1973

Administrative Law/Legislation (May 1973)

William & Mary Law School

ADMINISTRATIVE LAW/LEGISLATION

Professor Bromberger May 1973

You have just begun work at a large D. C. firm. On the very first day you find on your desk the following questions for your comment.

The instructions are rather vague but you conclude that you are required to raise any relevant issue that you think applies and draw some conclusion as to its possible outcome.

QUESTION 1:

In June of 1971, the Civil Aeronautics Board (CAB) granted Special Tariff Permission Applications by the domestic and foreign air carriers to file student and youth fare tariffs governing international air fares between points in the United States and Europe, as well as Mexico. Each tariff filed by the foreign air carriers was filed pursuant to orders from their respective national governments, while those filed by the domestic air carriers were pursuant to an order of the CAB dated April 15, 1971, Order 71-4-103, Docket 22628, authorizing domestic airlines to establish competitive fares with the foreign airlines. These students and youth fares are substantially less than the regular economy class fares charged by the same airlines. In June of 1971, the Member Carriers of the National Air Carriers Association filed a complaint with the CAB challenging the student and youth fares of some of the defendants. Shortly thereafter, Dennis Eisman, counsel for plaintiffs, wrote the CAB complaining that the student and youth fares constituted unjust price discrimination. To this letter, the CAB responded that it could not deal with the letter as a formal complaint, since copies thereof were not served directly on the named carriers. Plaintiffs thereafter filed suit in this court, challenging these student and youth fares. On September 1, 1971, subsequent to the filing of plaintiffs' complaint, the CAB instituted an investigation of the fares involved in this action "in order to determine if the youth and student fares at issue do constitute an unjust discrimination."

Plaintiffs' challenge to the student and youth fares is based on two separate grounds. Plaintiffs' first cause of action is based on Section 404(b) of the Federal Aviation Act of 1958, 49 USC §1374(b) which provides:

> "No air carrier or foreign air carrier shall make, give or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic, in air transportation in any respect whatsoever, or subject any particular person, port, locality or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice disadvantage in any respect whatsoever."

In an alternative cause of action, plaintiffs challenge the student and youth fares on the ground that such fares constitute a deprivation of their civil rights under 42 USC §1985(3), which provides in pertinent part:

> "if two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Before the court are the motions of defendant airlines to dismiss the complaint for lack of jurisdiction over the subject-matter and for failure to state a claim upon which relief can be granted.

QUESTION 2:

On February 21, 1968, the Department of the Air Force issued an advance synopsis of its plan to procure a weighing scales system for the Air Force Flight Test Center at Edwards Air Force Base, California. The system was to be used to measure and record the weight supported by the main landing gear of the C-5A aircraft. A formal Request for Proposals was subsequently issued on March 22, 1968.

The contract contemplated that the successful proposer would design the system as well as fabricate and install it. For that reason, the Government employed performance rather than design specifications. The Request for Proposals also included general provisions applicable to fixed-price research and development contracts. This combination resulted in numerous questions from prospective proposers, and on April 19, 1968, the Government held a pre-proposal conference to discuss the technical aspects of the system. Thirteen firms attended, including CBE. Each paragraph of the specifications was discussed in detail, and no change was made in the specifications, because all technical questions were answered.

The RFP provided that each proposal would first be evaluated on the basis of its technical sufficiency, without regard to price. If a proposal was found to be technically unacceptable, the Government reserved the right to reject it without further discussion. Paragraph nine of the RFP provided:

> "You are cautioned to carefully review all items, conditions and specifications of the Request for Proposals prior to submission of your proposal. Your proposal should be complete in all details, since evaluation of the proposal will determine whether further consideration will be given to it and whether negotiations will be conducted with you prior to making an award. At his option, the Contracting Officer may consider your original proposal as final without extending the privilege of revising the quotation or conducting any negotiations with any offeror. The term 'negotiation' does not imply that an opportunity automatically exists to submit revisions to your original proposal at will, nor does it imply that the submission of such revisions on a unilateral basis will be considered in the Air Force evaluation process."

