6. That they print or bind all or a portion of the copies listed in the contract of the first edition of an author's book: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that said books are printed or bound as represented.

7. That books published by respondents are reviewed by critics or columnists, or in newspapers, magazines, radio, TV or other reviewing media: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder to establish that the said books have been reviewed as represented.

8. That respondents offer and enter into contracts or agreements with authors of manuscripts, whether or not determined by them to have unusual possibilities of success or for any other reason, whereby respondents agree to assume all or a portion of the publication, promotion or distribution costs or to compensate the author on the basis of the number of books sold: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that they make such offers and enter into contracts or agreements as represented and that a bona fide effort is made to make such offers and enter into such contracts with each of the authors responding to such advertising representations.

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

IN THE MATTER OF

COMMUNITY BLOOD BANK OF THE KANSAS CITY AREA, INC., ET AL.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 8519. Complaint, July 5, 1962—Decision, Sept. 28, 1966**

Order requiring a community blood bank, an area hospital association, its hospital members, and hospital pathologists, all in the Kansas City area,

*The Court of Appeals, Eighth Circuit, 405 F. 2d 1011 (1969) (8 S.&D. 865), held that evidence established respondents, a hospital association and a blood bank association, were nonprofit corporations and exempt from provisions of the Federal Trade Commission Act.

to cease restraining interstate commerce in human whole blood by restricting any commercial blood bank from supplying any hospital or other user, or preventing any such user from receiving such blood, or excluding any such blood bank from membership in any association, or hindering the carrying out of contracts for the supply of blood.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporations, and individuals named in the caption hereof; and more fully described hereinafter; have been, and are now violating the provisions of said Act and that a proceeding in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Community Blood Bank of the Kansas City Area, Inc., hereinafter sometimes referred to as Community is a corporation organized and existing under and by virtue of the laws of the State of Missouri with its home office and principal place of business located at 4040 Main Street, Kansas City, Missouri.

The governing body of Community is composed of five officers, twelve board members, and a corporate body of thirty-nine. The corporate body is composed of thirteen (13) individuals chosen from the medical profession in the Kansas City area, thirteen (13) representatives of hospitals in the Kansas City area selected by the Board of Directors of the Kansas City Area Hospital Association and thirteen (13) representatives chosen from outside the medical community and commonly known as public members. Eleven (11) of the medical members are elected by the county medical societies in the Kansas City area which includes Kansas City, Missouri and Kansas City, Kansas. These eleven electees choose two more medical members. The thirteen public members must be approved by the medical and hospital members and elected by members of the corporation. Each of these groups of thirteen chooses four from its group to be on the Board of Directors which consists of twelve members. The Board of Directors annually elects officers. Approximately one third of the positions on the governing body become vacant each year and new members are chosen to fill these vacancies.

Respondents Perry Morgan and W. W. Henderson, individually, and as administrative director and business manager, respectively, of respondent Community, are managing officials and have

held these positions for the past several years and as such are responsible for the administration of the Community's affairs including the giving of direction to the policies and programs of the respondent Community. They have their offices at 4040 Main Street, Kansas City, Missouri.

The parties respondent, named in the caption hereof individually and as officers, directors and members of Community served in those capacities during 1961 and they, as well as their predecessors and successors, directed, controlled and were responsible for the policies, acts and practices of said corporate respondent including those hereinafter alleged as subject of this complaint.

During the past several years the officers and directors of respondent Community, as well as its membership, have varied from year to year, thus making it impracticable to name all such officers, directors, and members specifically as of a given date. The entire membership can be adequately represented by those officers, directors and members named as respondents. Accordingly, the Commission names and includes as respondents in this proceeding the aforementioned individuals, both individually, as members, officers and directors, and as representative of the entire membership of said respondent and all such members not named specifically are therefore made parties respondent herein as though they had been named individually.

The parties respondent named in the caption hereof individually, as officers, directors and members, and representatives of the entire membership of Community, were, during 1961, and are now, variously located as follows:

Adolph R. Pearson, Swedish-American Saving & Loan Association, 1010 Baltimore Ave., Kansas City 5, Missouri.

Walter V. Coburn, Bethany Hospital, 51 North 12th Kansas City 7, Kansas.

Hilliard Cohen, Menorah Medical Center, 4949 Rockhill Road, Kansas City 10, Missouri.

Carroll P. Hungate, 6845 Oak, Kansas City 13, Missouri.

Gilbert C. Murphy, First Presbyterian Church, Gardner, Kansas.

Robert A. Molgren, St. Luke's Hospital, 4400 J. C. Nichols Parkway, Kansas City 10, Missouri.

John Murphy, Tucker, Murphy, Wilson & Siddens, 818 Grand Ave., Suite 831, Kansas City 6, Missouri.

Marjorie Sirridge, 258 Brotherhood Bldg., 754 Minnesota Ave., Kansas City 1, Kansas.

Arch E. Spelman, Smithville Community Hospital, Smithville, Missouri.

Meyer L. Goldman, Beacon Printing & Publishing Co., 1825 Harrison, Kansas City 8, Missouri.

James T. Sparks, Ford Motor Company, P.O. Box 1008, Kansas City 41, Missouri.

Robert F. Zimmer, American Oil Company, Sugar Creek Refinery, Sterling & Standard Sts., Kansas City 21, Mo.

Respondent Kansas City Area Hospital Association, hereinafter sometimes referred to as respondent Association, is a corporation organized and existing under and by virtue of the laws of the State of Missouri with its office and principal place of business located at 3637 Broadway, Kansas City, Missouri. Respondent is a membership corporation and its membership is composed of hospitals located in the Kansas City area.

Respondent Baptist Memorial Hospital is a corporation organized and existing under and by virtue of the laws of the State of Missouri with its home office and principal place of business located at 6601 Rockhill Road, Kansas City 31, Missouri.

Respondent Menorah Medical Center is a corporation organized and existing under and by virtue of the laws of the State of Missouri with its home office and principal place of business located at 4949 Rockhill Road, Kansas City 10, Missouri.

Respondent Sisters of Charity of Leavenworth is a corporation organized and existing under and by virtue of the laws of the State of Kansas with its home office and principal place of business located at Xavier, Leavenworth County, Kansas, and doing business as Providence Hospital at 1818 Tauromee Avenue, Kansas City 2, Kansas.

Respondent Susan Jenkins, individually, and as Executive Director of respondent Association has her office at 3637 Broadway, Kansas City, Missouri. She has held this position for the past several years and as such she is responsible for the general administration of Association affairs and for giving direction to the policies and programs of the respondent Association.

The parties respondent, named in the caption hereof individually and as officers and directors of the Association served in those capacities during 1961 and they as well as their predecessors and successors, directed, controlled and were responsible for the policies, acts and practices of said corporate respondent including those hereinafter alleged as subject of this complaint.

They were, during 1961, and are now, variously located as follows:

James D. Marshall, 1016 Baltimore Avenue, Kansas City, Missouri.

Arch E. Spelman, Smithville Community Hospital, Smithville, Missouri.

Tom J. Daly, 2105 North 13th St., Kansas City 4, Kansas.

Thomas M. Johnson, 310 West 47th Street, Kansas City, Missouri.

Russell H. Miller, University of Kansas Medical Center, 39th and Rainbow Boulevard, Kansas City 12, Kansas.

David T. Beals, First National Bank, 14 West 10th St., Kansas City 5, Missouri.

Nathan J. Stark, Hallmark Cards, Inc., 25th and McGee Trafficway, Kansas City 41, Missouri.

Abraham Gelperin, Neurological Hospital, 2625 West Paseo, Kansas City 8, Missouri.

Mack Herron, Olathe Community Hospital, Santa Fe at Cooper, Olathe, Kansas.

James R. Rich, North Kansas City Memorial Hospital, 2800 Hospital Drive, North Kansas City 16, Missouri.

Sister Michaella Marie, St. Joseph Hospital, East Linwood Boulevard, Kansas City 28, Missouri.

William C. Mixson, 4635 Wyandotte St., Kansas City 12, Missouri.

E. B. Berkowitz, Tension Envelope Corporation, 19th and Campbell Street, Kansas City 8, Missouri.

T. R. Butler, License Department, City Hall, Kansas City, Kansas.

Maurice Johnson, First National Bank, 14 West 10th St., Kansas City 5, Missouri.

Walter N. Johnson, R.L.D.S. Auditorium, River and Walter Streets, Independence, Missouri.

Miller Bailey, 2810 West 66th Terrace, Shawnee Mission, Kansas.

Walter A. Reich, A. Reich & Sons, Inc., 1414 Wyoming, Kansas City, Missouri.

Ralph R. Coffey, 1324 Professional Building, Kansas City 6, Missouri.

Harry M. Walker, Smithville Community Hospital, Smithville, Missouri.

During the past several years the officers and directors and

members of respondent Association have varied from year to year by the addition and withdrawal of members, so that all of the members of said Association at any given time cannot be properly described herein for the purpose of naming them as respondents without considerable inconvenience and delay, and also said respondent membership constitutes a class so numerous as to make it impracticable, without considerable inconvenience and delay, to name them all as respondents herein; wherefore, the respondents hereinbefore named as respondents, as such officers, directors, and members, are also made respondents as generally and fairly representative of and as representing all of the members of said respondent Association, including those members not herein specifically named.

Respondent O. Dale Smith, individually and as pathologist for Baptist Memorial Hospital has his office at the Baptist Memorial Hospital, 6601 Rockhill Road, Kansas City 31, Missouri.

Respondent Hilliard Cohen, individually, as a pathologist for Menorah Medical Center and as second vice-president of respondent Community, has his office at the Menorah Medical Center, 4949 Rockhill Road, Kansas City 10, Missouri.

Respondent Evelyn Peters, individually and as a pathologist for Menorah Medical Center, has an office at the Menorah Medical Center, 4949 Rockhill Road, Kansas City 10, Missouri.

Respondent D. A. Hoskins, individually and as a pathologist for Osteopathic Hospital, has his office at the Osteopathic Hospital, 926 East 11th Street, Kansas City 6, Missouri.

Respondent William J. Sekola, individually and as a pathologist for Osteopathic Hospital, has his office at the Osteopathic Hospital, 926 East 11th Street, Kansas City 6, Missouri.

Respondent Victor B. Buhler, individually and as a pathologist for Queen of the World Hospital has his office at the Queen of the World Hospital, 3210 East 23rd Street, Kansas City 27, Missouri.

Respondent Russell W. Kerr, individually and as a pathologist for St. Joseph's Hospital, has his office at the St. Joseph's Hospital, 2510 East Linwood Boulevard, Kansas City 28, Missouri.

Respondent Frank A. Mantz, individually and as a pathologist for St. Joseph's Hospital, has his office at the St. Joseph's Hospital, 2510 East Linwood Boulevard, Kansas City 28, Missouri.

Respondent Ferdinand C. Helwig, individually and as a pathologist for St. Luke's Hospital, has his office at St. Luke's Hospital, 4400 J. C. Nichols Parkway, Kansas City 11, Missouri.

Respondent David M. Gibson, individually and as a pathologist

for St. Luke's Hospital, has his office at St. Luke's Hospital, 4400 J. C. Nichols Parkway, Kansas City 11, Missouri.

Respondent Angelo Lapi, individually and as a pathologist for St. Mary's Hospital, has his office at St. Mary's Hospital, 101 Memorial Drive, Kansas City 8, Missouri.

Respondent L. R. Moriarty, individually and as a pathologist for St. Mary's Hospital, has his office at St. Mary's Hospital, 101 Memorial Drive, Kansas City 8, Missouri.

Respondent Jack H. Hill, individually and as a pathologist for Trinity Lutheran Hospital, has his office at Trinity Lutheran Hospital, 31st and Wyandotte Streets, Kansas City 8, Missouri.

Respondent G. M. Bridgens, individually and as a pathologist for the Independence Sanitarium and Hospital, has his office at the Independence Sanitarium and Hospital, 1509 West Truman Road, Independence, Missouri.

Respondent William McFee, individually and as a pathologist for North Kansas City Memorial Hospital, has his office at the North Kansas City Memorial Hospital, 2800 Hospital Drive, North Kansas City 16, Missouri.

Respondent Ralph J. Rettenmaier, individually and as a pathologist for Providence Hospital, has his office at the Providence Hospital, 1818 Tauromee Avenue, Kansas City 2, Kansas.

Respondent Robert A. Molgren, individually and as executive director for St. Luke's Hospital, has his office at St. Luke's Hospital, 4400 J. C. Nichols Parkway, Kansas City 11, Missouri. In his capacity as executive director he has overall direction of the policies and programs of St. Luke's Hospital.

Respondent A. Neal Deaver, individually and as administrator of Independence Sanitarium and Hospital, has his office at the Independence Sanitarium and Hospital, 1509 West Truman Road, Independence, Missouri. In his capacity as administrator he has overall direction of the policies and programs of Independence Sanitarium and Hospital.

PAR. 2. Pathologists are medical doctors with special knowledge and training in pathology. They are employed by the various hospitals in the Kansas City area on a salary or commission basis to direct and supervise certain laboratory operations which include the procurement, handling, testing and transfusion of blood at the hospitals where the pathologists are employed. In said capacity the pathologist receives the orders for a needed blood supply and gives instructions and orders for its procurement, including source, and delivery in the amount needed for a particular patient

at the hospital. The medical doctors responsible for the care of patients at the hospital rely on the pathologist in securing this blood supply as do the administrative officials of the hospital.

There are about twenty-six pathologists employed at hospitals in the Kansas City area. They are members of the Society of Pathologists for the Kansas City area. The blood banks operated by the hospitals in the area, prior to affiliation with respondent Community, were under the supervision of the pathologists employed by the hospitals. The pathologists in the Kansas City area serve as medical consultants and on an advisory committee to respondent Community. The respondent pathologists and other pathologists not named serve in a rotation system on said committee.

PAR. 3. Since World War II the use of human blood for transfusions has become an increasingly important factor in the care and treatment of the sick. During 1960 more than 5½ million pints of blood were used for such transfusions. The need for such volume has resulted in the establishment of blood banks to maintain and furnish a constant, adequate and safe supply.

A blood bank collects, classifies and stores blood which may be so stored, under refrigeration, for a period not to exceed 21 days. There are different blood bank sources in the United States, some of which may be described as:

(a) Hospital blood banks: Those operated by hospitals primarily to meet their own needs and, occasionally, to supply the needs of other hospitals in their areas. Today, there are more than 2,000 hospital blood banks in the United States.

(b) Community blood banks: These usually are nonprofit facilities locally organized and controlled to serve the needs of a majority or of all of the hospitals in a community. Today, there are more than 100 community blood banks in the United States.

(c) Red Cross: The blood bank donor program of the American National Red Cross is administered through 55 regional centers. During 1957 the Red Cross provided 47.6% of all blood used for transfusions.

(d) Others: Blood bank programs not patterned within the foregoing categories, such as privately owned blood banks.

The Public Health Service Act, approved July 1, 1944, (58 Stat. 682), requires that a blood bank obtain a license issued by the United States Department of Health, Education and Welfare before it may transport citrated whole blood (human) in interstate commerce. The National Institutes of Health is the agency within the Department of Health, Education and Welfare which

has direct supervision and control over the inspection of blood banks and the issuance of licenses permitting the transportation of blood in interstate commerce.

The American Association of Blood Banks, hereinafter sometimes referred to as AABB, a national organization of blood banks was formed in 1947. The AABB provides technical information on blood banking, encourages research, conducts an inspection and accreditation program for blood banks, sponsors reference laboratories to provide local banks with assistance on serological problems, and conducts a national clearinghouse program to facilitate the exchange of donor replacement credits on a nationwide basis.

The AABB Clearinghouse Program employs a reciprocity system of making returns of blood to a blood bank from any blood bank in the county in payment, or as credit, for blood used in transfusing a patient in any other section of the country. When a blood bank accepts a replacement donation for a patient whose transfusion has been supplied by a facility in another location it forwards a reciprocity credit to the district clearinghouse office of the AABB where the transaction is recorded and credit issued to the account of the supplying bank.

The AABB National Clearinghouse program is conducted through five district clearinghouses in the United States. The Kansas City area is within the jurisdiction of the North Central Blood Bank Clearing House, hereinafter sometimes referred to as NCBBCH. There are in excess of 560 blood banks and drawing stations participating in this clearinghouse program which provides such services for more than 2300 hospitals in the United States. One of the requirements for membership of a blood bank in the AABB is that it be endorsed by or acceptable to the local medical society.

The clearinghouse program of AABB facilitates the movement of blood from one bank to another in commerce. It is a source for information at all times for those seeking blood supplies and a means through which blood is bought and sold by blood banks and hospitals.

PAR. 4. The main sources of supply of human blood for the metropolitan Kansas City area from 1955 to 1958, other than the National Red Cross, were the blood banks operated by the various hospitals in the area and blood bank which started operating as the Jackson County Blood and Plasma Service and later became known as the Mid-West Blood Bank and Plasma Center. In 1958

two additional blood banks were established in the Kansas City area the World Blood Bank, Inc., and the respondent Community. Respondent Community is a blood bank operator organized to collect, process and supply human blood to hospitals in the Kansas City Area. Respondent Community, formerly known as the Jackson County Community Blood Bank, began operating on April 3, 1958. When respondent Community first began its operation, about six of the major hospitals in the area discontinued their blood banks and turned the function over to Community. Since that date twenty-six more area hospitals have signed agreements with Community under which blood is supplied by Community. Prior to the time the hospitals in the area entered into agreements with respondent Community, many of the hospitals operated their own blood banks and there was some transferring of blood between such blood banks to meet the needs of the different blood banks and hospitals. Respondent Community holds a license issued by the National Institutes of Health of the United States Department of Health, Education, and Welfare, and is a member of the NCBBCH and AABB.

Hospitals in both the States of Missouri and Kansas are affiliated with respondent Community and respondent Community ships blood to each of these hospitals as often as blood is required. In addition respondent Community ships blood to other blood banks outside the State of Missouri and on occasion also purchases blood from blood banks outside the State of Missouri, generally through the NCBBCH. There has been and there now is a constant current and course of trade and commerce in blood between respondent Community and other blood banks and hospitals.

PAR. 5. The Midwest Blood Bank and Plasma Center, Inc., hereinafter sometimes referred to as Midwest, is also a blood bank operator in the Kansas City area. It began operating its blood bank in May of 1955 at 2904 Troost Avenue, Kansas City, Missouri, as a partnership under the name of Jackson County Blood and Plasma Service but soon thereafter changed the name to Midwest Blood Bank and Plasma Center. The company was incorporated July 1, 1958, in the State of Missouri. Midwest also has a subsidiary operating under the name of Midwest Blood Distributors, Inc., 2904 Troost Avenue, Kansas City, Missouri, and organized primarily for the purpose of selling Midwest's blood provider programs.

