked extent. In fact, it is not suggested that the new association which came into existence in 1933 for the very purpose of assistance in the Government's program and many of whose members were never members of the old Association, is in any way tainted with the objectionable features or objects of the dissolved National Association.

[Effect of governmental participation]

The Government's Peanut Diversion program, one of the important features of which is to peg the prices of peanuts to the producers, renders more remote and impossible danger of any combine, however great, successfully controlling and depressing prices to the producers.

[Control of prices impossible]

According to the stipulations, there are only 8 cleaners operating 22 plants (all in the Virginia-Carolina area) subject to the decree. In that area 12 cleaners operating 13 plants are not subject to the decree. In the

Southwest area there are 10 cleaners with 14 plants and in the Southeast area 44 cleaners with 57 plants not subject to the decree. In other words, 8 cleaners with 22 plants are subject to the decree while 65 cleaners who operate 76 plants are not subject to it. (Eight plants operated by Columbia Peanut Company in the Southeast area are excluded frm the figures last above given.) The inability of the defendants subject to the decree to control in any material way prices to the consumers is aoparent,

[Hardship of decree]

It is said in the Government's brief that since the decree prohibits nothing which is not condemned by the Sherman Act dissolution of the decree cannot remove the psychological fear of wrongdoing. But this does not fairly describe the situation that confronts the defendants still subject to the decree. In the conduct of their business they are, of course, at all times subject to the provisions of the statute. The statute in general terms declares illegal every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. But many of the acts which defendants are forbidden by the injunction to do are entirely legal and proper under the statute if they are not parts or in furtherance of an illegal contract combine or conspiracy. They are, however, not permissible under the injunction decree. The latter in express terms forbids them although it is clear that the combine went out of existence years ago. Hence, under conditions as they now exist, the injunction has become an instrument of oppression to defendants as members of the industry because they are forbidden to do in any event many acts which their competitors may do with impunity so long as the latter do not enter into a forbidden contract, combine, or conspiracy. That this situation unduly hampers and oppresses *them* in the conduct of legitimate business is apparent from the testimony, and the necessity of modifying the injunction decree in the respects set forth in the decree of April 2, 1934, in order to permit compliance with the N. R. A. Code and the Marketing Agreement further supports this conclusion with respect to the present effect of the decree.