Seven proposals were submitted. Each was evaluated by a team of Air Force engineers, which determined that only the proposal of Railweight, Inc., was technically acceptable. The evaluation team rejected CBE's proposal because it displayed "a poor engineering approach," which the evaluators described as follows:

> "The CBE proposal does not show an acceptable approach to the problem of safety as presented in paragraph 6.4.1 and 6.4.2 on page CBE-12. This is totally unsatisfactory from a safety standpoint since the requirements clearly state that the readout console will be located beneath the fuel laden wing of the C-5A, and that a static discharge could cause an explosion when in a fuel-air environment. The CBE proposal does not give any consideration for temperature stabilization of the electronics equipment and does not shown [sic] how the performance criteria of Tr 7.1, 7.2, and 7.3 will be met when the weighing system is subjected to the environmental conditions given in Tr 6.3.1 and Tr 6.3.2. The CBE qualification test plan as required by Special Instructions 3-0 is unacceptable because it offers the Air Force no assurance that the electronics equipment can operate safely prior to delivery to the AFFTC."

In accordance with the conclusions of the evaluation team, the contracting officer on May 21, 1968, issued notices of unacceptable proposals to the six rejected firms. Apparently before receipt of this notice, CBE's representatives went to Edwards Air Force Base on their own initiative for the express purpose of negotiating a contract for the weighing scales system. Upon their arrival, the contracting officer informed them that the CBE proposal had been rejected and that no negotiations were contemplated. However, he decided to have the project engineer explain the reasons for the unacceptability of the proposal. In meetings held May 22 and 23, 1968, the contracting officer and the project engineer gave the representatives of CBE a detailed explanation as to why the

proposal was considered unacceptable.

The contracting officer notified CBE on May 24, 1968, that he was reaffirming his decision to reject its proposal. CBE immediately announced its intention to protest the award, and a formal protest was filed on May 28. Pending resolution of the protest by the General Accounting Office, the contracting officer postponed awarding the contract to Railweight. However, in August, he informed GAO that he could not further postpone the award because any additional delay would prejudice the entire C-5A program. He subsequently awarded the contract to Railweight on August 21, 1968, at a negotiated price of $205,400.

The protests filed by CBE and two other bidders were considered by the Staff Judge Advocate of the Department of the Air Force. In an opinion of July 1, 1968, he recommended that headquarters technical personnel review the unsuccessful proposals and give an opinion as to whether any of such proposals was so technically inferior as to preclude further negotiations. His opinion stated in part as follows:

> "3. In the recent IBM case (47 Comp Gen 29), the Comptroller General said, 'When the application of a mandatory benchmark test requirement results . . . in leaving one proposer, and its price is, initially at least, substantially in excess of the price of another proposer we believe the spirit and intent of 10 USC 2304(g) would not be served without further discussion to determine whether the other proposal can be improved to meet the benchmark requirement.' The facts of the instant case bear striking similarities to the IBM case. In both cases, several contractors submitted proposals, but only one was found to be technically acceptable. Also, in both cases, there was a very considerable difference in price between the sole acceptable proposal (high) and nonacceptable proposals. It is also noteworthy that the technical evaluations in the file, although appearing to be very thorough, nevertheless frequently reach adverse conclusions predicated merely on the failure of the proposers to furnish certain information, and this, on occasion at least, despite the fact that there was no express requirement in the RFP for same." [Pl Ex 1]

Such a review was made and the Comptroller was advised that the CBE proposal failed to provide "for temperature stabilization of the electronics and to show that the electronic equipment could operate safely prior to delivery."