The owners and operators of Midwest also own and operate the

World Blood Bank, Inc., at 2116 West 39th Street, Kansas City, Kansas, which was incorporated in Kansas on or about September, 1958.

In addition to providing blood to hospitals pursuant to contracts with the hospitals or through informal arrangements, Midwest and World Blood Bank Inc., make use of contracts with individuals or groups to assure a supply of blood when needed by the individual or a member of a group. One such plan is the Blood Provider Program under which the individual or members of a group deposit blood with the blood bank which can be drawn on by the individual or a member of the group when and where needed. Another plan developed by these two blood banks is the Group Advance Blood Purchase Plan under which a monthly or yearly fee is paid by the individual or members of a group to assure a supply of blood to be furnished by the blood bank when needed by the insured individual or member of the group.

Both Midwest and World Blood Bank, Inc., hold licenses issued by the National Institutes of Health of the United States Department of Health, Education, and Welfare thus permitting these two firms to ship in interstate commerce. Midwest is a member of the NCBBCH. Midwest and World Blood Bank, Inc., perform the same function as respondent Community in that they withdraw blood from donors, process the blood by treating it with a chemical (citration) to prevent coagulation, keep it under proper refrigeration until it is needed, cross-match it with blood of the patient who is to receive the blood, and deliver the blood in needed quantities to hospitals where the blood is to be used. Midwest and World Blood Bank, Inc., both ship blood to hospitals and other blood banks located in states other than Kansas or Missouri. These two blood banks also purchase blood from blood banks outside their own state boundaries.

Midwest in 1955, and for some time thereafter, operated the only blood bank in the Greater Kansas City area that was licensed by the Department of Health, Education, and Welfare to ship human blood in interstate commerce.

PAR. 6. During 1955, most of the hospitals in the Kansas City area maintained their own blood banks or made arrangements with another local hospital to secure the needed blood supply. These hospitals were in competition with each other for an adequate blood supply and in competition with Midwest and other blood banks for a supply of blood for use in hospitals in the Kansas City area either in the buying or selling or both. From the

time respondent Community became active as a blood bank in 1958, those hospitals affiliated with Community and respondent Community, became competitors of Midwest and World Blood Bank, Inc., and are such competitors today in both the buying and selling of blood and blood plasma, except in so far as competition has been hindered, lessened or restrained, by the acts and practices, methods and policies of said respondents as herein set forth.

PAR. 7. During 1955 the respondent Kansas City Area Hospital Association, its officers, directors, Executive Director and members, the respondent Executive Director of St. Luke's Hospital and the respondent Administrator of Independence Sanitarium and Hospital and the respondent pathologists named herein, together with others not named as respondents herein, entered into and have since carried out an agreement, understanding, combination or planned course of action or course of dealing to hamper, restrict and restrain the sale and distribution of blood in interstate commerce. Since on or about the time respondent Community was incorporated on April 5, 1957, all the respondents named herein, together with others not named as respondents herein, continued to carry out the same agreement, understanding, combination or planned course of action or course of dealing to hamper, restrict and restrain the sale and distribution of blood in interstate commerce, using respondent Community as an aid and a means in the accomplishment thereof. In carrying out said agreement, understanding, combination, or planned common course of action or course of dealing, respondents have, among other acts, done the following:

(a) Agreed between and among themselves not to use blood obtained from Midwest or World Blood Bank, Inc., nor to permit it to be used in the Kansas City area; nor to be accepted or received as replacement for blood previously furnished by Community.

(b) Refused to use blood obtained from Midwest or World Blood Bank, Inc., and have refused to permit it to be used in treating patients hospitalized in the Kansas City area hospitals.

(c) Have advised customers and prospective customers of Midwest, World Blood Bank, Inc., and Midwest Blood Distributors, Inc., that blood obtained from these firms would not be accepted in exchange for blood obtained from said hospitals or from respondent Community.

(d) Have advised the North Central Blood Bank Clearing House and AABB that the respondents have agreed or have a pol-

icy not to use blood obtained from Midwest or World Blood Bank, Inc.

PAR. 8. The capacity, tendency and effect of the aforesaid understandings, agreements, combinations, conspiracies and planned common courses of action, and of the acts, policies, practices and things done thereunder and pursuant thereto by the respondents have:

(a) Hampered, hindered or prevented Midwest and World Blood Bank, Inc., their subsidiaries and agents from selling or furnishing blood to hospitals and other purchasers located in the States of Missouri, Kansas, and other States;

(b) Hampered, hindered or prevented Midwest, World Blood Bank, Inc., and their subsidiaries and agents from selling blood to or furnishing blood for use of patients hospitalized in hospitals located in States other than the State of Missouri or the State of Kansas;

(c) Hampered, hindered or prevented Midwest and World Blood Bank, Inc., and their subsidiaries and agents from carrying on trade in interstate commerce through dealings with the North Central Blood Bank Clearing House;

(d) Hampered, hindered or prevented Midwest and World Blood Bank, Inc., from becoming members of AABB and thus deprived them of the benefits that flow from such membership;

(e) Hampered, hindered or prevented Midwest, World Blood Bank, Inc., and their subsidiaries and agents, from carrying out contracts for the furnishing of blood to persons who were entitled thereto and have prevented the use of blood furnished or offered under such contracts as a replacement for blood already given to a patient who was a party to such contracts or entitled to the benefits thereof in the State of Missouri, the State of Kansas, and other States;

(f) Hampered, hindered or prevented or discouraged hospitals, blood banks, or other users of blood from dealing with Midwest, World Blood Bank, Inc., and their subsidiaries and agents in the States of Missouri, Kansas and other states.

PAR. 9. The aforesaid agreements, understanding or planned common course of action and the acts and practices of respondents done pursuant thereto and in furtherance thereof as herein alleged are all to the injury of the public and unreasonably restrict and restrain interstate commerce in the exchange, sale and distribution of blood and competition therein and constitute un-

fair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lee D. Sinclair and *Mr. Paul D. Scanlon* supporting the complaint.

*Mr. Charles E. Hoffhaus** of *Hillix, Hall, Hasburgh, Brown and Hoffhaus,* for Kansas City Area Hospital Association, member hospitals and individuals connected therewith.

Mr. Lucian Lane of *Tucker, Murphy, Wilson, Lane & Kelly,* for Community Blood Bank of the Kansas City Area, Inc., and its officers, directors and agents.

Mr. Dick H. Woods of *Stinson, Mag, Thomson, McEvers and Fizzell,* for a group of named doctors allegedly specializing in pathology for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

JUNE 8, 1964

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*Mr. John Hasburgh originally appeared for these clients. On his death Mr. Hoffhaus appeared. Following the hearings Messrs. Lane and Woods undertook to prepare the findings, conclusions and briefs for all respondents.

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PRELIMINARY STATEMENT

Allegations in this proceeding would test the extent to which medical doctors and nonprofit hospitals may combine or conspire with other elements in a community to form a nonprofit blood bank, when as a consequence a commercial blood bank becomes unable to sell blood to the participating hospitals. Placed in issue, in addition to the existence of the combination or conspiracy, are jurisdictional questions:

1) Is human whole blood an article of commerce or is the procedure in drawing, processing, shipping and transfusing blood all embraced within the profession of practicing medicine?

2) Are the nonprofit hospitals immune from proceedings initiated by the Federal Trade Commission in the circumstances?

At no time in issue was the right of a physician in the individual exercise of his medical judgment to utilize or to refuse to utilize any remedy including blood in the treatment of his patient. His right to combine with others to restrain trade is challenged.

Pleadings and Prehearing

The Federal Trade Commission issued its complaint July 5, 1962. The complaint, mailed July 16, 1962, charged a conspiracy to boycott in violation of Section 5 of the Federal Trade Commission Act. The alleged conspirators named as respondents included: a nonprofit hospital association, a community blood bank, certain nonprofit hospitals affiliated with such organizations, a group of individuals who are alleged to have been officers, directors and agents of the corporations, and a group of pathologists

associated with hospitals all in the Kansas City Metropolitan Area. The complaint is also brought against other Kansas City hospitals and individuals affiliated with them as a class represented by the named respondents.

It is the theory of the complaint that respondents and others engaged in a combination or conspiracy to boycott and otherwise interfere with a commercial blood bank, operating through two corporations (herein referred to as Midwest and World), and that interstate commerce in whole human blood for transfusion was thereby restrained.

For the purpose of representation by counsel respondents divided themselves into three groups as follows:

1) Kansas City Area Hospital Association (sometimes referred to as Area Hospital Association) and its officers, directors and agents and the named hospitals and their officers, directors and agents.[1]

2) Community Blood Bank of the Kansas City Area, Inc. (sometimes referred to as Community) and its officers, directors and agents.[2]

3) The pathologists including: Doctors O. Dale Smith, Evelyn Peters, D. A. Hoskins, William J. Sekola, Victor B. Buhler, Russell W. Kerr (deceased), Frank A. Mantz, Ferdinand C. Helwig, David M. Gibson, Angelo Lapi, L. R. Moriarity, Jack H. Hill, James G. Bridgens, William McPhee, and Ralph J. Rettenmaier (collectively referred to as the pathologists).

Prior to answer, and on August 7, 1962, Area Hospital Association and Community moved for a more definite statement and the pathologists moved to dismiss for lack of jurisdiction or in the alternative for a more definite statement. These motions were denied August 23, 1962.

On September 17, 1962, the Area Hospital Association filed a Reply to the complaint admitting many of the formal allegations

[1] The individuals and hospitals named as respondents because of their affiliation with the Hospital Association and represented by its counsel were: Baptist Memorial Hospital, Jewish Memorial Hospital Association of Kansas City (Menorah Medical Center), Sisters of Charity of Leavenworth, James D. Marshall, Arch E. Spelman, Tom J. Daly, Thomas M. Johnson, Russell H. Miller, David T. Beals, Nathan J. Stark, Abraham Gelperin, Mack Herron, James R. Rich, Sister Michaella Marie, William C. Mixson, E. B. Berkowitz, T. R. Butler, Maurice Johnson, Walter N. Johnson, Miller Bailey, Walter A. Reich, Ralph R. Coffey, Harry M. Walker, Susan Jenkins, Robert A. Molgren, and A. Neal Deaver.

[2] The individuals named as respondents because of their affiliation at Community and represented by its counsel were: Adolph R. Pearson, Walter V. Coburn, Hilliard Cohen, Carroll P. Hungate, Gilbert C. Murphy, Robert A. Molgren, John Murphy, Marjorie S. Sirridge, Arch E. Spelman, Meyer L. Goldman, James T. Sparks, Perry Morgan, W. W. Henderson, Robert F. Zimmer.

thereof but denying commerce and denying all parts of the complaint alleging the existence of a conspiracy. The same date, Community filed an answer admitting a few of the allegations of the complaint but expressly denying those charging the alleged conspiracy and alleging that human blood is not an article of commerce and that the respondents were not for profit corporations and immune from suit. The pathologists, on that day, also filed answer in which they denied substantially all of the allegations of the complaint and set up the same defenses.

In a separate document filed with its answer Community moved to dismiss the complaint for want of jurisdiction because blood was not an article of commerce and because the Commission did not have jurisdiction over it as a nonprofit corporation. This motion was denied by the hearing examiner [3] on October 3, 1962, but on motion of respondent Community permission was granted by the Federal Trade Commission on November 2, 1962, to file an interlocutory appeal. The other respondents were granted leave to intervene by the Commission on November 29, 1962.

The Commission, after hearing argument, on December 18, 1962, remanded the matter to the hearing examiner "—having—determined that the matters raised by said respondents involve substantial public interest based in turn upon factual questions which should be decided only upon a full record."

The hearing examiner then ordered a prehearing conference to be held February 7, 1963. On that day, respondents filed a motion that issues concerning the jurisdiction of the Commission be heard prior to a determination on the merits. The hearing examiner denied that motion by order dated February 18, 1963. At the prehearing conference held February 7, 1963, it was agreed that the initial hearing would be held in Kansas City, Missouri, from May 20, 1963, to May 31, 1963, and then from July 8, to July 26, 1963. It was also agreed that documents and witnesses names would be furnished opposing counsel ten (10) days in advance, that photostats could be used in lieu of originals and that these requirements might be varied for cause shown. Such agreements were embodied in an order dated February 18, 1963.

On February 27, 1963, respondents filed a request for permission to appeal from the hearing examiner's order refusing to hear the jurisdictional questions in advance of a hearing on the merits.

[3] Honorable Abner E. Lipscomb was originally designated hearing examiner in this proceeding and continued to act on the prehearing procedure until April 3, 1963, when the undersigned was designated in his stead.

This request was denied by the Commission on March 14, 1963, on the basis that the Commission had decided that it desired a full record before deciding the jurisdictional questions.

On March 21, 1963, respondents made application to take the depositions of three officials of the commercial blood bank allegedly the victim of the conspiracy and to have the records of that competitor produced. This motion was denied March 22, 1963, and a request for an interlocutory appeal from such denial was denied by the Commission by order dated May 3, 1963. A motion for a stay pending decision of such appeal was denied as moot May 10, 1963.

In the meantime and on April 5, 1963, the hearing examiner called for a prehearing conference, specifying the matters to be taken up and requesting prehearing memoranda on designated topics. A prehearing conference was held April 24, 1963, during which a stipulation of facts was executed disposing of noncontroversial matters and a procedure was adopted for prehearing exchange and authentication of documents and the listing of witnesses as well as for the taking of official notice of various classes of matters. Note was taken that the action had abated as to respondents Russell W. Kerr and David T. Beals, and several misspellings of names were corrected. The results of such conference were included in an order executed April 26, 1963, and designated "Pre-Hearing Order #2." Official notice was taken by subsequent order of statutes and official rulings respecting the not for profit character of respondents and the character of blood transfusions.

Cooperation of Counsel

Counsel for all parties were most cooperative and courteous during this entire proceeding and did much to alleviate by their professional demeanor the emotional atmosphere in the Kansas City Area where considerable resentment was evident because of the community-wide participation in the respondent blood bank.

The Trial Statistics

Pursuant to leave granted by the Commission's order of May 1, 1963, noncontinuous hearings were held, the first commencing May 20 and concluding June 7, 1963, then, the second resuming July 8 and continuing, with only brief intervals of the sort normally involved in judicial proceedings, until September 24, 1963. Almost one hundred witnesses were called and testified and almost one thousand exhibits were offered comprising about ten

thousand pages of exhibits and over eight thousand pages of transcript. Over 800 pages of briefs and proposed findings were submitted.

Extension of Time to File Decision

At the joint request of all counsel, the hearing examiner by order dated September 27, 1963, set up a time schedule for findings and for motions to amend and to strike, conditional upon extension by the Commission of the time of the hearing examiner to enter his Initial Decision until May 1, 1964. The Commission granted the examiner's request to extend the time to file the Initial Decision by order dated October 9, 1963. Changes in such timetable not involving the due date of this decision were thereafter approved by order dated November 24, 1963. The Commission further extended the time to issue this decision until June 8, 1964, by reason of counsel's need for additional time to file findings and conclusions.

Motions to Dismiss

At the conclusion of the case in chief each of the counsel for respondents moved to dismiss this proceeding for failure of proof. Decision was reserved. Thereafter, the hearing examiner requested counsel supporting the complaint to recommend, in light of the evidence received, whether or not the motion should be granted as to certain individuals whose connection with the alleged conspiracy was only that each had held a position in one of the respondent hospitals or associations. As respondents' case drew to a close counsel supporting the complaint informed the hearing examiner in open hearing that in their opinion the evidence received as to certain individuals was insufficient on which to base relief. The hearing examiner accordingly exercised his reserved right to dismiss the complaint against the following individuals in their individual but not their representative capacity at the pages of the record set opposite their respective names. Facts relating to them are included in findings hereafter made.

Miller Bailey	Page No.	8327
E. B. Berkowitz	"	"
T. R. Butler	"	"
Tom J. Daly	"	"
Abraham Gelperin	"	"
Meyer L. Goldman	"	8328
Mack Herron	"	8327
Maurice Johnson	"	"

Thomas N. Johnson	"	"
Walter N. Johnson	"	"
Sister Michaella Marie	"	"
James D. Marshall	"	"
Russell H. Miller	"	"
Walter A. Reich	"	"
James R. Rich	"	"
Nathan J. Stark	"	"
Harry M. Walker	"	"
Gilbert C. Murphy	"	8328
Adolph R. Pearson	"	"
James T. Sparks	"	"
Robert F. Zimmer	"	"
William C. Mixson	"	8457–62
Ralph Coffey	"	8462
William J. Sekola	"	8758

The reserved motion to dismiss against the other respondents is denied.

Proposed Findings and Motion

Proposed findings of fact, conclusions, and a proposed order with a brief in support were filed March 15, 1964 and reply briefs and counter proposed findings, conclusions and order were filed April 2, 1964. Argument was heard April 6 and 7, 1964. Respondents, in addition, filed a formal motion to dismiss on May 29, 1964, which is denied for the reasons hereafter given.

Basis for Decision

On the basis of the entire record, on his observation of the demeanor of the witnesses, and on his study of the exhibits, briefs, and proposed findings and conclusions, the hearing examiner makes the following Findings of Fact, Conclusions, and Order.[4] All findings of fact not found in substance or in terms are denied as erroneous or immaterial.

[4] Pursuant to Rule 3.21(b) citations to exhibits and to page references of testimony will be made. The citation of particular references does not mean that there are no others or in any way detract from the fact that the entire record has been considered.

In making citations the following abbreviations and references will sometimes be used:

CX—Commission Exhibits

RX—Respondents' Exhibits

TR—Transcript

CF—Finding proposed by counsel supporting complaint (with citations).

RF—Finding proposed by counsel for respondents (with citations).

(Name of Witness)—Reference to entire testimony of such witness.

P.H. Stip.—Prehearing Stipulation dated April 24, 1963 ordered filed by Pre-Hearing Order #2.

Stip. ( )—Stipulation and exhibit number.

Heavy reliance has been placed on counsels' proposed findings for record references due to time limitations.

FINDINGS OF FACT

The Named Respondents and Relationships Among Them

1. *Community*

a. Community Blood Bank of the Kansas City Area, Inc. is a not-for-profit corporation organized and existing under and by virtue of the laws of the State of Missouri, Chapter 355, R.S. Mo. 1959. Said corporation is located and has its office at 4040 Main Street, Kansas City, Missouri. (P. H. Stip.)

b. The governing body of Community Blood Bank of the Kansas City Area, Inc. is composed of five officers, twelve board members and a corporate body of thirty-nine. The corporate body is composed of thirteen individuals chosen from the medical profession in the Kansas City Area, thirteen representatives of hospitals in the Kansas City area selected by the Board of Directors of the Kansas City Area Hospital Association and thirteen representatives chosen from outside the medical community and commonly known as public members. Eleven of the medical members are elected by the county medical societies in the Kansas City area which includes Kansas City, Missouri and Kansas City, Kansas. These eleven electees choose two more medical members. The thirteen public members must be approved by the medical and hospital members and elected by members of the corporation. Each of these groups of thirteen choose four from its group to be on the Board of Directors which consists of twelve members. The Board of Directors annually elects officers. Approximately one-third of the positions on the governing body become vacant each year and new members are chosen to fill these vacancies. (P.H. Stip.)

c. Respondents Perry Morgan and W. W. Henderson are administrative director and business manager, respectively, of respondent Community, have their offices at 4040 Main Street, Kansas City, Missouri and have held such positions for the past several years. (P.H. Stip.)

d. During the past several years the officers and directors of respondent Community, as well as its membership, have varied from year to year. (P.H. Stip.)

e. The following individuals named in the complaint were, during 1961 and at the time of the filing of the complaint, located and affiliated as indicated below. They served Community in 1961 in the capacities set forth opposite their respective names:

President	Adolph R. Pearson, Swedish-American Saving & Loan Association, 1010 Baltimore Ave., Kansas City 5, Mo.
First Vice-President	Walter V. Coburn, Bethany Hospital, 51 North 12th, Kansas City 7, Kansas.
Second Vice-President	Hilliard Cohen, Menorah Medical Center, 4949 Rockhill Road, Kansas City 10, Missouri.
Sec'y. Treas.	Carroll P. Hungate, 6845 Oak, Kansas City 13, Missouri.
Asst. Sec'y. Treasurer	Gilbert C. Murphy, First Presbyterian Church, Gardner, Kansas.
Director	Robert A. Molgren, St. Luke's Hospital, 4400 J. C. Nichols Parkway, Kansas City 10, Missouri.
Director	John Murphy, Tucker, Murphy, Wilson & Siddens, 818 Grand Avenue, Suite 831, Kansas City 6, Missouri.
Director	Marjorie Sirridge, 258 Brotherhood Bldg. 754 Minnesota Ave., Kansas City 1, Kan.
Director	Arch E. Spelman, Smithville Community Hospital, Smithville, Missouri.
Director	Meyer L. Goldman, Beacon Printing & Publishing Co., 1825 Harrison, Kansas City 8, Missouri.
Director	James T. Sparks, Ford Motor Company, P. O. Box 1008, Kansas City 41, Mo.
Director	Robert F. Zimmer, American Oil Company, Sugar Creek Refinery, Sterling and Standard Sts., Kansas City 21, Mo.
(P.H. Stip.)	

f. The following listed members of Area Hospital Association executed contracts with Community (or revisions thereof) on the dates set forth opposite their respective names. Dates followed by the designation (a) mean that the contract called for furnishing human whole blood and related blood products; those followed by (b) mean that a drawing station was established at the hospital, and, those followed by (c) mean that the contract was to supply heparinized and citrated whole blood (human) used in extracorporeal procedures.

Baptist Memorial Hospital	January 14, 1960; revised March 10, 1960 (a)
Bethany Hospital	May 1, 1958; revised February 23, 1960 (a)
Cushing Memorial Hospital	April 1, 1959 (b)
Excelsior Springs Hospital	Dated June 15, 1960 but not signed by Community Blood Bank (a)
Independence Sanitarium and Hospital	May 5, 1958; revised May 12, 1960 (a)

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Lakeside Hospital	October 23, 1958; revised May 11, 1960 (a)	
Lexington Memorial Hospital	April 23, 1959 (b)	
Jewish Hospital Association of Kansas City (Menorah Medical Center)	May 27, 1958; revised March 8, 1960 (a)	
North Kansas City Memorial Hospital	October 24, 1958; revised June 2, 1960 (a)	
Olathe Community Hospital	March 29, 1960 (a)	
Osteopathic Hospital (Kansas City College of Osteopathy and Surgery)	July 1, 1959; revised June 2, 1960 (a)	
Sisters of Charity of Leavenworth (Providence Hospital)	July 1, 1958; revised February 20, 1960 (a)	
Queen of the World Hospital	April 16, 1958; revised May 10, 1960 (a)	
Research Hospital	May 31, 1958; revised February 20, 1960 (a)	
Pleasant View Health and Vocational Institute, Inc. (Shawnee Mission Hospital)	May 8, 1962 (a)	
Community Hospital Association (Smithville Community Hospital)	August 9, 1960 (a)	
Sisters of Charity of Leavenworth (St. John's Hospital)	April 6, 1959; revised January 18, 1960 (b)	
St. Joseph Hospital	April 9, 1958; revised May 14, 1960 (a)	
St. Joseph's Hospital	December 6, 1961 (a)	
St. Joseph, Missouri	December 6, 1961 (b)	
St. Luke's Hospital of Kansas City	May 7, 1958; revised February 11, 1960 (a)	
Sisters of St. Mary (St. Mary's Hospital)	Revised February 20, 1960 (a)	
Sweet Springs Community Hospital	December 14, 1961 (a)	
St. Margaret Hospital	May 5, 1958; revised February 22, 1960 (a)	
Trinity Lutheran Hospital	April 16, 1958; revised February 25, 1960 (a)	
University of Kansas Medical Center	July 1, 1962 (c)	
Wheatley-Provident Hospital	Dated July 28, 1960, but not signed by Community Blood Bank (a)	
Warrensburg Medical Center, Inc.	September 15, 1961 (a) October 13, 1961 (b) (P.H. Stip. Stip. CX 583).	

2. *Area Hospital Association*

a. Kansas City Area Hospital Association is a not-for-profit corporation organized and existing under and by virtue of the

"General Not-For-Profit Corporation Law" of the State of Missouri with offices at 3637 Broadway, Kansas City, Missouri. It was incorporated May 14, 1954. (P.H. Stip.) (Stip. CX 540).

b. Respondent Baptist Memorial Hospital is a corporation organized and existing under and by virtue of Chapter 355 of the 1959 Revised Statutes of the State of Missouri and is located at 6601 Rockhill Road, Kansas City 31, Missouri.

c. Respondent Jewish Memorial Hospital Association of Kansas City (Menorah Medical Center) is a corporation organized and existing under and by virtue of Chapter 355 of the 1959 Revised Statutes of the State of Missouri and is located at 4949 Rockhill Road, Kansas City 10, Missouri.

d. Respondent Sisters of Charity of Leavenworth is a corporation organized and existing under and by virtue of Article 17, Chapter 17 of the General Statutes of the State of Kansas and is located at Xavier, Leavenworth County, Kansas. It operates Providence Hospital at 1818 Tauromee Avenue, Kansas City 2, Kansas. (P. H. Stip.) (Stip. 540 a—e).

e. Respondent Susan Jenkins is now serving, and for the past several years has served, as executive director of the Kansas City Area Hospital Association and in such capacity has her office at 3637 Broadway, Kansas City 8, Missouri. (P. H. Stip.)

f. During the past several years the officers, directors and members of respondent Kansas City Area Hospital Association varied from year to year by the expiration of terms and addition of members. (P. H. Stip.)

g. The following individuals named in the complaint were, during 1961 and at the time of the filing of the complaint (with the exception of Abraham Gelperin, Mack Herron and Sister Michaella Marie), located and affiliated as stated below. They served Area Hospital Association in 1961 in the capacities set forth opposite their respective names:

Chairman of the Board	James D. Marshall, 1016 Baltimore Avenue, Kansas City, Missouri.
President	Arch E. Spelman, Smithville Community Hospital, Smithville, Missouri.
First Vice President	Tom J. Daly, 2105 North 13th Street, Kansas City 4, Kansas.
Second Vice President	Thomas M. Johnson, 310 West 47 Street, Kansas City, Missouri.
Secretary	Russell H. Miller, University of Kansas Medical Center, 39th and Rainbow Boulevard, Kansas City 12, Kansas.

Treasurer	David T. Beals (deceased), First National Bank, 14 West 10th Street, Kansas City 5, Missouri.
Assistant Treasurer	Nathan J. Stark, Hallmark Cards, Inc., 25th and McGee Trafficway, Kansas City 41, Missouri.
Director	Abraham Gelperin, Neurological Hospital, 2625 West Pasco, Kansas City 8, Missouri.
Director	Mack Herron, Olathe Community Hospital, Santa Fe at Cooper, Olathe, Kansas.
Director	James R. Rich, North Kansas City Memorial Hospital, 2800 Hospital Drive, North Kansas City 16, Missouri.
Director	Sister Michaella Marie, St. Joseph Hospital, East Linwood Boulevard, Kansas City 28, Missouri.
Director	William C. Mixson, 4635 Wyandotte Street, Kansas City 12, Missouri.
Director	E. B. Berkowitz, Tension Envelope Corporation, 19th and Campbell Street, Kansas City 8, Missouri.
Director	T. R. Butler, License Department, City Hall, Kansas City, Kansas.
Director	Maurice Johnson, First National Bank, 14 West 10 Street, Kansas City 5, Missouri.
Director	Walter N. Johnson, R.D.D.S. Auditorium, River and Walter Streets, Independence, Missouri.
Director	Miller Bailey, 2810 West 66 Terrace, Shawnee Mission, Kansas.
Director	Walter A. Reich, A. Reich & Sons, Inc., 1414 Wyoming, Kansas City, Missouri.
Director	Ralph R. Coffey, 1324 Professional Building, Kansas City 6, Missouri.
Director	Harry M. Walker, Smithville Community Hospital, Smithville, Missouri.

Respondent Abraham Gelperin is not now connected with Neurological Hospital or any other hospital in the Kansas City area and at the time of the filing of the complaint resided in the State of Illinois; respondent Sister Michaella Marie was not on the date of the filing of the complaint connected with St. Joseph's Hospital or any other hospital in the Kansas City area but resided on such date in the State of Michigan; and respondent Mack Herron was not as of the date of the filing of the complaint connected with Olathe Community Hospital or a resident of Olathe, Kansas. (P. H. Stip.)

h. Respondent Robert A. Molgren is, and for several years has been, executive director of St. Luke's Hospital and has his office

at St. Luke's Hospital, 4400 J. C. Nichols Parkway, Kansas City 11, Missouri. (P. H. Stip.)

i. Respondent A. Neal Deaver is, and for several years has been, administrator of Independence Sanitarium and Hospital and has an office at said hospital (P. H. Stip.).

j. The following hospitals and service agency became members of Area Hospital Association on the dates preceding their names. Those whose names are followed by (a) and (c) were granted tax exemptions under Section 501(c) (3) and 501(c) (4), respectively. Those whose names are followed by (b) are Instrumentalities of Federal, State, county or local governments. Thompson, Brumm and Knepper Clinic Hospital and Warrensburg Medical Center, Inc., are proprietary corporations, the others listed secure their authority from the agency or under and by virtue of the statutes set forth opposite their respective names. All except those whose names are italicized have contracts with Community, as hereinbefore found.

1/ 8/57	Baptist Memorial Hospital ....(a)	Chapter 355, RSMo 1959
9/16/61	*Bates County Memorial Hospital* .....(b)	Section 205.160 *et seq.* RSMo 1959
5/14/54	Bethany Hospital .....(a)	Chapter 17, Article 17, and Article 29, G.S. Kansas
5/14/54	*Blue Cross Hospital Service* ...(c)	Chapter 355, RSMo 1959
5/11/56	*Cameron Community Hospital*..(b)	Section 205.160 *et seq.* RSMo 1959
11/ 8/60	*Carroll County Memorial Hospital*	Chapter 355, RSMo 1959
5/14/54	*Children's Mercy Hospital* ....(a)	Chapter 352, RSMo 1959
9/30/58	*Chillicothe Municipal Hospital*..(b)	Section 81.190, RSMo 1959
5/14/54	Cushing Memorial Hospital ....(a)	Chapter 17, Article 17, G.S. Kansas
5/14/54	*Douglas Hospital* .....(a)	Chapter 17, Article 29, G.S. Kansas
5/14/54	Excelsior Springs Hospital ....(a)	Chapter 355, RSMo 1959
5/ 4/57	*John Fitzgibbon Memorial Hospital*	Chapter 355, RSMo 1959
5/14/54	*Kansas City General Hospital and Medical Center*..(b)	Sections 82.240, 96.030, RSMo 1959
5/14/54	*Memorial Hospital of Harrisonville Association (dissolved)*	Chapter 352, RSMo 1959
5/14/54	*Cass County Memorial Hospital* .....(60)	Section 205.160, RSMo 1959
5/14/54	Independence Sanitarium and Hospital..(a)	Chapter 352, RSMo 1959 Chapter 33, Article 2, RSMo 1919

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1/27/54	Lakeside Hospital .....(a)	Chapter 355, RSMo 1959
1/ 7/60	*Lawrence Memorial Hospital* ..(b)	Article 13, Section 14b01, G.S. Kansas
5/14/54	Lexington Memorial Hospital ..(b)	Section 205.160, RSMo 1959
5/14/54	Jewish Hospital Association ...(a) of Kansas City (Menorah Medical Center)	Chapter 355, RSMo 1959
7/12/56	*Miami County Hospital* .....(b)	Article 19, Section 1801 *et seq*, G.S. Kansas as amended
5/11/57	*Neurological Hospital* .....(a)	Chapter 355, RSMo 1959
3/11/57	North Kansas City Memorial ..(b) Hospital (City—third class)	Section 96.150, RSMo 1959
5/14/54	Olathe Community Hospital ...(a)	Chapter 17, Article 29, G.S. Kansas
1/27/58	Osteopathic Hospital (Kansas ..(a) City College of Osteopathy and Surgery)	Chapter 352, RSMo 1959
5/14/54	Sisters of Charity of .....(a) Leavenworth (Providence Hospital)	Article 17, Chapter 17, G.S. Kansas
5/14/54	Queen of the World .....(a)	Chapter 352, RSMo 1959
5/14/54	*Ralph Clinic* .....(a)	Chapter 355, RSMo 1959
10/ 2/56	*Ray County Memorial* .....(b) *Hospital*	Section 205.160 *et seq.* RSMo 1959
5/14/54	Research Hospital .....(a)	Chapter 352, RSMo 1959
8/19/62	Pleasant View Health and ....(a) Vocational Institute, Inc. (Shawnee Mission Hospital)	Chapter 17, Article 29, G.S. Kansas
5/14/54	Community Hospital .....(a) Association (Smithville Community Hospital)	Chapter 352, RSMo 1959 Chapter 32, Article 10, RSMo 1929
5/14/54	Sisters of Charity of .....(a) Leavenworth (St. John's Hospital)	Chapter 17, Article 17, G.S. Kansas
5/14/54	St. Joseph Hospital .....(a)	Chapter 352, RSMo 1959
5/14/54	St. Joseph's Hospital .....(a) (St. Joseph, Missouri)	Chapter 352, RSMo 1959
5/14/54	St. Luke's Hospital of .....(a) Kansas City	Chapter 352, RSMo 1959
5/14/54	Sisters of St. Mary .....(a) (St. Mary's Hospital)	Chapter 352, RSMo 1959
5/14/54	St. Margaret Hospital .....(a)	Chapter 17, Article 29, G.S. Kansas
12/29/60	Sweet Springs Community ....(a) Hospital	Chapter 352, RSMo 1959
5/14/54	Trinity Lutheran Hospital ....(a)	Chapter 355, RSMo 1959
5/14/54	University of Kansas .....(b) Medical Center	State University

12/19/57	*Veterans Administration Hospital* ..... (b)	38 U.S.C.A. Section 5001 *et seq.*
5/14/54	Wheatley-Provident Hospital .. (a)	Chapter 35, RSMo 1959
8/10/62	328th U.S.A.F. (Richards-Gebaur)	
10/ 3/56	*Thompson, Brumm and Knepper Clinic Hospital (St. Joseph)*	
5/14/54	Warrensburg Medical Center, Inc. (Warrensburg, Missouri)	(P.H. Stip. St. CXs 540, 582).

3. *The Pathologist—Their Hospital Affiliations and Functions*

a. Respondent Hilliard Cohen, M.D., is a pathologist for Menorah Medical Center and is second vice-president of respondent Community. He has his office at the Menorah Medical Center, 4949 Rockhill Road, Kansas City, 10, Missouri.

b. Respondent Evelyn Peters, M.D., is a pathologist for Menorah Medical Center and has an office at the Menorah Medical Center, 4949 Rockhill Road, Kansas City 10, Missouri.

c. Respondent D. A. Hoskins, M.D., is a pathologist for Osteopathic Hospital and has his office at the Osteopathic Hospital, 926 East 11 Street, Kansas City 6, Missouri.

d. Respondent William J. Sekola was a pathologist for Osteopathic Hospital and had his office at the Osteopathic Hospital, 926 East 11 Street, Kansas City 6, Missouri. Since the filing of the complaint he has ceased to be a resident of the Kansas City area and is no longer connected with any hospital in that area.

e. Respondent Victor B. Buhler, M.D., is a pathologist for Queen of the World Hospital and has his office at the Queen of the World Hospital, 3210 East 23rd Street, Kansas City 27, Missouri.

f. Respondent Russell W. Kerr, M.D., now deceased, was a pathologist for St. Joseph's Hospital and had his office at the St. Joseph's Hospital, 2510 East Linwood Boulevard, Kansas City 28, Missouri.

g. Respondent Frank A. Mantz, M.D., is a pathologist for St. Joseph's Hospital and has his office at the St. Joseph's Hospital, 2510 East Linwood Boulevard, Kansas City 28, Missouri.

h. Respondent Ferdinand C. Helwig, M.D., is a pathologist for St. Luke's Hospital and has his office at St. Luke's Hospital, 4400 J. C. Nichols Parkway, Kansas City 11, Missouri.

i. Respondent David M. Gibson, M.D., is a pathologist for St. Luke's Hospital and has his office at St. Luke's Hospital, 4400 J. C. Nichols Parkway, Kansas City 11, Missouri.

j. Respondent Angelo Lapi, M.D., is a pathologist for St. Mary's Hospital and has his office at St. Mary's Hospital, 101 Memorial Drive, Kansas City 8, Missouri.

k. Respondent L. R. Moriarity,[5] M.D., is a pathologist for St. Mary's Hospital and has his office at St. Mary's Hospital, 101 Memorial Drive, Kansas City 8, Missouri.

l. Respondent Jack H. Hill, M.D., is a pathologist for Trinity Lutheran Hospital and has his office at Trinity Lutheran Hospital, 31st and Wyandotte Streets, Kansas City 8, Missouri.

m. Respondent James G. Bridgens,[5a] M.D., is a pathologist for the Independence Sanitarium and Hospital and has his office at the Independence Sanitarium and Hospital, 1509 West Truman Road, Independence, Missouri.

n. Respondent William McPhee,[5a] M.D., is a pathologist for North Kansas City Memorial Hospital and has his office at the North Kansas City Memorial Hospital, 2800 Hospital Drive, North Kansas City 16, Missouri.

o. Respondent Ralph J. Rettenmaier, M.D., is a pathologist for Providence Hospital and has his office at the Providence Hospital, 1818 Tauromee Avenue, Kansas City 2, Kansas.

p. Respondent O. Dale Smith, M.D., is a pathologist for Baptist Memorial Hospital and has his office at the Baptist Memorial Hospital, 6601 Rockhill, Kansas City 31, Missouri. (P.H. Stip.)

q. Pathologists are medical doctors with special knowledge and training in pathology. Pathologists are associated with various hospitals in the Kansas City area and by virtue of such association direct and supervise certain laboratory operations in the hospitals with which they are associated including the procurement, handling, testing and transfusion of blood. (P.H. Stip.)

r. As of the date of the filing of the complaint herein there were about twenty-six pathologists either employed by or associated with hospitals in the Kansas City area. Such pathologists were and are members of the Society of Pathologists for the Kansas City area. The blood banks operated by certain hospitals in the Kansas City area prior to their obtaining their supply of blood from respondent Community were under the supervision of a pathologist or pathologists employed by or associated with such hospitals. Pathologists in the Kansas City area serve as medical consultants to and on an advisory committee of respondent Community and they, and other pathologist not named as respon-

[5] Sometimes described as Lauren R. Moriarity.