The Comptroller General issued a decision on the protest on November 13, 1968. 48 Comp Gen 314 (1968). CBE's principal contention there, as here, was that its proposal was technically acceptable and that the contracting officer therefore violated a statutory duty to negotiate, expecially since its price proposal was far less than Railweight's. The Comptroller General declined to rule on the technical acceptability of the proposal, however, stating that the resolution of the question required technical judgments beyond the expertise of the General Accounting Office, and that the contracting officer's decision was a discretionary one. Id. at 317-18. The Comptroller's opinion did state that the contracting officer used "poor procurement procedures" because "the RFP failed to state known design requirements with sufficient particularity and also failed to include information concerning evaluation weights and standards." Id. at 319-20. Finally, the Comptroller General held that paragraph nine of the RFP, quoted above, in which the contracting officer reserved the right to deny any proposer the opportunity to negotiate, violated 10 USC §2304(g) and Section 3-805 of the Armed Services Procurement Regulations. Defendant strenuously contests the legal basis of this conclusion, asserting that the contracting officer had a statutory right to employ such a provision in the RFP, and to refuse to negotiate with any offeror. Defendant also contends that, in any event, the contracting officer was not required to negotiate with CBE because its proposal was technically unacceptable.

QUESTION 3:

In April, 1967 the F. T. C. held an investigational hearing and on November 27, 1968, issued its complaint against the petitioners, Marco Sales Company (Marco), an Illinois corporation and Marvin O. Baer, individually, as an officer controlling the acts and practices of the corporation. After a two-

day evidentiary hearing in Chicago, Illinois, on April 15 and 16, 1969, the examiner issued his initial decision and order on June 30, 1969. Cross appeals were taken to the Commission, which heard oral argument on October 16, 1969 with four members sitting. No decision was rendered, and the Chairman of the Commission requested petitioners' permission to participate in the decision. The case was reargued before the full Commission on February 3, 1971 which issued a final order to cease and desist on February 25, 1971, in the form initially recommended by the examiner. The petition for review is granted. We reverse the order and remand to the Federal Trade Commission for further consideration consistent with this opinion.

Marco's method of conducting business is not in dispute. Marco sells articles by means of a lottery or game of change in interstate commerce in various states including Connecticut, New York and Vermont. Marco sends literature through the mail to the public, describing merchandise which is sold through the device of push or punch cards. Typical merchandise includes such items as electric toasters, skillets, percolators, cameras, clocks, flower desk sets, Happy Twin dolls, Jack & Jill dolls, stuffed dogs and thermal blankets. A typical push card bears some 23 masculine and feminine names with columns on the back of the card for writing the name of the purchaser of the push corresponding to the masculine or feminine name selected. Each such card has 23 partially perforated disks which bear one of the names corresponding to those on the list. Concealed within each disk is a number which is disclosed only when the customer pushes the disk from the card. The card depicts a doll or stuffed dog or whatever the prize is, describes it and indicates the cost of each number punched out. The cost ranges from free to a maximum of 39 cents.

The push card also has a master seal under which is one of the names - this seal is not to be removed until the entire card is sold.

The operator of the push cards sells the chances or pushes to his friends, family or fellow workers, and when all have been purchased, he remits the total amount to Marco which sends back two prizes--one for the lucky winner and the other for the operator. The amount received by Marco is equivalent to the selling price of the two articles. There is no claim at all that Marco is engaged in any skulduggery in its operation. The goods are delivered as represented. Marco culls its prospective customers from sales lists which it purchases. It concedes that infants may be on the list, but the Commission concedes that Marco is not deliberately cultivating the youth market. At the hearing the Commission was able to produce a 20 year old male who admitted taking one chance and winning a doll (sex not disclosed). He also confessed to selling a chance to his 13 year old sister-in-law. His wife also testified that she sold some of his chances to minors. There was other evidence to indicate that a few 13 to 15 year olds had been enticed to take pushes or punches.

In its defense, Marco produced two professors from the University of Wisconsin who testified generally that the punch board operation provided a psychological outlet or release from tension which accounted for the widespread popularity of games of chance as marketing devices employed by a great number of giant national corporations. Marco's answer urged that its practices were consistent with the standards of fair dealing of the contemporary economic environment of the United States and therefore not in violation of Section 5 of the Federal Trade Commission Act, that the Commission's action constituted an unreasonably discriminatory application of the Act, depriving them of their liberty and property without due process in violation of the Fifth Amendment of the Constitution of the United States and further that it constituted an invalid exercise of police power by the Commission in violation of the Fifth, Ninth and Tenth amendments to the Constitution of the United States.

QUESTION 4:

The National Labor Relations Board seeks of its bargaining order issued against Commercial Letter, Inc. on March 4, 1971. The Board's decision and order are reported at 188 NLRB No. 132, 76 LRRM 1413. Commercial Letter admits the acts charged but denies that these constitute violative acts because of the invalidity of the representation election certification.

The union won the election in a 7 to 5 vote. Commercial Letter filed objections, complaining of union reimbursement to eight employees for attendance at representation case hearings held prior to the election. The Regional Director conducted an investigation, exonerated the union and concluded that there was no substantial and material factual issue which would entitle the employer to a hearing under the regulations of 29 CFR §102.69(c). Commercial Letter filed exceptions to the Regional Director's decision and requested a hearing. The Board denied the request for review on the ground that it raised no substantial issues warranting review and later granted summary judgment on the unfair labor practice complaint on the basis that there were no facts in dispute and Commercial Letter's attack was on the legal conclusion reached by the Regional Director.

The representation case hearings were held on June 5, and June 19, 1970. The union subpenaed eight employees to appear at one or both of these hearings. There is nothing in the record to indicate the extent to which these employees testified at the hearing except the ambiguous statement contained in the Regional Director's Supplemental Decision and Certificate of Representation that "some of them testified." This statement could easily be read to mean that not all of them testified. These employees were paid various sums of money by the union allegedly in reimbursement for wages lost while attending the hearings. Six of the employees were paid on or about July 21, 1970, the seventh was paid on or about July 28, and the eighth was paid on the evening of August 4 (the evening before the scheduled representation election) by a check, postdated to August 5, 1970. The Regional Director found that non of the employees were paid in excess of what they would have earned had they worked instead of attending the hearing; as to the delay in paying the eighth employee, he found no intent to influence the employee's vote by the election eve postdated check in the amount of $54.78.

Question 5.

Plaintiffs Jerome S. Kalur and Donald Large are consistent users of the Grand River in Northeastern Ohio. They use the river for numerous conservational and recreational activities. This suit is brought by them on behalf of all persons and conservation groups that are similarly situated. Defendants Resor, Ruckelshaus, and Clarke are duly appointed United States Government employees and are respectively, Secretary of the Army, Administrator of the Environmental Protection Agency, and Chief of Engineers for the Army Corps of Engineers.

The suit requires the interpretation of the Rivers and Harbors Act of 1899, Section 13 (Refuse Act). This section prohibits the discharge of refuse into any navigable water, or tributary of any navigable water. The same section provides that the Secretary of the Army may permit the deposit of "refuse" in navigable water. In 1971, pursuant to Executive Order Number 11574, the Corps of Engineers, Department of the Army, promulgated regulations covering the issuance of these permits. These regulations included the power to issue permits to dump "refuse" into navigable waters of the United States and into any tributary where its flow would reach a navigable water.

Plaintiffs aver that the defendants have exceeded their statutory authority, and continue to do so, in issuing permits under the terms of these regulations. Plaintiffs claim that the defendants have absolutely no authority or right to order the issuance of permits do deposit "refuse" matter into non-navigable waterways of the United States and the Grand River of Ohio in particular.

In addition to the above, plaintiffs complaint alleges a further violation of environmental laws on the part of defendants. The National Environmental Policy Act states that all agencies of the federal government shall . . . "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official" on the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented. This Act, the plaintiffs state, is subverted and violated by the regulations issued by the Corps of Army Engineers wherein they exempt the Corps from making such a detailed statement in all cases where the question is solely one of water quality.

The defendants deny that they have acted in excess of their statutory authority or in violation of the National Environmental Policy Act. There being no questions of fact in dispute the parties have briefed the issues of law. These issues are now before this court for determination on cross motions for summary judgment. It is the finding of this court that the defendants have acted in excess of their statutory authority and also, in violation of the National Environmental Policy Act.

"It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any or description whatever. . . , into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, . . . And provided further, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

Question 6.