[5a] Erroneously described in the Complaint as G. M. Bridgens and William McFee, respectively.

dents, serve in a rotation system on said advisory committee. (P.H. Stip.)

Background Information Concerning Blood Banks, Their Regulations and Interrelations

4. Since World War II the use of human blood for transfusions has become an increasingly important factor in the care and treatment of the sick. During 1960 more than five and one half million pints of blood were used for such transfusions. The need for such volume of blood has resulted in the establishment of blood banks to maintain and furnish a constant, adequate and safe supply of blood. (P.H. Stip.)

5. The blood bank collects, classifies and stores blood which, except for heparinized blood, may be stored under proper refrigeration for a period not to exceed twenty-one days. There are different blood bank sources in the United States, some of which may be described as

(a) Hospital blood banks: those operated by hospitals primarily to meet their own needs and, occasionally, to supply the needs of other hospitals in their areas. Today, there are more than 2,000 hospital blood banks in the United States.

(b) Community blood banks: These usually are non-profit facilities locally organized and controlled to serve the needs of a majority or of all of the hospitals in a community. Today, there are more than 100 community blood banks in the United States.

(c) Red Cross: The blood bank donor program of the American National Red Cross is administered through 55 regional centers. During 1957 the Red Cross provided 47.6% of all blood used for transfusions.

(d) Others: Blood bank programs not patterned within the foregoing categories, such as privately-owned blood banks (P.H. Stip.).

6. During 1955, most of the hospitals in the Kansas City area maintained their own blood banks or made arrangements with another local hospital to secure some of the needed supplies of blood. (P.H. Stip.)

7. The American Association of Blood Banks (herein sometimes referred to as AABB), a national organization of blood banks, was formed in 1947. It provides technical information on blood banking, encourages research, conducts an inspection and accreditation program for blood banks, sponsors reference laboratories to provide local blood banks with assistance on serological

problems, and conducts a national clearinghouse program to facilitate the exchange of donor replacement credits on a nationwide basis. The AABB clearinghouse program employs a reciprocity system of making returns of blood either in kind or by way of blood credits to a member blood bank from any member blood bank in the country in satisfaction for blood used in transfusing a patient in any other section of the country. When a blood bank accepts a replacement donation for a patient whose transfusion has been supplied by a facility in another location, it forwards a reciprocity credit to the district clearinghouse office of the AABB where the transaction is recorded and credit issued to the account of the supplying bank. (P.H. Stip.)

8. The Public Health Service Act, aproved July 1, 1944, (58 Stat. 682), requires that a blood bank obtain a license issued by the United States Department of Health, Education and Welfare before it may transport citrated whole blood (human) in interstate commerce. The National Institutes of Health is the agency within the Department of Health, Education and Welfare which has direct supervision and control over the inspection of blood banks and the issuance of licenses permitting the transportation of blood in interstate commerce. (P.H. Stip.)

9. Respondent Community holds a license issued by the National Institutes of Health of the United States Department of Health, Education and Welfare and is a member of the North Central Blood Bank Clearing House (hereinafter sometimes referred to as NCBBCH) and the American Association of Blood Banks. (P.H. Stip.)

10. World and Midwest both hold licenses issued by the National Institutes of Health of the United States Department of Health, Education and Welfare (CX 1) (1903) and they are members of NCBBCH. (CX 10.)

FACTS RELATING TO THE JURISDICTION OF THE FEDERAL TRADE COMMISSION

11. Since the initiation of this proceeding the corporate respondents have vigorously maintained that the Federal Trade Commission had no jurisdiction over their persons (primarily because of their status as non-profit corporations) and that it also had no jurisdiction over the administration of human whole blood (primarily because the whole system of transfusion is allegedly a medical service and constitutes the practice of medicine not commerce and secondarily because human whole blood is living tissue

and thus not a proper subject of barter and sale). (See respondents' brief, pp. 13–65.) As heretofore pointed out, the Commission, after an interlocutory appeal, in remanding to the hearing examiner the jurisdictional questions taken up on a prehearing motion, stated that they should be determined only upon a full record (order dated December 18, 1962).

We, accordingly, first marshall the facts found relating to these jurisdictional questions and to the general question whether the activity allegedly restrained was in, and in the course of, interstate commerce under the next following subheadings.

The Non-Profit Status of the Respondent Corporations and Their Operations

12. As heretofore pointed out (findings 1 and 2), both Community and Area Hospital Association are organized under not-for-profit statutes. Each of the hospital corporations named as respondents, *i.e.* Baptist Memorial Hospital, Menorah Medical Center, and Sisters of Charity of Leavenworth are not-for-profit corporations (finding 2–j). All the foregoing have been granted an exemption under the Internal Revenue Code (*id.* RX 52, RX 3).

13. All except two hospital corporations affiliated with Area Hospital Association, one of which is affiliated with Community, are either not-for-profit corporations or instrumentalities of local, county, state or federal governments (findings 1 and 2). The two exceptions are proprietary corporations (P.H. Stip., CX 540, 582). All affiliated corporations which are not proprietary corporations or governmental instrumentalities have been granted exemptions under the Internal Revenue Code (finding 2–j, P.H. Stip.)

14. The evidence is uncontradicted that in accordance with the applicable statute and their articles of incorporation both Community and Area Hospital Association have no shares of stock and that no part of any funds received has ever been distributed or inured to the benefit of any of its members, directors, or officers (Tr. 2673–4, 4545–51; RX 51–52; CX 467, 471; Tr. 8466–69; Tr. 4363; RX 2; CX 582; Tr. 703). The funds of said corporations have been used only for the purposes authorized by law and their articles of incorporation (Tr. 4363, 8466–69).

15. Funds received by Community originated from gifts, loans, and grants, replacement blood donations, and payment of respon-

sibility and processing fees (Tr. 2673, 4545–51; CX 467–471, 232). Such receipts have not been sufficient to meet expenses and to repay outstanding loans (Tr. 2674–78; CX 467, 471; Tr. 8466–69).

16. Funds received by Area Hospital Association originated from grants, loans, gifts and dues of member hospitals (Tr. 705).

17. Among the stated purposes for which Community was formed on December 23, 1953, under the title Community Blood Bank of Jackson County, was:

> To create, establish and maintain a permanent blood bank of human blood, to collect whole human blood from voluntary or paid donors, to process, freeze, dry and fractionate the same, to store the same or any of its derivatives in liquid, frozen, dried plasma or any other form, and generally to collect, process, store, dispose of and distribute the same as the Board of Directors may determine, in Jackson County, Missouri, or elsewhere, and to conduct such charitable, educational, civic, patriotic, scientific and research programs as the Board of Directors may determine necessary, desirable or feasible in connection with all or any one of the foregoing. (RX 51.)

The articles of association were twice amended. Once to change its name to reflect its broader community interest on April 1, 1957, and again, on February 9, 1960 to expatiate on its charitable and non-political status (RX 51).

18. Community became operative as a blood bank on April 3, 1958 (Tr. 2568). Prior to that time $87, 840.21 had been obtained as gifts or loans. This sum was used to place Community in operation as a blood bank (Tr. 4551; CX 232 a–d). Detailed plans for the formation and operation were under consideration for over two years during which the funds were raised, a location was secured and a director and other full time staff were hired (Tr. 4344-60; CX 383-397). Discussion concerning the formation of a community blood bank by the Jackson County Medical Association and other persons including the Red Cross and some of the pathologist respondents had been sporadically carried on since at least August of 1953 when the Jackson County Medical Association appointed a committee to initiate action for a community blood bank. Two of the six members of the original committee are respondents Dr. Hilliard Cohen and Dr. Jack H. Hill (Tr. 4522; RX 129; CX 354–j; see RF 93–96, CF pp. 1–9). Area Hospital Association or its predecessor became involved in these discussions commencing at least in January of 1955 (CX 165).

19. Community carried on its operations under the full time direction of Perry Morgan, a paid staff member, and the medical guidance of respondent Dr. Ferdinand C. Helwig, the pathologist

of St. Luke's Hospital who serves without compensation (P.H. Stip., RF 165; CX 397). The various pathologists in the Kansas City area including respondents are its technical advisory committee and assist Dr. Helwig by serving in rotation for a two-week period without compensation as acting medical directors of the blood bank (P.H. Stip., par. 18; Tr. 2846–7; RF 165, 176; CF p. 340; RX 54 a–b).

20. Dr. Perry Morgan (Ph.D.), the director of Community described in detail the operation of Community in the collection, processing and distribution of blood, and its relations to hospitals, other blood banks, drawing stations, the clearing house and the Red Cross (Tr. 2481–2994). The following brief description is deemed adequate for purposes of this decision.

a. Community receives its blood direct from donors at its principal office and it also receives blood from donors bled at drawing stations maintained at hospitals away from the center of Kansas City, Missouri. Blood received at drawing stations, as well as that drawn at Community's office, is sent to the laboratory in the principal office and there processed by being typed, tagged and refrigerated in accordance with Community's laboratory procedures (RX 70). Minute procedures are prescribed to insure the quality of the blood and the care of the donor (RX 69). Community utilizes three types of donors: predeposit donors who, generally, belong to donor's groups and create credit for their group by donating blood in advance of needs, replacement donors who donate their blood to wipe out an obligation for some friend or relation who has been transfused, and professional paid donors who uniformly are given a $15 fee for their services. It also receives Red Cross blood and at times blood from other banks through the American Association of Blood Banks clearing houses.

b. Community maintains contractual relations with its drawing stations and with hospitals who do not have drawing facilities (CX 233 and 234). These contracts are form contracts and no variations are permitted (Henderson Tr. 8304). Initially four hospitals, St. Joseph's, St. Mary's, Trinity Lutheran, and Queen of the World, signed supply contracts (RF 159; CX 583). Within a month and a half, Bethany, St. Margaret's Independence Sanitarium, St. Luke's Menorah Medical Center, and Research hospital entered into agreements and by the end of 1958 there were twelve hospitals so affiliated (RF 159; CF p. 340, CX 583, 466). Community refused to undertake to supply the blood requirements for University of Kansas Medical Center in 1958 (Tr.

2719–20; CX 403, 404; RF 160) because it believed it could not meet the blood requirements of all hospitals in the area (CX 542). However, it subsequently entered into a special arrangement to supply heparinized blood only and later became the Medical Center's principal supplier (CX 435, 458). By the time this proceeding was filed, Community had affiliations with all but a handful of hospitals in the entire Kansas City area. Thus almost fulfilling "the intent and hope of those who planned the Community Blood Bank that all the hospitals of greater Kansas City would become affiliated members * * *." (RX 130.)

c. In case of the hospitals to which blood is supplied CX 233) Community is required under the terms of its contract to meet the contracting hospitals' requests for blood (Tr. 2723–24; CX 233; RF 161). While, in terms, the contracts do not expressly require such hospitals to obtain all their blood from Community (CX 233), in practice, many hospitals take the position that they deal exclusively with Community (Fndings 151–153) and Community, at least in the case of Kansas University Medical Center, refused to accept partial affiliation (CX 403, 433; Tr. 2720–21). It sought, moreover, to have even Red Cross blood flow through its laboratory with consequent processing fee charges (CX 372, 366, 361; Tr. 2574).

d. Blood is maintained in the refrigerators at affiliated hospitals (Tr. 2696) but title is retained in Community until transfusion to the patient is made (Tr. 2558, 2560, 2697). Community assumes the risk of blood becoming outdated after the passage of 21 days (Tr. 2730–31) and, thus, not available for tranfusion (RF 162). On transfusion, Community charges the contracting hospital a replacement fee of $25 and a processing fee of $9.00 (Tr. 2558). This the hospital passes on to the patient plus whatever laboratory or transfusion fee which its hospital laboratory charges (see RX 126 a–b). The replacement fee of $25 can be eliminated by the recipient presenting a donor at Community or through supplying a donor at any other blood bank which will transfer credit through the American Association of Blood Banks' national clearing house system (Tr. 2565). If the recipient is a member of a predeposit group with a Community affiliation, or is entitled to Red Cross blood, Community will cancel the replacement fee (Tr. 2573–6; RF 163) and the $9 processing fee will be eliminated if a second pint of blood is supplied by a donor (Tr. 2565, 2569; RF 164).

e. The provisions of the Community hospital contract is

couched in terms of a commercial transaction *e.g.*, "the hospital agrees . . . to pay in the normal course of business the net amount of the invoices . . . the bank agrees to promptly forward to the hospital any credits . . . ." Where a credit is received after the patient is discharged, ". . . hospital agrees to refund the credit to the patient by check." (CX 233.)

f. The contract with hospitals which act as drawing stations (CX 234) also contains language comparable to that used in business transactions of bargain and sale rather than loan. The personnel of such hospitals are paid by Community when engaged in drawing blood and are subject to yearly retraining by it.

g. In addition to its own drawing station and to the hospital drawing stations, Community operates a mobile unit which is set up at factories, churches, etc., in Kansas and in Missouri for the purpose of the convenience of blood donors (*e.g.*, CX 465 in camera, p. 7).

h. In the operation of its laboratory, Community performs a number of tests in addition to those required by National Institutes of Health regulations (Tr. 2830–39). It also maintains a file on rare blood donors (CX 465 in camera). It performs special laboratory testing procedures and consults on difficult cross match problems (Tr. 2844–45, 3621, 3681–82). It trains medical technologists, students and resident physicians in blood banking procedures (Tr. 2844, 2876–7, 3623).

i. In the operation of its donor area, Community adopts standards of procedure more stringent than are required by National Institutes of Health standards for the benefit of the donor (Tr. 2842–43; RX 69, 70, 71).

j. Community maintains membership in the American Association of Blood Banks and the North Central Clearing House. It also contracts with certain American Red Cross Chapters for the supply of blood to patients to whom the Red Cross has an obligation to supply blood. As to such blood no charge can be made under Red Cross regulations but a processing fee of $6 is charged by Red Cross and Community in turn charges a $9 fee to the hospitals (Tr. 2574).

k. In the early stages, the percentage of paid donors reached possibly 40% (Tr. 2566). In 1962 it was 25% (CX 465–a; Tr. 2566) and in the intervening year, 1960, reached a low point of 16.9% (CX 463, p. 4).

21. Area Hospital Association in its certificate of incorporation filed May 14, 1954, among other matters, was authorized:

* * * To measure and evaluate the present and future requirements of the area for hospital services, to assist in the procurement and training of necessary personnel and *to foster understanding* and *cooperation between hospitals, the medical and para-medical groups and the public.*

* * * To act as an agency and instrumentality for or in cooperation with other non-profit organizations, in the general public interest, to provide and extend comprehensive and cordinated planning and financing to strengthen and improve medical care, facilities and services in the area. To do any and all things necessary, proper and consistent with the accomplishment and performance of the above stated purposes. [Emphasis supplied.] (RX 2.)

22. Area Hospital Association derives all of its funds for operations solely from grants, loans, gifts and dues of member hospitals (Tr. 705). It serves as an agency to make studies and surveys, collects, interprets and analyzes data in the field of hospital activities (Tr. 5101) in the Kansas City area, such as: the adoption of a master plan or program (RX 149 a–k; Tr. 5288), the Community Blood Bank, disaster planning for the four principal municipalities and 83 lesser ones in the area (Tr. 5309), obsolescence of area hospitals (Tr. 5093), utilization of hospitals (Tr. 5321), hospital costs and patient care, nurse and hospital employee training and recruiting (Tr. 5333–34), and many other similar programs and projects listed in RX 203. It supplies such studies and reports to about 1,000 agencies including hospitals (Tr. 5103, 5295), city and state officials, the United States Public Health Service (Tr. 5336–37), planning agencies, universities, and health information foundations. No charge is made for such reports (Tr. 5338).

23. Participation by hospitals in Area Hospital Association is voluntary (Tr. 5106). Each hospital member is free to follow or reject any matter studied and submitted by Area Hospital Association (Tr. 5369, 5444, 5484). Area Hospital Association has no legal authority (RX 2) to make or direct any policy or decision for any individual hospital (Tr. 712, 4552). All persons serving Area Hospital Association serve without compensation except the small paid staff (Tr. 5060, 8466).

24. Area Hospital Association and its predecessor, its Committees, and its president participated, as hereinafter set forth, in the formation of Community and in the resolving of the conflicting interests and plans of doctors, administrators, pathologists and the public. It continues to nominate the hospital members of the corporate body of Community. On at least two occasions, one involving an infant feeding supplier and the other Community, Area Hospital Association sought to pass on the qualifications of

an enterprise to serve its hospital members. (Tr. 614–717; 5044–5187; 5287–5458.) As heretofore pointed out, Community realizes $3 per pint on Red Cross blood above its payment to Red Cross and either $6 or $16 per pint on all replacements given for the purpose of removing a $9 processing fee dependent upon whether the calculation is made using the replacement fee of $25 or the donor fee of $15 as the minuend.