Under the Commission's table of television allocations, 47 CFR § 73.606 (1971), Stations WDBJ-TV, WSLS-TV and WRFT-TV(UHF) operate on Channels 7, 10 and 27 respectively in Roanoke, Virginia, a city of approximately 100,000 nestled in the mountainous terrain of western Virginia. WDBJ-TV is an affiliate of the Columbia Broadcasting System and WSLS-TV is affiliated with the National Broadcasting Company. Intervenor WRFT-TV, a considerably smaller operation, began broadcasting over Channel 27 in March 1966 as a primary affiliate of the American Broadcasting Company in Roanoke. Because of the limited scope of WRFT-TV's technical facilities, however, the station has encountered continuous and substantial financial difficulties ever since its inception. As a result, its impact on the existing competitive structure of the local broadcast market has been minimal.

Approximately 45 miles east of Roanoke is Lynchburg, Virginia, a community of approximately 55,000 people, where appellant WLVA-TV, serving as Lynchburg's only operating television station, broadcasts on VHF Channel 13 as an affiliate of the American Broadcasting Company. Although the Commission's table of allocations treats Roanoke and Lynchburg as separate communities, the spacing is such that WSLS-TV and WDBJ-TV in Roanoke and WLVA-TV in Lynchburg can provide technically acceptable service to both communities. Roanoke and Lynchburg are therefore considered a single television market (the 67th largest in the nation) by the major audience measurement firms (American Research Bureau and A.C. Nielson Company), the national television networks, national television advertisers, and the Research and Education Division of the Commission's Broadcast Bureau.

As a result, WLVA-TV competes for national and regional advertising with Roanoke television stations WDBJ-TV and WSLS-TV. The technical facilities of WSLS-TV and WDBJ-TV, however, are superior to those currently employed by WLVA-TV. The two Roanoke VHF stations transmit from antennas located on Poor Mountain, situated 13 miles southwest of Roanoke, with an effective radiated power of 316 kw and an antenna height of 2,000 feet. WLVA-TV's antenna is located on Johnson Mountain, approximately 17.5 miles southwest of Lynchburg, and operates with an effective radiated power of 316 kw and an antenna height of only 1,095 feet. Thus while WDBJ-TV and WSLS-TV are able to reach 543,000 and 581,000 television homes respectively, WLVA-TV's overall coverage is 326,000, or approximately 60 per cent of that attained by the two major Roanoke stations.

Despite this situation, however, WLVA-TV managed to garner a modest yet consistent profit until 1966. In that year the Evening Star Broadcasting Company, which had purchased the station in 1965 and transferred it to a wholly-owned subsidiary in 1966, made two decisions intended to improve WLVA-TV's competitive position vis-a-vis its Roanoke competitors. First, the Evening Star made sizable capital outlays and incurred sharply increased operating costs in an effort to upgrade the station's physical plant and technical equipment and to improve its public service programming. Initially, these increased expenditures produced substantial net operating losses and negative cash flows, but as the beneficial effects of these improvements began to take root, revenues gradually increased with the result that WLVA-TV's cash flow has increased from a negative $19,228 in 1967 to a positive $48,677 in 1968, and 9.1 per cent of total revenues in 1969.

On November 4, 1966, the Evening Star launched the second part of its drive to improve WLVA-TV's competitive standing in the Roanoke-Lynchburg market. On that date, WLVA-TV applied to the Commission for authority to move its facilities 17.5 miles to the northwest, to raise its antenna 1,250 feet, and for waiver of the Commission's spacing requirements. The proposed transmitter site would be located atop Flat Top Mountain, 17.4 miles from Roanoke and 27.9 miles from Lynchburg. If granted, this modification would enable WLVA-TV to improve its existing signal over the areas it presently serves as well as to extend its Grade B coverage to reach a sizable audience west of Roanoke not presently served by the Lynchburg station.

WLVA-TV's application was opposed by WRFT-TV in Roanoke, by permittees of two Charlottesville UHF stations, and by the Association of Maximum Service Telecasters, Inc. The matter was designed for hearing on nine issues, including "whether a grant of the application would impair the ability of authorized and prospective UHF television broadcast stations in the area to compete

effectively, or would jeopardize, in whole or in part, the continuation of existing UHF television service." WLVA, Inc., 15 FCC 2d 757, 764 (1968). On November 24, 1969, the hearing examiner issued his initial decision in which he recommended denial of WLVA-TV's application. The examiner concluded that a grant would have an adverse impact on WRFT-TV and that such impact would be detrimental to the public interest. Exceptions were filed and the matter is presently pending before the Commission's Review Board.

Meanwhile, on June 10, 1969, intervenor WRFT-TV applied to the Commission for modification of its own facilities. Roanoke Telecasting Corporation was organized in 1965 to establish WRFT-TV as an affiliate of the American Broadcasting Company in Roanoke. WRFT-TV commenced operations in March 1966 and was granted an hourly network rate of $75 based on predicted ultimate delivery of 10,000 to 18,000 prime time homes. Because of the modest nature of WRFT-TV's technical facilities, however, the station failed even to approach its projected coverage and the hourly network compensation was therefore discontinued in November 1967 when WRFT-TV was delivering only 1,000 prime time homes. The station's financial picture is dismal. WRFT-TV suffered a net cash loss of $41,397 during the first year of operation, $46,729 in 1967, and $52,740 for the first eight months of 1968. By June 1969 the station had lost over $200,000 and the indebtedness has since swelled to over $450,000 and is increasing at the rate of $10,000 per month.

In an effort to rectify this situation, WRFT-TV filed its application with the Commission to expand its technical facilities and to move its transmitter to Poor Mountain, the location of WDBJ-TV and WSLS-TV. WRFT-TV presently operates at a site six miles west of Roanoke with an effective radiated power of 21.4 kw and an antenna height of 410 feet. In its application, it proposes to broadcast with an effective radiated power of 250 kw and an antenna height of 2,010 feet, increases of 228.6 kw and 1,600 feet respectively. The new facilities would enable WRFT-TV to cover 46 per cent of the homes able to receive UHF service in the Roanoke-Lynchburg market, with the result that WRFT-TV would duplicate WLVA-TV's ABC network programming in approximately an additional 25 per cent of WLVA-TV's present coverage area.

On July 16, 1969, WLVA-TV filed a petition in support of WRFT-TV's application or in the alternative a petition to deny, arguing that "the public interest compels the grant of both its application and the application of WRFT-TV." Because of the detrimental competitive impact a grant of only WRFT-TV's application allegedly would have on WLVA-TV, however, WLVA-TV urged that "should the Commission deny its application, the application of WRFT-TV must also be denied." To support its petition WLVA-TV incorporated by reference relevant portions of the evidentiary record compiled in the hearing on its own application. It did not, however, submit additional data to substantiate its claim that a Carroll hearing should be held to determine whether the competitive effect of a grant of WRFT-TV's application would cause an overall derogation of service to the public.

After issuance of the hearing examiner's initial decision on WLVA-TV's own application, appellant filed another petition with the Commission requesting consolidation of consideration of WRFT-TV's application with its own on the ground of alleged economic mutual exclusivity of the two applications. WLVA-TV contended that it would be denied its Ashbacker rights unless this petition was granted.

The Commission, in a memorandum opinion and order released September 9, 1970, found that WLVA-TV had not pleaded sufficient factual data to raise a Carroll issue and that a consolidated comparative hearing was not required. Accordingly, the Commission, without hearing, granted WRFT-TV's application and denied WLVA-TV's petition to deny and petition for consolidation.

Question 7.

May Department Stores (Mays) operates a chain of department stores in Southern California - one major store in downtown Los Angeles, seventeen branch stores in that part of the state, and a service facility three miles from the downtown store.

The service facility is the subject of these proceedings. It consists of five buildings making up one complex serving the retail stores. Goods are received, warehoused, and distributed. There are also processing activities in a variety of workrooms handling furniture, drapery, upholstery, carpeting, clothing alterations, etc. The workrooms are on several floors of the buildings comprising the facility, adjacent to merchandise storage and warehousing areas.