25. There are 43 member hospitals of Area Hospital Association: 9 located in Missouri and 3 in Kansas are instrumentalities of federal, state, county or local governments; 21 are incorporated as religious and charitable associations under Chapter 352 of the Revised Statutes of the General Not-for-Profit Corporation Law, Chapter 355; 8 are incorporated under Articles 29 or 17 of Chapter 17 of the General Statutes of Kansas. Two member hospitals, Thompson, Brumm and Knepper Clinic Hospital (St. Joseph) and Warrensburg Medical Center, Inc., (Warrensburg, Missouri) are organized as proprietary corporations.

Except for the two named corporations, no officer, director, trustee, or corporate member of the hospital members has ever received, or can receive, any profit or thing of value (except reimbursement for expenses actually incurred) from any of those hospital members (Tr. 8466).

The Subject Matter of the Alleged Restraint

26. There is no dispute concerning the physical nature of blood or of the fluid used in blood transfusions. Nor is there any dispute that human whole blood can only be produced by a human being and that the transfusion of blood is fraught with many dangers, some as a result of incompatibility between the blood of the donor and others as the result of disease or sensitivities transmitted. Care in the selection of the donor, care in the drawing of the blood, its proper identification and storage and proper cross matching to determine compatibility are all matters which both sides regard as essential. (See CF pp. 128–130; CX 244; RF 49–73.) Improper cross matching can result in a fatal reaction in the recipient (Tr. 3547–9; RX 135, p. 51).

27. It is common ground that the fluid called whole blood and used in transfusing a human being consists of live human blood which has been collected from the vein of a donor in a bottle or other sterile container. The container has been prefilled to 6%–25% of its useable capacity with an anticoagulant fluid (either ADC or Heparin depending on the use for the blood and the

length of storage desired). (See CX 243, p. 51.) This mixture is essential to feed the blood during storage and to prevent coagulation which would result within minutes if the blood were not so diluted (Tr. 1063). In the ADC solution the blood remains viable and can be used within 21 days if properly refrigerated (Tr. 4069, 4083; RX 136, p. 60). In the Heparin solution it will tend to coagulate within 48 hours (RX 136, p. 45).

28. Standards for the drawing of blood, its storage, the admixtures to be used with it, its marking and testing have been prescribed in Public Health Service Regulations (CX 243, pp. 50–56, 19, 22, 15–17, 7–8). Standards have also been prescribed by Joint Blood Council, Inc., and American Association of Blood Banks (AABB) (RX 135) and a Handbook of Technical Methods and Procedures has been produced by the latter (RX 136). Much more detail is found in the Handbook than in the Public Health Service Standard which is primarily concerned with laying down general principles to insure the safety of the product for interstate shipment. The greater detail in the Handbook and the AABB Standards are primarily designed to particularize procedures within the generalizations laid down and to insure the health of the donor (Tr. 3787–91, 4085–88).

29. Persons engaged in transmitting blood across state lines are required to be licensed by the National Institutes of Health as to the product produced and the establishment in which it is produced (PH Stip., Tr. 1174–81). Licenses are issued only after inspection repeated once a year or oftener (Tr. 1196–1199; 1966–67). The inspectors exercise their judgment and that judgment is reviewed before licenses are issued (Tr. 1212–13). Formal education of personnel is, however, not necessarily the criterion for issuance (Tr. 1204–1214).

30. Both Community and the two commercial banks (Midwest and World) operating in the Kansas City area have received appropriate licenses (CX 1, 2, PH Stip., CX 3, 243).

Respondents produced technical proof concerning the nature of blood, a detailed description of the blood grouping systems, the incidence of particular groups in various races, the problems of heredity and of marriage of persons with incompatable blood types (including blue babies), the specific operations involved in storage, blood typing and cross matching and the effects of incompatible bloods or bloods with varying sensitivities. In large measure these technical descriptions were presented by respondent Hilliard Cohen (Tr. 3490–3694; 3751–3779; 3873–3890) with the aid

of tables and enlarged color microphotographs (RX 101–124). This presentation was both clear and convincing and forms a background of information which was most useful to the hearing examiner in understanding the terms used by the other technical witnesses and the procedures described. Respondents' proposed findings with respect to these matters, while they appear to the hearing examiner not to be essential to a decision in this proceeding, reflect with accuracy the technical discussions. They include the following proposed findings: RF 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, which would have been found in terms had it been considered necessary.

31. The following statements in large measure suggested by respondents' proposed findings relate, among other things, to their contention that each of the steps from the taking of the medical history and the preparation for the puncture of the donor's vein to the administering of the drawn blood to the recipient, constitutes the practice of medicine and thus is not trade or commerce (*E.g.*, 3809–3810.) They also relate to the public interest in this proceeding. (The hearing examiner does not adopt respondents' contention and reaches the contrary factual conclusion that a majority of the steps, while they must be carefully performed, constitutes the preparation of a product capable of sale and transmission in interstate commerce under proper safeguards (CX 3, 243). The basis for such contrary factual conclusion is the administrative practice of the National Institutes of Health which, pursuant to its interpretation of its statute, issues licenses to blood banks who are in the commercial field and regards technical excellence of personnel, whether or not obtained through the issuance of a degree or certification, controlling in their determination whether or not a license should be issued (CX 243, Tr. 1204–1216). The medical practice properly relates to a physician determining the desirability of the particular source, whether further tests are to be required on properly labeled blood, and whether there should be a transfusion at all (see Tr. 1211).

a. Because of the hazard of transfusion reactions, the correct grouping and typing of blood to be used in transfusion therapy is of the utmost importance (Tr. 4075–77; 4282–83).

b. If blood of a different group from that of the blood group of the recipient is transfused, a hemolytic transfusion reaction may result. Any transfusion reaction due to incompatible bloods may be dangerous and in some instances the reaction may be fatal (Tr. 3547–49; RX 136, p. 51).

c. The grouping and typing of blood is a complex process that must be done by properly trained personnel. (CX 243; Tr. 3647–48, 3653, 4816–17.)

d. The proper selection of the donor of blood for transfusion therapy is of paramount importance from the standpoint of the individual receiving the blood (Tr. 3794–3800, 4270–71, 4825; CX 243). This is so not only because of incompatibility and transfusion reactions but also because diseases and allergies may be transmitted to the recipient by the blood infused (Tr. 3799–3800, 4271).

e. One of the most serious disease transmission problems in transfusion therapy is that of serum hepatitis, one of the forms of viral hepatitis (Tr. 3648–62, 3800, 3924; CX 243).

f. There is no single test known to medical science at this time by which the presence or absence of the hepatitis virus in human blood to be used for transfusion therapy can be detected with a degree of certainty (Tr. 3722, 4072). Liver malfunction can, however, be cheaply ascertained (Tr. 3553; CX 142). A medical history, including any report of the donor's having had hepatitis or liver disease or having been jaundiced is the usual method by which donors whose blood might transmit the hepatitis virus are sought to be excluded (Tr. 3722, 5009).

g. Because of the danger of hepatitis being transmitted to the recipient of a blood transfusion, a person who has a history of hepatitis, jaundice or liver disease is disqualified as a blood donor (CX 243, p. 50; RX 136, p. 2).

h. The taking of the medical history from a potential blood donor is thus an important function that should be performed by a person who has received adequate training (Tr. 1204–1216). Some experts contend that medical training is essential (Tr. 3793–94).

i. The value and reliability of a medical history taken from a potential blood donor depends, to a very great degree, upon the integrity, understanding and motivation of the donor (Tr. 3647–48; RX 136, p. 1; Tr. 7748).

j. Some experts contend that where the donor is of the "skid-row" type receiving a monetary consideration for giving his blood, the risk of an incomplete or inaccurate medical history is enhanced (Tr. 3799–3800).

32. Various studies relating to the incidence and fatal effects of hepatitis were presented to the hearing examiner through their authors or coauthors (CX 137–138, 140, 142, 127–128). It is ap-

parent from these articles and from the testimony that the existence of hepatitis virus in any given person cannot be determined with certainty. A healthy carrier could not be exposed by taking his history no matter how skillfully. Moreover, science has not produced a reliable test for viral hepatitis and the tests which indicate liver malfunction are sufficiently misleading so that a large percentage of the apparently healthy population, in the neighborhood of one-third, should be excluded if these were relied upon. One test, the injection of blood from a suspected carrier into a volunteer healthy prison inmate, caused such serious results to the inmates that research of this type was discontinued.

33. On the information collected and the statistical studies performed by the experts who testified, the following factual conclusions appear probable:

a. Narcotics addicts tend to have a very high incidence of hepatitis presumably because of the common use of unsterile injection instruments (Tr. 3930, 3720; RX 141).

b. Malnutrition due to chronic alcoholism or to other causes tends to make a person susceptible to hepatitis (RX 140).

c. Donors who were institutionalized either in dormitories or prisons presented a greater risk of transmitting hepatitis than those having a more healthy environment (RX 127, p. 457, RX 140).

d. Persons from such unhealthy environments are more apt to be alcoholics and narcotics users, or to suffer from malnutrition, and are thus more likely to be chronic carriers of viral hepatitis than persons from less crowded and better nourished groups (RX 142).

e. Many paid donors come from such unhealthy environments (RX 142).

f. Even persons from healthy backgrounds and in an economic status where they are apt to be considered substantial citizens, who show no clinical abnormalities suggestive of hepatic disease or the carrier state, have been established to be carriers (RX 140).

g. Homeless men, sometimes described as of the skid-row type, who have been institutionalized or are chronic alcoholics or drug addicts, or intimately associated with such addicts, presumably present a greater risk of being carriers of hepatitis than persons from more fortunate economic circumstances (RX 140–142).

Many persons knowledgeable in the field of human blood and transfusion therapy take a firm position that the voluntary, fam-

ily type of blood donor is a much safer donor than the paid donor from low economic or social groups, so far as the incidence and risk of post transfusion serum hepatitis is concerned (Tr. 3799–3800; 3942–43, 7357–58, 7748).

34. In the practical operation of a blood bank a varying percentage of paid donors are utilized. In the case of Community this at one time probably reached 40% of the total (Tr. 2566) and it has been as little as 16.9% (CX 463, p. 4). Community also has a donor club in Leavenworth Prison. (See CX 412.) Midwest and World, although in the early stages of Midwest's operations sought to form donor clubs (see CX 181). In recent times they relied in large part on paid donors many of whom appeared to be of the "skid-row" type (Tr. 8519–8547).

The Existence of Interstate Commerce

Having decided that the facts do not support the contention that all the steps included in the transfusion of blood from one person to another are included within the practice of medicine and thus could not be commerce (finding 31, *supra*), we limit the factual findings under this sub-heading to those relating to the interstate character of respondents' operation and that of the alleged victims.

35. Respondent Community holds a license issued by the National Institutes of Health of the United States Department of Health, Education and Welfare (N.I.H.) and is a member of the North Central District Blood Bank Clearing House (NCDBBCH) and the American Association of Blood Banks (AABB) (Stip. April 24, 1963, paragraph 24).

36. Hospitals in both the States of Missouri and Kansas procure blood from respondent Community and it transports or ships blood to such hospitals as often as blood is required or ordered. Respondent Community also ships blood to other blood banks outside the State of Missouri and on occasion receives blood from blood banks outside the State of Missouri through NCDBBCH (Stip. April 24, 1963, paragraph 25) or from the Red Cross (RX 464, 465) or by direct purchase (RX 348, 349, 357).

37. Midwest Blood Bank is licensed by N.I.H. (CX 1 and 2), is a member of North Central District Blood Bank Clearing House (CX 10), and has shipped blood through such clearing house to many points outside the Kansas City area including the Mayo Clinic in Rochester, Minnesota (RX 274–a). It and its affiliate, World Blood Bank, have also made direct shipments of blood to

points on the East and West Coasts of the United States and to the Gulf (RX 244 in camera). They have also made substantial shipments from points in Kansas to veterans facilities in Missouri and from points in Missouri to veterans facilities in Kansas (RX 256–257).

38. In the proposed operation of its donor clubs and blood provider programs, Midwest, World and their affiliates, contemplated providing for the shipment of blood from their drawing stations in the Kansas City area to locations in other states throughout the United States (RX 278 A–B, 280, 281, 289, 290, 291, 294).

The Class Sued as Such

39. As Community admits in its answer, it has a corporate body of thirty-nine; five officers and four board members. Its officers, board members and members of the corporate body have varied from year to year (PH. Stip.). The officers, directors and members for one year are named individually and as representatives of the entire membership (Complaint, par. 1). It would be wholly impracticable to name each member officer and director who served from 1958 to 1962, the date of the service of the Complaint (see RX 53). Insofar as this proceeding is concerned, each of the officers, directors and members who appeared before the hearing examiner took consistent positions with respect to the operation of Community and each in their representative capacity as officers, directors and members constituted a proper proportion of those made parties by representation and had consistent interests in no way antagonistic to other members of the class.

40. An examination of the membership roster (CX 163, 164) of Area Hospital Association demonstrates that it is impracticable to name each of the many hundreds of persons listed therein. Its officers, board members, and members have varied from year to year (PH. Stip.). The officers and directors for one year are named and three of the forty-three hospital members are named (Complaint, par. 1). It would be wholly impractical to name each member officer and director who served at any time from 1955 to 1962, the date of the service of the complaint. Service on the association was calculated to bring the existence of this proceeding to the notice of each of the corporate members. Insofar as this proceeding is concerned, the officers, directors and representatives of members who appeared before the hearing examiner took consistent positions with respect to the operation of Area Hospital Association and each in their representative capacity as officers, direc-

tors and members constituted a proper proportion of those made parties by representation and had consistent interests in no way antagonistic to other members of the class.

41. The hospital members despite the diversity of authority under which they were organized (heretofore set forth in detail, finding 2–j) and their wide geographical dispersion each had the same position as members of Area Hospital Association and each was equally responsible as a member for its operation and the action which it took and which will hereafter be detailed.

BACKGROUND OF THE ALLEGED CONSPIRACY

Each of the parties offered extensive proof concerning the events which preceded the opening of the commercial blood bank in Kansas City, Missouri, during 1955. It was variously known as Jackson County Blood and Plasma Service (Tr. 6736), Midwest Blood Bank and Plasma Center, and World Blood Bank (hereinafter collectively referred to as Midwest except where special emphasis may be placed on one of the organizations). Complaint counsel claims this proof shows purpose, motive and intent and respondents, that it shows a good faith if lethargic attempt to get the best possible blood supply for Kansas City (Final Argument). The following brief recitation seems adequate to this decision.

The Red Cross Proposals

42. As early as 1947, following the conclusion of World War II, there was some effort to continue the operation of the Kansas City Defense Blood Bank by the opening of a Regional Red Cross Blood Center which would operate for the benefit of the community rather than solely for the Armed Services. Efforts along this line continued up until a Defense Blood Center was again commenced for the purpose of supporting the Korean emergency effort (CX 324–344, 357).

43. Following the conclusion of the Korean emergency, there was again discussion of the opening of a Red Cross regional blood center as a continuation of the Defense Blood Center in the Kansas City area. On August 6, 1953, the Red Cross passed a resolution urging that this be done (CX 323). This action followed a number of instances in which requests were made to the Red Cross to commence the supply of blood for civilian use (CX 345–353). None of these efforts was successful and in August 1953 the Jackson County Medical Society formed a community blood bank committee (CX 369). There was some discussion con-

cerning joint sponsorship of a blood bank by the medical society and the Red Cross which was unsuccessful (RX 329) and in December 1953 a non-profit corporation, then known as the Community Blood Bank of Jackson County, was organized. It was later completely reorganized to include a greater area and more widespread representation and changed its name to Community Blood Bank of the Kansas City Area, Inc., (Community) (RX 329–z; Tr. 4323, 4324, 4526–27).

44. Cooperation between the Red Cross and Community did not materialize, among other reasons, because:

(a) Red Cross would not authorize participation by its chapter in a community blood bank that made a charge of any kind to the recipient of the blood (RX 19; CX 354–358, 359; Tr. 1641–1647);

(b) the use of the Red Cross Building with a charge for replacement and processing fee, it was felt, might result in misunderstanding the Red Cross attitude that blood should be "free" (Tr. 1646–1647);

(c) there was some objection to the downtown location of the Red Cross Building from a civilian defense point of view (CX 358);

(d) there were persons who were concerned about an adverse reaction to Red Cross by former servicemen (CX 354 k);

(e) some of those concerned with the community blood bank proposal believed that the Red Cross policy of not permitting replacement fees would result in insufficient replacements (Tr. 5475);

(f) the pathologists who operated hospital blood banks in Kansas City wanted local, not Washington control.

Sporadic Discussions of Central Blood Bank—1953–1955

45. There were sporadic discussions concerning the proposal for the establishment of a community blood bank in Jackson County from December 1953 through the spring of 1955 by the medical society and by the administrative group of the hospitals (see RX 113, 127) because it was recognized that a community bank would better be able to handle prepayment and group donor plans than the individual hospitals (CX 598). A Community Studies Report was considered during this period (RX 365). Community Studies, Inc., was a group which had prepared a number of factual studies for Area Hospital Association and for eleemosynary foundations and trust funds operating in the area. A formal request for cooperation between the Medical Societies and the

Area Hospital Association to support the Community Studies Program was not made however until June of 1955 (RX 161 d).

Community Plans for Blood Bank Stalled

46. Although discussions about the formation of a community blood bank had been going on sporadically since Community was organized in 1953, at the time of the formation of Midwest in May 1955 the plans of the Medical Society to form a blood bank through Community in its then form had reached a low ebb.

47. Leslie Reid, the Chairman of the Administrative Council of Area Hospital Association, reported to the February 23, 1955 meeting: The Blood Bank Committee had met twice during February 1955, once with representatives of the Jackson County Medical Society. The Committee had reiterated its position that increased cost of blood to the public through a community blood bank would be a very difficult factor and that industry possibly had some misunderstandings regarding the advantages of a community blood bank. The entire matter of the proposed bank was to be re-submitted to the executive council of the Jackson County Medical Society for further consideration, and that if it was decided the project would not go forward, a joint statement would be made to the press by the Medical Society and the Hospital Association (CX 170; RF. 124).

48. At the March 1955 meeting Reid reported that the matter was in status quo (CX 171; RF 127).

49. Dr. Carroll P. Hungate, President of Community, on March 17, 1955 had sought the aid of Community Studies, Inc., to make a survey to determine how best the blood needs of the Kansas City area could be fulfilled (RX 365, RF 125). As Miss Jenkins, the executive secretary of Area Hospital Association, reported in her confidential memorandum to the Blood Bank Committee in January in 1956, there were no negotiations between February 22, 1955 and June 1955 regarding blood banking between Community and Area Hospital Association (RX 161–d) and there had been comments about the alleged failure of hospitals and pathologists to cooperate with the Medical Society in implementing Community (RX 161–a).