The Board has certified a unit of "warehouse employees," essentially those personnel who check merchandise in and out and move it around the facility. Excluded are the workroom employees.

The history of attempts to unionize the service facility employees is brief. In May of 1967, Teamsters Local 986 filed a petition pursuant to Section 9(c) of the Act, seeking a Board election among employees at the facility. The union did not contest May's position that the unit should include all workroom employees. The regional director ruled that the unit appropriate for collective bargaining was that contended for by Mays and sought by the union, even though the alterations workroom employees to be included were then located outside the facility. The alterations workroom was transferred to the facility in September of 1967.

The representation proceeding initiated by Teamsters Local 986 ultimately culminated in an election. The union failed to receive a majority of the valid ballots cast and the results of the election were certified.

In November 1969, Teamsters Local 196 filed a second amended petition for election, seeking a bargaining unit to include warehouse employees but excluding the workroom employees. After a hearing, and over the protest of the company, the regional director certified the smaller unit now requested by the union.

An election was ordered in January 1970, for the unit as sought by the union and it received a majority of the valid ballots cast. The result of the election showed no overwhelming union sentiment even within the fragment unit, the union winning by the narrow margin of 72 to 65.

In order to secure judicial review, Mays refused to bargain with the union and the latter filed refusal to bargain charges. A complaint issued; Mays answered with an admission that it had refused to bargain, but pleaded affirmatively the inappropriateness of the bargaining unit. Upon motion of the General Counsel, summary judgment was granted and Mays held in violation for refusal to bargain with the union.

Question 8.

Plaintiffs seek damages and injunctive relief based on an alleged conspiracy by defendants in violation of federal and state antitrust laws. Essentially, they assert that the defendants conspired to keep plaintiffs' drug Cothyrobal off the interstate market and out of competition with Choloxin, a similar drug sold by defendants Baxter and Travenol, by influencing the Food and Drug Administration to deny fair consideration of the new drug applications filed by plaintiffs for Cothyrobal. The plaintiffs allege that defendants (who include an official of the FDA) carried out this conspiracy by suppressing, concealing and misconstruing information concerning the two drugs before the FDA; by arranging for the employment as a consultant to the FDA of a medical doctor who had a financial interest in Baxter, which was seeking approval of its own cholesterol-lowering drug Choloxin; by applying an unfair standard in judging Cothyrobal; and by misrepresenting the safety and efficacy of Cothyrobal.

I. Procedural Background

The plaintiff Vascular Pharmaceutical Company filed with the FDA a series of new drug applications for approval of interstate sale of Cothyrobal, followed either by withdrawal or abandonment of such applications before final agency action had taken place.

The first new drug application (No. 11-311) for Cothyrobal was filed by Vascular in 1960, but was withdrawn without prejudice to subsequent application. The next such filing (No. 13-118) in 1961 was found by the FDA to be incomplete. In rejoinder, Vascular requested a filing over protest and demanded a hearing, which the FDA granted. During the course of the hearing commencing 18 November 1963, Vascular agreed to provide certain minor information clarifying statements in the application, while the FDA promised to cooperate and consult on the application in order to expedite the clarification it had requested of Vascular. The hearing was thereupon terminated and Vascular withdrew its application. Shortly afterwards, Vascular submitted another new drug application (No. 15-497), containing what plaintiffs considered was the information the FDA had requested. In September 1964, however, the FDA revoked the investigational new drug exemption it had earlier granted Cothyrobal on the grounds that the drug was not clinically safe.

It was not until 8 January 1969 that the FDA finally announced that it proposed to disapprove the new drug application for Cothyrobal. Plaintiffs protested this action and demanded a hearing. A pre-hearing conference was scheduled for 23 April 1969, with the hearing itself set for 19 May. However, on 22 April the plaintiffs withdrew their new drug application for Cothyrobal without prejudice to a subsequent filing. The Department of Health, Education and Welfare hearing examiner then entered an order dismissing the proceedings as moot on the basis of plaintiff's withdrawal of their application.