The Basses Start Their Blood Bank: May 1955

50. Prior to 1955, there was no blood bank not affiliated with a hospital and operated for profit for its owners in the Kansas City area (Tr. 1624, 1637; PH Stip. Tr. 7994). Discussion concerning formation of such a bank had been discouraging (Tr. 7308).

51. A partnership composed of Francis H. Bass, Margaret P. Bass, and H. W. Dolph and his wife (Tr. 6750–51) commenced operation as a commercial blood bank known as Jackson County Blood & Plasma Service at 2904 Troost Avenue, Kansas City, Missouri, on May 17, 1955 (Tr. 6736). This later became known as Midwest.

52. Mrs. Bass had worked in the office of Dr. Wallace Graham prior to 1940 or 1941 (Tr. 6739) and having found from a discussion which he had with a retired doctor that there was no central blood bank operating in Kansas City (Tr. 6723–6724, 6731) and having been an observer in the latter part of 1954 of a blood bank in Houston, Texas (Tr. 6716), Mrs. Bass and her husband, Francis H. Bass, decided to open a blood bank in Kansas City.

53. The Dolphs became financially interested in contributing to the capital of the bank as a result of an advertisement for an investment opportunity (Tr. 6750–51). Neither the Dolphs nor Mr. Bass had had any previous experience in the medical field (Tr. 6754, 6692, 6700).

54. Dr. J. W. Graham, the father of the physician with whom Mrs. Bass had been associated, volunteered to be the medical director of the blood bank (Tr. 6739–6744) when Mrs. Bass talked with him about it and he became the original medical director (Tr. 6739).

55. Mr. Bass was not aware of the fact that Community was in existence until after May 16, 1955 (Tr. 6735, 6736). No effort was made prior to the opening of Midwest to secure other local medical or hospital sponsorship (Tr. 6732–34, 7993). Mrs. Bass, however, sought membership in the American Association of Blood Banks in April 1955 (CX 13) and invited Dr. Buhler to call on her at the blood bank on May 10, 1955 sometime before it opened on May 17, 1955 (CX 14).

56. No investigation was made concerning Dr. Graham's special qualifications to act in a blood bank (Tr. 6734–36).

57. The medical profession was informed of the opening of Jackson County Blood and Plasma Service (Midwest) by letter dated May 17, 1955 which was circulated to the medical profession and to the hospital administrators (Tr. 6756, 6761).

58. On opening, Midwest employed a medical technician, a nurse and a deliveryman. Original proposed charges were $25 per unit of positive bloods and $35 per unit of negative blood with no replacement required. There was a credit on a one-for-one basis

of $10 for positive bloods and $15 on negative, and $20 on a two-for-one basis and cancellation of the entire charge if replacement was made on a 3-for-1 basis (RX 277). Dr. J. W. Graham, the Medical Director, had been a general practitioner in the Kansas City area, was 78 years old and had received no special training in the field of hematology and immunohematology (Tr. 7309, 7507, 7987).

FACTS BEARING ON EXISTENCE OF CONSPIRACY CHARGED

The Charge Pleaded

59. Paraphrasing the facts stated in Paragraph Seven of the Complaint, the combination or conspiracy allegedly commenced during 1955 with Area Hospital Association and its officials, pathologists, and two hospital executives plus unknown persons entering into and carrying out "the agreement, understanding, combination or planned course of action or course of dealing to hamper, restrict and restrain the distribution of blood in interstate commerce." With the incorporation of Community about April 5, 1957 [sic], all respondents joined using Community as an aid. The means of carrying out the conspiracy alleged included:

(a) The agreement not to use Midwest blood or to permit it to be used or accepted as replacement of blood furnished by Community;

(b) Refusal to use Midwest blood or to permit it to be used in the Kansas City area;

(c) Advice to prospective customers that Midwest blood would not be accepted;

(d) Advice to North Central Blood Bank Clearing House (NCBBCH) and American Association of Blood Banks (AABB) that respondents had agreed or had a policy not to use such blood.

The charge was denied in respondents' answers.

60. During the trial the emphasis appeared to shift as the evidence unfolded. It was established that Community was incorporated in 1953 long before the date charged in the complaint and before Midwest commenced to do business. Moreover, many of the refusals to accept Midwest blood were refusals to accept direct shipments with a statement that credit through the NCBBCH would be accepted.

61. Although opportunity was afforded to amend the language of the complaint to conform to the proof, counsel declined to specify how the complaint should be amended stating in their notice

dated October 30, 1963, "it being counsel's view that the present complaint is satisfactory."

In ensuing headings we shall set forth the facts supporting the charge of conspiracy and later the position of respondents that the doctors and hospitals were merely following their individual decisions without combination or conspiracy because of a fundamental disagreement with the ethics and methods of procedure as well as the quality of blood supplied by Midwest.

By reason of the fact that there was no direct proof available to establish the existence of the combination and conspiracy, the proof offered by counsel supporting the complaint was necessarily circumstantial. Accordingly, the division of the evidence under ensuing headings and subheadings does not mean that any of the evidence can be ignored in determining the existence or lack of existence of the conspiracy charged. All evidence received must be and has been considered although it has been impossible to even summarize it all and still keep this initial decision within reasonable bounds.

Facts Supporting Charge of Conspiracy or Planned Course of Action

Motivation

62. Apparent throughout the hearings was the adverse reaction by the medical profession, as exemplified by the pathologists and others called as witnesses, to the advertisements, the policies and the personalities engaged in operating Midwest. The original announcement of Dr. J. W. Graham as medical director was made on May 17, 1955 (RX 276). This was resented by the pathologists who felt that a person skilled in pathology or hematology was required to run a blood bank (Tr. 7986). Subsequent advertisements or letters, widely distributed, attacked the medical profession's practice of looking to relatives of persons hospitalized for replacements and praised Midwest's qualifications and efficiency in a manner not considered appropriate or ethical (RX 278–285). Resented also was the announcement in a newspaper advertisement of Midwest's acceptance as a member in the National Blood Bank Clearing House Program and the implied criticism of the replacement plans allegedly existing among the hospitals (RX 280–281). The physicians steeped in the medical ethic against all advertising were revolted by the display advertising of Midwest (RX 284). On a visit to the Midwest Blood Bank, moreover, Dr. Buhler felt he had been accused of stealing papers (Tr. 7997).

63. The American Association of Blood Banks in its publication criticized the use of so-called insurance plans (CX 25). The American Medical Association and the Red Cross both adopted policies to prevent any "trafficking in blood" (RX 319). Many of the pathologists took the position that the sale of blood was immoral. Dr. Buhler, for example, testified that it was not consistent with the dignity of the human being. There was thus some motivation for doctors holding such beliefs not only to refuse to deal with such an organization themselves but to discuss their attitude with others with a consequent restraint on the business of Midwest.

Meeting of Pathologists and Area Hospital Association Reaction in May 1955

64. Dr. Buhler testified (by referring to the handwritten minute book) about a meeting of the Kansas City Society of Pathologists held May 18, 1955 (Tr. 8074, 8077).

(a) At that meeting Dr. Kerr told about the newly formed Jackson County Blood Bank (Midwest) which had opened the day before. Midwest's blood procurement policy including the required unit replacement or choice of replacement by professional donors was also discussed. Dr. Kerr moved that the Society request a meeting with hospital administrators and pathologists to discuss blood banking programs under the auspices of the Area Hospital Association.

(b) Dr. Hilliard Cohen seconded this motion and it was unanimously carried (Tr. 8075).

(c) Dr. Firminger discussed the establishment of a blood bank account agency to facilitate the exchange of blood between the city hospitals.

(d) Dr. Buhler recalled that this was probably the origination of a loose federation of the existing hospital blood banks because Dr. Cohen volunteered, effective May 23, 1955, to furnish the service necessary to operate the call service for the first month. Parenthetically, this system involved each hospital calling the central hospital and giving an inventory. Then any hospital bank requiring a rare type blood would know where to get it.

At the same meeting, Dr. Lapi presented problems as chairman of the Missouri State Blood Bank and concerning the North Central Clearing House (Tr. 8077).

65. It appears from the foregoing that within a day following the announcement by Midwest of its going into business, the

pathologists in the area at their meeting reacted by perfecting an arrangement for the exchange of blood between existing hospital blood banks, discussed the character of operation of Midwest, and heard from Dr. Lapi, the Missouri representative to the North Central Blood Bank Clearing House (NCDBB).

66. When the pathologists, on getting a report about the formation of Midwest, decided upon the establishment of an informal telephone check system to be run the first month by Dr. Hilliard Cohen at Menorah (Tr. 8074–76), and sought a discussion, there was a relatively rapid reaction by the Area Hospital Association. Administrative Council Chairman, Leslie D. Reid, reported to the 19 hospitals represented [6] at a meeting held May 25, 1955, that he too had been approached by a commercial bank and in connection with the discussion described an improvement in the reciprocity program between hospitals wherein a telephone check is made each morning of supplies and types of blood in the several hospital banks (CX 172; RF 128).

67. With this improved arrangement, the necessity for seeking blood from a commercial source was reduced because blood of all types was made readily available from other hospital banks (Tr. 7338).

Alleged Admissions of Joint Pathologist and Hospital Action by Respondents Helwig and Lapi

68. There are two written reports of statements allegedly made by Doctors Helwig and Lapi which would indicate that an agreement had been reached among pathologists and hospitals to boy-

[6] The minutes list the following:
Baptist Memorial Hospital
Bethany Hospital
Blue Cross
Cushing Memorial Hospital
Excelsior Springs Hospital
General Hospital
Harrisonville Memorial
Independence Sanitarium and Hospital
Lexington Memorial Hospital
Menorah Medical Center
Providence Hospital
St. John's Hospital
St. Joseph's Hospital
St. Luke's Hospital
St. Margaret's Hospital
Smithville Community Hospital
Trinity Lutheran Hospital
St. Joseph's
Kansas University Medical Center
(CX 172–a).

cott Midwest at some time prior to November 1955 (CX 160, 598). Respondents involved in both instances took the stand and gave sworn testimony concerning the statements.

69. The first statement is contained in a Field Report by C. T. Snavely, Attorney Adviser of the Kansas City Branch Office of the Federal Trade Commission (CX 598 a–b). The Field Report is dated October 4, 1956 and records an interview with Dr. Ferdinand C. Helwig, pathologist at St. Luke's Hospital, held October 1, 1956. This report was offered by complaint counsel at the suggestion of one of respondents' counsel who stated he had no objection to it (Tr. 7342). Mr. Snavely was present during the hearings and would have been available to testify concerning the contents of his report had objection been made to it. In view of this failure to object and in view of the date of the report, it is considered reliable. Dr. Helwig was unable to recall that he had talked to Mr. Snavely in 1956 (CX 598) but indicated he would not deny he had done so. He recalled a second interview in 1961 (CX 599) because it took up his entire afternoon (7333–34).

70. One of the paragraphs in Mr. Snavely's report of 1956 reads as follows (CX 598):

> Informant stated that he belongs to both the Kansas City and the Missouri Pathological Societies. About two years ago at a meeting of the Kansas City Pathological Society he said *there was drawn up a resolution stating the Association's preference for using replacement donors rather than getting blood from commercial blood banks because the Association was not in accord with traffic in human blood.* The resolution stated, however, that commercial blood should be used in emergencies. He said that he knows of no one who has tried to "do in" the local commercial blood bank and that he knows of no conspiracy against it and no concerted action to restrain its trade in any way. (CX 598.) [Emphasis supplied.]

71. In his 1961 Field Report (CX 599), also admitted without objection (Tr. 7342), Mr. Snavely stated:

> When apprised of the matter of the charges in subject matter informant said, "That is about the most ridiculous thing I ever heard of!" Indicating that similar charges had been made before he said "Why this harassment? Its been Harassment! Harassment! Harassment!" (CX 599 a)

The 1961 Field Report also stated in part:

> In answer to inquiry informant said that "We've been very careful not to make derogatory statements" about or even have discussions about Midwest in meetings because, "We don't want a legal hassle". *He thought, however, that most pathologists would prefer blood from voluntary donors over bought blood* because voluntary donors are more likely to tell the truth about previous

diseases, etc. He said further that he didn't know where Midwest blood comes from, *but he had heard that Midwest is a commercial blood bank, that it was organized for profit.* On the other hand, no profit was made by CBB as all revenue is put back into the operation. In answer to inquiry as to why CBB blood apparently costs patients $14.00 a pint more than Midwest blood, informant said that, "I'll let your figure that out" and although he reiterated he would say nothing against Midwest, he thought there is "such a thing as skid row blood". Aside from all this he repeated he was happy with "what we have in Community Blood Bank". (Emphasis supplied.)

Finally, informant emphasized that he had not the slightest knowledge that there was any element of conspiracy on the part of proposed respondents to act against Midwest (CX 599 c & d).

72. In his testimony, Dr. Helwig, on direct examination, stated when asked whether he had agreed with anyone not to use blood obtained from Midwest or permit it to be used in hospitals:

I am sure I would have to admit this has been discussed as to whether or not we should or shouldn't. I think I may have discussed it with another pathologist. I am sure I have at some time or another but I have never lined up against anybody or lined us with anybody against anybody, we had our bank, we had a bank that was satisfactory, we were pleased with it, I don't remember ever lining up to boycott, if that is the word you want, another bank. (Tr. 7320.)

Asked whether there was any occasion on which he was asked to agree not to use Midwest blood, Dr. Helwig said, "No, we have, I think, discussed at times with one another that we would use commercial blood in an emergency." Then after an interruption he said, "This is not against the Midwest Blood Bank, it was a matter of preferring not to use blood that was sold for profit." (Tr. 7320–21.) When asked if he had knowledge of an understanding or agreement between members of the medical profession that they would not obtain blood from Midwest or permit it to be used in the Kansas City area, Dr. Helwig testified: "I don't know of any instance which the medical profession went on record of anything of that kind." (Tr. 7322.) He thought it was "unlikely" that there was any agreement or understanding or plan of action by Area Hospital Association (Tr. 7322) and had certainly never heard of it.

He denied categorically that he had knowledge of any fact that led him to believe that there was any agreement or plan of action or understanding among members of the medical profession or any members of the Area Hospital Association or representatives of Community that Midwest blood would not be permitted to be used in hospitals in the Kansas City area (Tr. 7322–7323).

73. On cross-examination, with respect to CX 599 a–d (Snavely's 1961 Field Report), Dr. Helwig said (Tr. 7377):

A. There is just one thing here, I don't believe is correct, that the hospital had used Midwest Blood before Community Blood Bank got into operation and a meeting of pathologists, *the only thing I can recall is that it wasn't anything to do with the Midwest Bank that the pathologists all felt they would prefer to use only blood that was not being used for profit and we certainly would not turn down any kind of blood, commercial bank blood or any other in an emergency.* If we ever used any blood we did accept a pint but we never used it. I don't know of a single instance where our hospital ever used any Midwest blood. If we did I am unaware of it. The rest of that is substantially a brief outline of a very much longer interview, what he left out I don't know. I remember one thing he did leave out. He asked me specifically if I would be satisfied to take skid row blood myself, I said, "Mr. Snavely, would you be satisfied to take skid row blood?" He said "That is not what I am asking you," he said, "Would you be satisfied?" I said, "That is not what I am telling you, would you be satistied?" His answer was complete quiet he never answered and neither did I. In two or three years' time I can't specifically say whether or not those are my exact words or whether-all I know is this was a much longer interview than goes into those three pages, a great deal is left out. Because he was there over two hours and a half and he was busily writing all the time. I think this must be a summary of his impressions rather than an actual detailed account of what he [sic] said. I know it was much, much longer that that, what else was said I haven't the remotest or foggiest remembrance. (Emphasis supplied.)

When questioned on cross-examination he testified (Tr. 7338):

Q. Wasn't it agreed among the pathologists that they could buy blood from a commercial blood bank in an emergency?

A. Surely.

Q. But otherwise—

A. (Interposing) We had no reason to buy it unless we ran short. We were being supplied by our banks. Of course we would get blood wherever we could get it under emergency circumstances.

He then explained that "awful" short-cuts were necessarily taken in real emergencies.

74. In this answer, quoted in finding 73, Dr. Helwig thus establishes that the informal federation, admittedly agreed upon at the May 18, 1955 meeting, placed hospitals in a position where they had no reason to buy blood from a commercial bank. The fact that the meeting described in the 1956 Field Report was placed prior to 1955 is not surprising because Dr. Helwig had a poor recollection of dates of events (see Tr. 7337, 7297, 7350, 7308, 7310, 7311, 7317). He had, however, a clear recollection that he had personally been opposed to commercial operations in blood and that he had in 1955 felt costs of blood by a community bank would be higher. These statements are in the 1956 Field Report

and are confirmed by Dr. Helwig's testimony or by other records (see Tr. 7328, 7330; CX 169 b).

75. The second statement admitting an agreement not to use Midwest blood and made by a respondent, this time Dr. Lapi, is contained in a typewritten transcription (CX 158) of the stenographic notes taken by Ardyth Cobb, the Executive Secretary of North Central District Blood Bank Clearing House, at a meeting of its board of directors (CX 160) held November 18, 1955. It follows:

Report by Dr. Angelo Lapi re Mid West Blood Bank, Kansas City, Missouri:

It is a blood bank established for profit and they (the owner) make no excuse about that. That is its avowed purpose—to make money.

They have a medical director who is a 78 year old practitioner in town. His only experience with blood banking is with this blood bank and they have made less than minimal effort to enlist the cooperation of the city hospitals but rather have resorted to methods which are short of coercion and they have used harassing techniques, telephone calls, threats. They are allied with the Better Business Bureau. A man in the division called the families of several of our patients and asked if they needed legal aid to sue our hospital and several of us have been threatened with suit and *the hospitals finally got together in the area and issued a statement that we would buy blood from them only in an emergency but we did not feel we were forced to go beyond that.* We have tried to stay within regular bounds and to respect public opinion and we do not want anyone to feel that they are being denied blood because we will not buy from them. (Emphasis supplied.)

The Mid West B.B. was very evasive about what their plan is, re blood procurement.

The Mid-West B.B. is NIH licensed. Dr. Graham, the director, is the father of a former physician to Harry Truman and obtained NIH approval after two weeks of operation.

76. Dr. Lapi acknowledged that he had made statements about everything in Mrs. Cobb's transcript (CX 158, see finding 75) except the statement that the hospitals finally got together in the area and issued a statement that they would buy blood from Midwest only in an emergency "but we did not feel we were forced to go beyond that." (Tr. 7619.)

Dr. Van Pernis, who presided at the meeting of the board of directors on Nobember 18, 1955, upon questioning by the hearing examiner, stated that the statements were made but he could not recall their having been made at that meeting (Tr. 554–556). He later denied that they had been made at all (Tr. 3862).

77. Although Dr. Lapi could recall no meeting of the hospitals, it is clear that one was held May 25, 1955 and that the loose telephone call federation which the pathologists had augmented in

their May 18, 1955 meeting had also been described to the hospitals. This made it generally unnecessary for any hospital to go beyond the other hospitals to get blood (findings 72–74 inclusive) and may very well have been what Dr. Lapi referred to in his November 18, 1955 Board Meeting and failed to recall when he testified.

Doctors Kerr and Buhler Visit and Express Disapproval to Midwest and to Other Pathologists of Midwest's Commercial Policy

78. Early in April 1955, the month before Midwest opened for business, Mrs. Bass attempted to secure for it membership in the American Association of Blood Banks (AABB). The Executive Secretary sent her an application (CX 13) and suggested that she might want to make contact with Dr. Victor Buhler, the AABB state representative (Tr. 7984) and Dr. John R. Schenken of Omaha, the district director (Tr. 7984). A carbon copy of the Executive Secretary's letter was sent to Dr. Buhler (Tr. 7981). Mrs. Bass tried unsuccessfully to reach Dr. Buhler several times and then invited him by letter dated May 10, 1955, a week before the blood bank opened, to visit it (CX 14).

79. Apparently, before he visited Midwest, Dr. Buhler received a telephone call from Dr. James Graham, the Medical Director of Midwest (Tr. 7985–7987). Dr. Graham asked if Dr. Buhler did not think it was "wonderful" that the new blood bank was being opened and Dr. Buhler replied that he though it was "terrible." (Tr. 7986.) He said he thought what was needed was someone "knowledgeable and expert in the field of blood banking." Dr. Graham admitted he had no special training but pointed out that this was not required by N.I.H. regulations. Dr. Buhler said this would not provide the type of blood banking service that "we" (meaning the pathologists associated with St. Margaret's, Providence and General Hospitals with which Dr. Buhler was associated) felt would best serve the community (Tr. 7987). Dr. Buhler felt he was expressing an opinion by virtue of previous contact and previous discussion with the persons who had to do with the administration and direction of blood banks at Providence, St. Margaret's and General Hospital (Tr. 7989) although not specifically relating to Midwest (Tr. 7991).

80. After writing her letter, Mrs. Bass telephoned Dr. Buhler, made a date to see him at his office and called on him to personally invite him to come over to see the new blood bank and to offer suggestions (Tr. 7991–2). In accordance with this invitation,

Dr. Buhler with Dr. Russell W. Kerr called on Midwest in late May or June 1955, after finding out by telephone that neither the Area Hospital Association nor the Jackson County Medical Society, nor the pathologists with whom he made contact had been told of Midwest's intention to open a bank (Tr. 7993). According to Dr. Buhler's testimony, he and Dr. Kerr were greeted cordially by Mr. and Mrs. Bass and escorted through the facilities; they did not meet the employees (Tr. 7993–4). After the tour Dr. Kerr and he ascertained that this was a commercial enterprise and "that they [Midwest] did intend to buy blood and to sell it to whomever would buy it." (Tr. 7994.) They quoted $25 for positive blood and $35 for negative but Mr. Bass told Dr. Buhler it was "none of [his] my business what they paid the donor for blood" (Tr. 7995). Dr. Buhler testified: "I personally discussed with Mr. and Mrs. Bass my own concept of blood banking and primarily I discussed what I considered the morality of blood banking. I again told them that I felt it was wrong to buy and sell living human tissue for profit, * * * we discussed the medical direction of their bank and we indicated * * * that we did not feel * * * Dr. Graham qualified to direct the blood bank." (Tr. 7995.) Dr. Buhler also discussed replacements and Mr. Bass said he "didn't feel that this was necessary in the operation of a bank." Dr. Buhler told Mr. Bass he thought the voluntary type of donor was best. As he was going out Dr. Buhler picked up a piece of paper which he thought was informational material and Mrs. Bass reprimanded him for picking it up without permission. He apologized and left (Tr. 7997).

Dr. Buhler denied on direct examination that he had made the remark that he had kept commercial banks out of Kansas City up to that time (Tr. 7998). He could not recall exactly when but within the next few months "I did indicate to some of the pathologists that a commercial blood bank had been established and that Dr. Kerr and I had visited the blood bank and gave them information concerning our discussions while at the blood bank." (Tr. 7999.) He was quite confident he had made such a report to Dr. Angelo Lapi and believed he had told Dr. Hilliard Cohen about it (Tr. 7999, 8000).

Agreement on Need for Study by Community Studies, Inc. of Community, Area Hospital Association and Pathologists

81. Around the time of the visit of Dr. Buhler and Dr. Kerr to Midwest and on June 6, 1955, Joseph M. Welsh, the Secretary-

Treasurer of Community, requested Bishop De Lapp of Area Hospital Association, to cooperate in a survey to be made by Community Studies, Inc. (RX 154). At about this time also, the Pathological Society sought advice from Area Hospital Association about the status of Community. Miss Jenkins replied June 9, 1955 that the project had not been dropped but merely held in abeyance and that Community Studies was making a survey (RX 155; RF 129).

82. On June 21, 1955, the board of directors of Area Hospital Association was informed by Dr. Kerr that the pathologists were somewhat divided but would welcome the Community Studies report and the board, after considerable discussion, voted to cooperate with the study but not to finance it (RX 157). At the same meeting, Miss Jenkins was made Executive Secretary. This limited undertaking for cooperation was communicated to Mr. Welsh of Community by Miss Jenkins on July 15, 1955 (RX 156; RF 130).

83. The day of the meeting of the directors of Area Hospital Association, June 21, 1955, The National Institutes of Health issued Establishment and Product Licenses to Midwest (CX 1, 2).

84. The following day, June 22, 1955, a meeting was held of the Administrative Council of Area Hospital Association (CX 173). (The group was composed of hospital administrators.) Leslie D. Reid, the Administrator of St. Luke's Hospital presided. Mr. Reid explained that the meeting had been requested by pathologists of the Kansas City area for the purpose of discussing various aspects of blood banking. Mr. Reid briefly reviewed the activities of the Association's blood bank committee in meetings with representatives of the Community Blood Bank of Jackson County and said that members of the committee considered the proposed budget for the blood bank to be unrealistic and thought the unit cost of blood to the patient would be increased through the Community Blood Bank program. He also advised that Community Studies had been requested to make a study of the best method of blood banking for the community.

Dr. Firminger of the University of Kansas School of Medicine and President of the Kansas City Society of Pathologists summarized what had taken place in their group, advising that the proposal for a community blood bank appeared to have come to a stalemate. He believed this probably had occurred because the people most concerned in such a project, hospital administrators and pathologists, had not been consulted early enough or taken

into the planning phase. Dr. Firminger reported that the pathologists' group had had two meetings on the problem of whether there could be a community blood bank. In his opinion, the present blood transfusion charges at some hospitals were unrealistic and needed to be re-evaluated in relation to the cost. He stated that the overall cost to the patient of a unit of blood probably would not go down and believed that the public as a whole probably had the impression a profit was being made from blood.

Dr. Firminger also stated that several of the pathologists felt there were definite advantages in a community blood bank but others expressed a contrary view. He indicated that if there was a demonstrated need for a central blood bank, those immediately concerned with the operation should be the ones to do the planning. Among the advantages of a central blood banking operation, he mentioned, were: 1) greater availability of different blood types; 2) better service to the smaller hospitals where a blood bank was not economically feasible; 3) research. Dr. Firminger then stated that the pathologists had hoped the meeting with the administrators would provide a means for informal discussion and exchange of views which had not previously occurred.

The following is a brief summary of remarks reported of certain of the pathologists present:

a. Dr. Russell W. Kerr pointed out there was considerable difference of opinion among pathologists regarding a central blood bank with some feeling that there should be such a bank at any cost and others believing it did not represent an urgent need because the hospitals were presently conducting a very efficient blood banking operation adequately meeting the needs of the community. Dr. Kerr *stated that he deplored what seemed to be a national trend toward the outright purchase of blood rather than replacing it in kind.* He also pointed out the difficulties in the supervision of a central blood bank and said acceptance of such a bank by pathologists would depend entirely upon the quality of its personnel. (Emphasis supplied.)

b. Dr. Jack Hill stated that one of the principal advantages of a community blood bank was the deposit of blood by industries, labor organizations and the like so employees or members could be served without the need for individual replacement. *Dr. Hill explained the informal exchange system that had recently been established between all blood banks in Kansas City permitting each hospital blood bank to know exactly the quantities and types available in each blood bank at all times.* He thought this had very much increased the efficiency of hospital blood bank operations. While Dr. Hill felt the cost of blood under a community blood bank operation might be higher, he nevertheless believed some of the advantages might offset the increased cost. (Emphasis supplied.)

c. Dr. Hilliard Cohen advised that the existing individual hospital blood

banks were a very fine operation with pathologists having complete confidence in the quality of blood exchanged between banks. Dr. Cohen reviewed some of the background of the Community Blood Bank and said he felt some years ago the pathologists had approved the idea, and in fact, were rather enthusiastic about it, but the matter brought up during the past year had been turned over to a small group within the Medical Society without the full participation of pathologists and administrators. He said a community blood bank was desirable but not necessarily an urgent need at this time and that one of the advantages of a central blood bank would be an elimination of duplication; also that it would be to the advantage of the smaller hospitals which could not economically operate blood banks, and to municipal hospitals which had a problem in obtaining replacements. Further, Dr. Cohen stated, he thought the research function would be of value and that a greater degree of uniformity in charges would result.

d. Dr. Jack Hill then discussed some of the difficulties he envisioned in the organization of the proposed community blood bank and said the matter of increased cost posed a very difficult problem. He also said that in his opinion the existing hospital blood bank operation was a highly satisfactory one and there appeared to be no urgent need for a central blood bank.

e. Dr. Victor Buhler stated that at municipal hospitals they had been able, for the most part, to supply the blood needed and that no one had suffered from lack of blood; that a community blood bank ought to be able to supply blood at a lower cost than that prevailing in Kansas City, and that if it were possible to obtain a better quality of blood at a lower cost through the community blood bank it would be worth undertaking.

Near the conclusion of the meeting, Mr. Reid advised that the board of directors of the Area Hospital Association had agreed to cooperate with Community Studies in its research project and that he thought perhaps the pathologists might want to take similar action. It was resolved that the Administrative Council of the Area Hospital Association go on record as favoring cooperation with Community Studies in furnishing whatever information or data it required for the survey (CX 173 a–g; Tr. 7762; RF 131; CF pp. 19 and 20).

General Hospital Refuses Midwest Blood on Dr. Buhler's Order

85. In the summer of 1955, the supervising blood bank technologist at General Hospital called Dr. Buhler and told him Mr. Bass was there to tender blood. Dr. Buhler testified: "I instructed the technologist by telephone to inform Mr. Bass that we had not ordered the blood and, therefore, suggested that he take the blood with him." Later, Dr. Buhler ascertained that a member of the family of the patient had accompanied Bass (Tr. 8002). On his return to General Hospital, Mrs. Bass talked to Dr. Buhler on the telephone and was "highly indignant that we had not accepted

the delivery". Later a member of the patient's family called and Dr. Buhler told him that "I could not accept blood from any source unless I knew without question that the source of blood was adequate" (Tr. 8002–03). Perhaps a year later this refusal was the subject of a telephone conversation with Thomas Howell, an attorney retained by Midwest, who (according to Dr. Buhler but not Mr. Howell) threatened suit (Tr. 906; 8008–10). Dr. Buhler informed Doctors Kerr, Lapi and Cohen about this and it became "rather common knowledge" among the medical community that Howell had threatened suit (Tr. 8010). Dr. Buhler also reported this to Dr. Burns, Commissioner of Hospitals, and Dr. Dwyer, Director of Health of Kansas City, Missouri (Tr. 8014).

N.I.H. Clearance of Informal Federation Followed by Formal Federation Proposal

86. Sometime in August 1955, National Institutes of Health, presumably on a complaint, questioned whether or not the operation of the informal arrangement between the hospital blood banks was a violation of law (Tr. 8005). Contact was made with Dr. Lapi and Dr. Buhler (RX 315). When Dr. Buhler explained that it was an informal arrangement to supply blood in an emergency and Doctors Lapi and Bridgens talked to the N.I.H. Inspector, the N.I.H., by letter dated August 29, 1955, advised that the informal arrangement did not constitute a violation of law (Tr. 8004; RX 315).

87. Early the next month, September 2, 1955, Dr. Lapi proposed a federation plan to the Kansas City Society of Pathologists which was to include the neighboring counties (Tr. 8079). On motion it was resolved that this plan be discussed with the hospital administrators (*id*).

Such a discussion was had at a meeting of the Area Hospital Association held September 28, 1955. According to the minutes (CX 174 b): "One of the principal advantages of the proposed system of banking was that it would remove hospitals from the position of buying and selling blood. Dr. Lapi said the pathologists were noticing an increasing trend toward buying of blood rather than replacing, and he pointed out that what blood banks had to have was replacement of blood rather than money. He felt the proposal being made would have a favorable public reaction to there being no price tag on a unit of blood."

88. The actual proposal was set forth in writing and attached to the minutes (CX 174 g–h).

Basically the plan entailed a central clerical office with a telephone answering service and personnel for the filing of blood donor cards, and possibly messenger service for transfer of blood between hospitals. There would be no replacement fee but hospitals would continue to urge patients to have their relatives and friends donate blood and appeals would be made to the community at large (CX 174 g–h).

89. The Administrative Council took no specific action with respect to this new federation proposal at the meeting because it had agreed to cooperate with Community Studies. Parenthetically, the informal exchange having survived N.I.H. scrutiny, there was no urgency. It was the concensus that a request be made to Community Studies for an early report on its survey, possibly in time for the November 1955 meeting of the council (Tr. 8497; CX 174 a–c).

Pathologists and Area Hospitals React to Midwest's Labor Pre-Deposit Plan Solicitation

90. The next month, October 7, 1955, Midwest prepared a letter to labor unions suggesting that they set up advance deposit plans or donor clubs (RX 289).

91. The Pathologists' society reacted the same day and again discussed Dr. Lapi's plan (Tr. 8080) but further development was delayed pending the Community Studies report.

92. Leslie D. Reid, the administrator of St. Luke's and chairman of the Administrative Council of Area Hospital Association, reacted more slowly but quite definitely. He called a meeting October 20, 1955 (CX 175 a) stating among other things: "Action will need to be taken on the position of our hospitals in relation to the Mid-West Blood Bank and Plasma Center now operating in Kansas City. Inquiries from industry and labor groups regarding this commercial bank's 'blood deposit program' make it essentail that our stand be well defined. Please come prepared to discuss it fully." The agenda also provided for "Pathologists' recommendation on commercial blood banks."

93. The minutes of the October 26, 1955 meeting are less informative. Dr. Bryant of Community Studies reportedly made a "comment about the Blood Bank study—research was completed and he was in process of writing the report."

Under a marginal heading, Commercial Blood Banks, the following appeared:

There was some discussion of commercial blood banks and what the position of the hospitals operating their own blood banks might be toward them. The Association office had received some requests from some large labor union groups regarding the position of hospitals. After discussion, it was agreed this was a matter that would have to be decided by each individual hospital rather than by the Association.

It was brought out in discussion that there was a serious matter of public relations involved, since commercial banks were properly licensed by NIH, and failure to accept blood from them would create a real problem. There was general discussion as to whether an investigation should be made of a specific bank, *but since Dr. Bryant stated this would be covered in the report of his research study,* such action would not be necessary. It was agreed that the Council would stand on the statement of awaiting the Community Studies report before taking any action in the matter of blood banking. (Emphasis Supplied.) (CX 175 d.)

94. Respondent Jenkins' stenographic notes of the meeting as transcribed (CX 190 a & b) are more revealing. They indicate that after a letter from Midwest was read there was a discussion by various administrators in substance as follows:

a. William B. Schaffrath, the administrator of Menorah, expressed concern that "will put ourselves in an awkward position if we refuse to accept blood from them. Have not a leg to stand on. If no one else comes up with a better program."

b. Harry Walker, the administrator of Smithville, said he had used blood from Midwest and complained "the small hospital needs a place to get blood."

c. Leslie Reid, the administrator of St. Luke's and chairman of the Administrative Council, responded that he "believe[d] the hospitals have been meeting the need" (*i.e.*, the informal exchange was working out).

d. A. Neal Deaver, administrator of Independence, said he didn't "like to see something go on without knowing what goes on." He moved the appointment of a committee to study and make a report on the organization.

e. Commissioner of Hospitals, B. I. Burns, also wanted to inquire about Midwest's qualifications: "If we have to answer should we know the qualifications of the bank and their supervision."

f. Schaffrath took the position that "seems this group could not exercise an opinion over the approval standards." He felt the community wanted a community bank and to give blood on a reciprocity basis and "we must see to it that there is community (participation)."

g. Reid counseled no action "Till we get Community Studies report * * *."

h. Sister Marita (St. Joseph's Superior) had another recommendation: " . . . Kansas City Banks will now participate in the clearing (house)."

i. Reid rejoined, "awaiting the survey . . . for each hospital to decide." This caused Deaver to withdraw his motion. Robert Molgren, then of the University of Kansas Medical Center, suggested, "should tell we are making available a wider community effort."

j. To Bryant's suggestion that hospitals take out an N.I.H. license came the rejoinder it was "an unnecessary nuisance."

k. Burns repeated his suggestion that N.I.H. be asked for the qualifications of the personnel operating the bank. Reid responded that it would be "premature." Burns insisted that it should be done before the organization takes any action.

Then comes the final note "no action."

Midwest Charges Dr. Lapi's St. Mary's Hospital Through Better Business Bureau and Respondent Jenkins Investigates for Area Hospital Association and Mr. Reid

95. On November 3, 1955 Mr. Bass of Midwest sought the assistance of the Better Business Bureau to plead his cause (RX 287), charging three instances where St. Mary's had refused to use Midwest blood as a source. Apparently the Better Business Bureau called respondent Jenkins. She got in touch with Leslie Reid, the chairman of the Administrative Council of Area Hospital Association, immediately, reporting trouble with Midwest, this time with the Better Business Bureau (CX 587).

96. According to her letter of November 4, 1955, Miss Jenkins made an "investigation" of the charge that St. Mary's Hospital had refused to accept Midwest blood and found that while there was no emergency because the patient involved was to have an "elective" operation, the hospital's supply of O negative had become exhausted and "the clearing house revealed that there was no O negative blood available in the Association of Blood Banks. It was available at Midwest however."