Plaintiffs brought suit 6 July 1970 in United States District Court, charging the defendants with conspiring in violation of federal and state antitrust laws to keep Cothyrobal from being approved by the FDA for interstate sale, thereby favoring Choloxin, and seeking damages and injunctive relief.

Question 9.

During the last week in October, 1969, Everett began work under a contract with United Gas Pipeline Company for the construction of a compressor and meter station several miles north of Opelousas, Louisiana. Gilco, a local contracting firm, provided heavy equipment and operators for the preliminary clearing and grading of the site. Because Everett was an out-of-state, Houston-based company it was not a signatory to a master working agreement between area contractors and Local 198, by the terms of which all job vacancies requiring welders and other allied craftsman within the union's trade jurisdiction would be filled by exclusive referral through the union's hiring hall. As a result Ward and several other nonresident, nonunion welders were hired directly by Thomas Haynie, Everett's job supervisor, sometime in early November.

At some time during the first week in November three unemployed local workers passed the construction site and learned that Ward and the other welders had been imported for the job from out-of-state. One of these men then notified local union representatives, which resulted in a visit to the project by John Trotti, assistant business manager for Local 198, and Bill West, business manager for Ironworkers Local 623. Trotti first asked Haynie whether the work had been bid in as a union job and received a negative answer, after which the three men held a short meeting in Haynie's office. Following the meeting Haynie asked Ward whether he and the other men had a union book. Ward replied that he was not certain about the others but that he did not.

On November 10 Haynie met with union officials at the office of the local sheriff for the purpose of negotiating a settlement of the dispute. During this meeting, Haynie told Albert Durbin, Local 198's business manager, that he would hire all unemployed local welders who were qualified for the job. Durbin replied that no workers could be referred through the union unless an agreement were signed. Haynie stated that he had no authority to sign such an agreement but that he would contact Claude Everett, the president of the company.

On the following Friday, November 14, after employees of Everett and Gilco had started work, between eight and ten men (including Local 198's Trotti) established picket line at the gate entrance to the site, but they dispersed before quitting time, and there were no incidents. However, on Monday morning approximately 50 to 60 pickets arrived early and blocked the gate. Haynie sought the assistance of the sheriff, who went out and talked to the pickets afterward informing Haynie that they were not going to interfere with the progress of the work. When the sheriff left Trotti told Haynie that nothing had changed, and the picketing continued. None of Everett's employees were permitted to pass.

Haynie then telephoned Claude Everett in Houston and explained the situation to him. Everett flew to Opelousas that night and arranged for Gil Cortez, Gilco's president, to act as "management and personnel consultant" for Everett in its dealing with the union. Cortez was a long-time resident of the area, knew most of the disputants, and was intimately concerned inasmuch as his equipment operators on the United Gas job were not union members. On Tuesday night, November 18, during an informal meeting at the sheriff's office between Everett, Cortez, Trotti and another union official, the union stated that its primary concern was with two crafts, welders and pipefitters, and that if the dispute could be settled there would be no further picketing or work stoppages because of the nonunion status of Gilco's employees. A second meeting the next morning resulted in an oral agreement between Everett, Gilco and the union which provided that all welders and pipefitters for the United Gas job would be hired through the union's referral system and that all Everett welders who did not reside in the locality (with Local 198's territorial jurisdiction) would be fired. Cortez was told that the non-resident employees would not be given work permits by the union because there were already too many unemployed local people. Haynie discharged Ward on the following day, telling him that Everett was "going to hire union personnel, and they won't let us let you stay on the job, so we got to fire you." Two other nonunion welders were discharged at about the same time.

Cortez testified that he "thought" the three men thereafter referred by the union to fill the vacancies were union members, although he was not absolutely certain. However, there is dispute that one of the welders whose employment was terminated, at the behest of the union was replaced by a man who lived in the same town - Eunice, Louisiana.

The only issue raised by Ward's petition for review involves purely and simply a question of fact: was he discharged for the purpose of replacing him with a union member, as found by the trial examiner, or for the purpose of replacing him with an area resident, as found by the Board.