According to Miss Jenkins' letter which was written shortly after the events, two things had occurred which apparently caused Better Business Bureau's action. The first was that a business associate of the patient who had used up all St. Mary's available O negative blood was called out of bed at midnight and "er-

roneously" told his friend needed blood immediately. The business associate called Midwest and found the blood was available but it would not be accepted. Neither was blood from Osteopathic Hospital acceptable. The second incident was that one of the donors for the second patient went to Midwest and was drawn rather than going to St. Mary's as he had been requested to do.

Miss Jenkins expressed astonishment and shock, to use her terms, at Better Business Bureau's representative's suggestion that the wife of the patient should sue St. Mary's for criminal neglect *and* his allegation that pathologists were prejudiced against Midwest because they got a commission from blood drawn in their blood banks.

97. Miss Jenkins' contemporaneous account was substantially in accord with Dr. Lapi's testimony (Tr. 7527–7533). He was then pathologist at St. Mary's (Tr. 7498). He too was "appalled" at Better Business Bureau (Tr. 7533). In a follow-up letter the Better Business Bureau warned that an N.I.H. license was required before blood could be transported inter-state and that hospitals should deal with a licensed bank (CX 586).

98. Dr. Lapi related his experience with Midwest and the Better Business Bureau to Dr. Victor Buhler (Tr. 8035, 8036). Dr. Lapi had been appointed Missouri representative to the North Central District Blood Bank Clearing House (Tr. 8097) with the approval of Dr. Buhler who was then President of the Missouri Pathological Society (Tr. 8097) and state representative of American Association of Blood Banks (Tr. 7984). (Surprisingly, Dr. Lapi could not recall who appointed him (Tr. 7608).)

Dr. Lapi Criticizes Midwest to NCDBBCH

99. Following shortly after the incident with the Better Business Bureau, Dr. Lapi attended the board meeting of North Central District Blood Bank Clearing House and admittedly made all the statements heretofore quoted in Finding 75, (CX 158), except the statement that the hospitals had gotten together and agreed they would buy blood from Midwest only in an emergency (Tr. 7618). He thus gave NCDBBCH information designed to bring Midwest into disrepute with the doctors there.

100. Moreover, during the summer of 1955, the executive secretary of NCDBBCH had written to Dr. Lapi requesting information about Midwest and some of their requests to the clearinghouse (RX 316). Lapi had replied: "As far as I am aware it is a private blood bank, presumably operated for profit. I personally

do not intend to have any dealings with them but cannot advise you since I don't know what your policy is in this regard" (RX 317 a & b). He also said he would write Dr. Mason. Lapi later received a letter from Dr. Coye C. Mason of Uhlein Memorial Hospital in Chicago indicating that there were some good and some bad commercial banks, that the AABB membership committee usually relied on the State representative of the Association (which was Dr. Buhler (Tr. 8097)) and on local medical societies (RX 318; CF p. 21).

The Administrative Council of Area Hospital Association Announces Community Studies Report and the N.I.H. Decision

101. Shortly after the NCDBBCH meeting of November 18, 1955, the Administrative Council of the Area Hospital Association had its regular monthly meeting on November 23, 1955 (CX 176). The chairman, Leslie Reid of St. Luke's, reported that the Community Studies Report (CX 244) had been released and Dr. Bryant said that copies could be made available for each member hospital and would be put out with a covering letter asking that the administrator make it available to the trustee and medical staff representatives (CX 176 b). Leslie Reid also reported that N.I.H. had cleared the hospitals of any claims of violation (thus announcing to all present that the way was clear for continuation of the informal blood exchange system inaugurated in May of 1955).

The Community Studies Report Recommends Against Commercial Operation and for Non-Profit Central Bank

102. Community Studies Report which had been produced with the cooperation of both Community and Area Hospital Association, although not financed by the latter, purported to analyze with impartiality the various proposed methods of supplying the blood needs of Kansas City. After analyzing the operation of other community blood banks and the Kansas City hospitals, it reached the conclusion that a non-Red Cross community blood bank charging a replacement fee was the best solution to the problem (CX 244, p. 34).

103. In reaching this conclusion the Report, among other things:

a. Recognized that a commercial blood bank would compete with community banks;

b. Predicted that the Red Cross would experience increasing difficulty in securing adequate blood supplies for civilian use because of the weakness of not penalizing non-replacement, and objected that Red Cross had been unable to develop satisfactory working arrangements with medical societies and hospitals;

c. Regarded the hospital federation plan as wasteful and hazardous having the same disadvantage of non-replacement as Red Cross and as being unable to take advantage of donor groups;

d. Charged that prices of commercial banks (namely, Midwest and World) were unduly high and would result in large profits, that a commercial bank would tend toward monopoly and raising rates with various malpractices, and that though licensed by N.I.H. would have to be continuously supervised by persons acceptable to the hospital pathologists;

e. Praised the proposed operation of a community blood bank;

f. Failed to recognize that the proposal of a community bank might increase blood costs to the patient or that commercial blood banks had utilized donor groups and made charges considerably less than those currently made by hospital banks;

g. Inferred it was possible to equate blood quality to the amount paid to donors (CX 244, p. 21);

h. Urged that:

1. a community bank would be in a better position to secure donors and to supply research and free blood to the indigent;

2. it should be placed in operation immediately with appropriate change in the structure of Community.

Community Adopts Community Studies Report;
Area Hospital Association After Consulting
Pathologists Recommends Federation
of Hospital Banks Again

104. On November 28, 1955, the board of directors of Community held a meeting at which approval was given to the Community Studies Report, and amendments to the by-laws of the association were adopted. The amendments provided for hospital representation in the membership of the corporation and for a total corporate membership of thirty-nine persons, thirteen of whom should be "Council members," thirteen hospital members and thirteen members representing the general public. Amendments to the by-laws were also approved providing that a total of two directors of the corporation should be elected by the combined vote of the hospital and general members of the corporation (CX 378). These

amendments, while differing in the numbers of directors, provided proportions as recommended by Community Studies Report (CX 244, p. 34). A committee on arrangements was appointed in anticipation of cooperation by Area Hospital Association.

105. Following receipt of the Community Studies Report, Bishop DeLapp, the then president of the Area Hospital Association, appointed a Community Blood Bank Committee composed of: Adolph R. Pearson, Leslie D. Reid, A. Neal Deaver, Robert Molgren, Dr. Russell W. Kerr, Dr. Ralph R. Coffey, E. B. Berkowitz, James H. Schuler and Dr. Arch E. Spelman, chairman (Tr. 8497–8500). That Committee (sometimes referred to as the Spelman Committee) was directed to review the report of Community Studies and to make recommendations to the board of Area Hospital Association concerning the type of blood program that would be most desirable (Tr. 8511; RX 161 d). The membership of this Committee consisted of three members from the Trustee Council, three doctors of medicine from the Medical Staff Council and three hospital administrators from the Administrative Council of Area Hospital Association (Tr. 8497–99; RX 161 d).

106. The Spelman Committee held two meetings in December 1955. The first was held December 15, 1955. Dr. Victor Buhler and Dr. H. I. Firminger, representing the Kansas City Society of Pathologists, were present and two committee members Messrs. Berkowitz and Schuler were absent. The second meeting was held on December 29, 1955. All committee members and Bishop DeLapp, the president of Area Hospital Association, were present (CX 177 and 178). The second meeting was held because there was insufficient time at the first meeting to reach a conclusion.

107. At the first meeting of the Spelman Committee Drs. Firminger and Buhler outlined modifications of Dr. Lapi's proposal for a federation of hospital blood banks to include a responsibility fee. The following are summaries of some of the statements made:

a. Dr. Buhler took the position that public pressure for a community bank should be resisted and that hospitals and pathologists should work out their own program without active participation of persons lacking professional or technical knowledge of blood banking. He suggested a $7.50 processing fee and $10 responsibility fee and indicated he and other pathologists would be willing to advance funds.

b. Mr. Deaver questioned whether existing facilities were not

adequately supplying community needs and the pathologists indicated this was not the case.

c. Dr. Firminger then gave details of his proposed federation. The pathologists stressed that there should be no increase in the price of blood to the patient. Under the plan a central registry and multiple drawings at the hospitals were contemplated thus requiring all hospitals to get N.I.H. licenses but reducing the expense entailed if a central bank were set up.

108. At the second meeting, Dr. Spelman reviewed the Committee's assignment. Bishop DeLapp, president of the Association, advised it was necessary for the Association to get the facts and determine what might be done in the best interests of the hospitals and the public in the field of blood banking. He stated that the hospitals probably would have to develop a more centralized manner of handling blood in the future, if not immediately. He recognized that some interested people believed the hospitals should move immediately into a fully centralized blood banking operation but that he personally believed such steps should not be taken hastily. He cautioned against being forced into a situation which would not be in the best interest of the hospitals and the public.

The following additional views were expressed:

a. Dr. Coffey said that, in his opinion, the Committee should first determine if the centralized blood bank was necessary and should evaluate how real the pressure was for some type of central blood bank and for a pre-deposit plan. *He felt there should be an evaluation of how much risk, or harm, if any, might come from the use of a commercial bank.* He also stated that the Area Hospital Association should be the agency through which any centralized blood bank was established in order to protect the quality and the safety of blood used by the hospitals. He further indicated that if some form of centralized operation was desirable, the proposed federation plan was probably the simplest and most practical one in that it would preserve the existing system of individual hospital blood banks and also provide a means for contracting with industry, labor and fraternal groups desiring to establish blood credits. (Emphasis Supplied.)

b. Mr. Molgren enthusiastically endorsed the federation proposal because he believed the plan met all community needs, and that it would allow the application of the insurance principle. He hoped it would be accepted. He stated it was necessary for the existing hospital blood banks to continue in operation and thought

the Community Studies' report revealed they had been very successful in the past and had attained all but 5% of complete replacement.

c. Mr. Schuler was opposed to a large central community blood bank of any type at the time. He thought the hospitals were getting along rather well with the present system and pointed out that if the federation plan were adopted, it would require a director and other staff members. *He thought the idea of a commercial bank or banks, filling the need, should be considered since they did represent the free enterprise system and could set up a program of insurance.* In his opinion, if there was proper competition between banks, blood could be provided at a reasonably low price. He questioned whether the federation plan met the needs of the Veterans Administration, University of Kansas Medical Center and the Municipal Hospitals. (Emphasis Supplied.)

d. Mr. Pearson advised that Trinity Lutheran Hospital, its administrator and pathologist, favored the federation plan.

e. Dr. Kerr also supported the federation program. He stated that all should realize that a very serious problem existed in the area under the present system and that a solution was needed; *that commercial banks would create problems by pressure on hospitals to use their blood and in contracting with industry for the setting up of insurance programs.* He pointed out the special problems of some of the smaller hospitals and stated the existing system was not servicing those hospitals adequately. He thought the federation program would retain the good features of the existing system and would represent an affirmative move toward satisfying the community need, that the Area Hospital Association should be the agency to carry out the project and that the pathologists and participating banks should take care of the technical aspects. The federation could contact business and industry to set up a credit system. (Emphasis Supplied.)

f. Mr. Deaver believed that, if the federation proposal was acceptable to the pathologists, it would be satisfactory to the hospitals. He felt it would not be necessary for all hospital banks to qualify for an N.I.H. license but if a few could qualify, it would be possible to exchange blood across the state line without any problem. He expressed his support for the federation proposal and felt it might be necessary to have a separate corporate body. He also said that all hospitals should support the program if it would fulfill the community need at the lowest possible cost.

g. Mr. Reid felt the hospitals need not apologize for their blood

bank operations up to the present time. He believed the Community Studies' report substantiated the fact that they had been doing a very good job, but agreed that the present system did not permit group or individual credits or reciprocity with blood banks in other areas. He also felt a federation offered a better solution to civil defense and that credits must be staggered. These features would be possible under the federation plan.

h. Mr. Berkowitz approved the federation proposal but inquired if there was a similar operation elsewhere in the country. Dr. Kerr advised that there were no really comparable programs and that it was a new concept in blood banking which other areas would like to see tried. Mr. Berkowitz *stressed the need for obtaining legal counsel,* and said that if there were no serious obstacles, he was certain Menorah Medical Center would participate. (Emphasis Supplied.)

i. Bishop DeLapp said it would be desirable to have a sub-committee study further the details of the program, *to obtain the approval of legal counsel* and have the plan ready for presentation at the annual meeting of the Area Hospital Association on January 4, 1956. He expressed approval of the approach made by the Committee and appreciation for the thought and effort it had devoted to the matter resulting in what appeared to be a very satisfactory solution to the problem. *He said he was personally opposed to the idea of a commercial bank, and thought the hospitals, operated non-profit in the community interest, should be able to solve their problems without making blood banking a commercial venture.* He considered the primary purpose of a blood bank to be service to the community and, in providing such a service, hospitals could at the same time safeguard the interests of the public. (Emphasis Supplied.)

j. Dr. Spelman, speaking for the small hospitals, *felt that blood banking did not belong in the commercial field* and that the hospitals through the proposed federation could get the job done. He stressed the special problem of the small hospitals and suggested this could be solved by participation in the federation proposal. He felt the Area Hospital Association had a duty to the smaller hospitals and the communities they served in helping to correct an unsatisfactory situation. (Emphasis Supplied.)

After further unreported discussion, Dr. Coffey moved that the Committee approve the federation plan in principle and so report to the Area Hospital Association at its January 4, 1956 meeting. The motion was adopted and Dr. Spelman appointed a sub-com-

mittee composed of Dr. Coffey, Dr. Kerr and Mr. Reid to refine the report for presentation at that meeting (Tr. 8500–07; CX 178 a–d).

109. At the annual meeting of the Area Hospital Association held on January 4, 1956 the written report (CX 179 i through k) of the Spelman Committee recommending support of the federation plan was approved in principle and the Committee was authorized to proceed with preparation of the details of the project for final recommendation and report to the board of directors (CX 179 a–e). Dr. Spelman, reporting for the Committee, pointed out that a great deal of community effort had gone into the project through the work of the Community and the Jackson County Medical Society, the latter having defrayed the expense of the survey made by Community Studies, Inc. Dr. Spelman further reported that the Committee was convinced that a community blood bank operation was needed but that there were wide differences of opinion as to how the need should be met. He advised the federation plan (CX 179 i–k) contemplated using existing hospital blood banks which would, in effect, make each a drawing and processing station with activities coordinated through a central administrative agency that would be prepared to contract with groups in an insurance type of operation. Dr. Bryant of Community Studies warned that a larger and more centralized drawing operation would be required in the future (CX 179 d, e).

Dr. Kerr Keeps the Pathologists Informed

110. The Kansas City Society of Pathologists held a meeting on January 6, 1956 which was recorded by Dr. Moriarity. Dr. Buhler was present and Dr. Kerr reported on the revised blood bank plan which had been presented after the Community Studies Report (Tr. 8082, 8083).

Disappointment of Church and Labor Groups Seeking To Use Midwest Blood

111. Wilber R. Harrison, a post office clerk who was interested in blood banking as Chairman of the Blood Bank Committee of Central Labor Union and had secured considerable information about it from Miss Jenkins, in either late 1955 or early 1956 received a letter from Midwest wanting to discuss establishing a service (Tr. 237, 238). He and two of his fellow labor union members were authorized, as a committee, to investigate and report by the Central Labor Union (Tr. 238). The committee exa-

mined the credentials and the facilities of Midwest but were not satisfied with Bass' statement that he could not guarantee acceptance of hospitals (Tr. 240). They told Bass they could not recommend his service (Tr. 240), reported to the Central Labor Union and recommended all matters be held in abeyance for further developments (Tr. 241). Rev. Gilbert Murphy, who later became secretary of Community, also prepared a memorandum critical of the pathologists for the Council of Churches (CX 293).

112. Mrs. Warren Hoff, secretary of Tabernacle Baptist Church, which had a contract with Midwest of indeterminate terms (Tr. 2127–28), attempted in early January 1956 to have General Hospital receive replacement blood for Mrs. Babcock, one of the church members who had been operated on and was entitled to it (Tr. 2121). Mrs. Hoff made contact with Mr. Bass and he asked her to find out what type of blood was required (Tr. 2122). Mrs. Hoff called the hospital and an unidentified person who was at the hospital blood bank told her that Mrs. Babcock had not yet been typed that she should just send down two donors (Tr. 2122). Mrs. Hoff tried to reach Mrs. Babcock's doctor and after calling him several times on the telephone wrote a letter, dated January 7, 1956 (CX 280), telling him that blood was on deposit at Midwest and asking where he wanted it delivered. It was not requested.

Monroe-Jenkins Correspondence with Fourteen Hospitals

113. On January 9, 1956, Kenneth Monroe (Tr. 723–763) who was then a clerk at the Main Post Office in Kansas City and secretary-treasurer of the Post Office Hospital Employees Association, Inc., sent an inquiry to fourteen hospitals. The hospitals were:

University of Kansas
Providence
Bethany
St. Margaret's in Kansas City, Kansas
General Hospital, Kansas City, Mo.
Research
St. Luke's
St. Mary's
St. Joseph
Menorah Center
Trinity

Independence Sanitarium
North East Osteopathic Hospital
Wheatley Providence (Tr. 727)

114. Prior to sending the letters, Monroe had been informed by an unidentified person at St. Margaret's Hospital that the pathologist would not accept Midwest blood as a replacement for blood transfused into his wife (Tr. 739, 740). Members of his association had called him stating that "they had not been able to get blood in to the hospital" (Tr. 729). He had then secured authorization to write to the hospitals from the board of control of his association (Tr. 743).

115. The letter sent to each of the 14 hospitals stated (CX 181; RX 195):

KANSAS CITY, MISSOURI POST OFFICE EMPLOYEES
HOSPITAL ASSOCIATION INC.

Re—Blood Bank

All Hospitals
Attn Business Managers

In order to make our organization a better organization, our board of control is striving to give our members more benefits and more protection.

We have been approached by the Mid West Blood Bank and Plasma Center with a proposition to establish a reserve bank of blood for any of our members to use at any time and at any Hospital. Our board of control are investigating a plan whereby we can protect our members and also the Hospitals on replacing blood used. We have investigated the Mid West Blood Bank and Plasma Center and know that they are Federally licensed and inspected.

Before our board of control makes their final decision we would like to know what cooperation we can expect from all Hospitals in the greater Kansas City, area. Would you please answer by enclosed return stamped envelope whether your Hospital will accept blood from the Mid West Blood and Plasma Center, for use of our members or as a replacement for blood used from your blood bank, and aproximately the charge for set-up and etc.

Our interest in this is to help protect our members who are unable to get blood donors to replace their needs.

Your cooperation and answer on this matter will be greatly appreciated.

Sincerely yours,
K.C. MO. EMP. HOSPITAL ASSN., INC.
Kenneth L. Monroe, Secy, Treas.
938 Central Ave. Kansas City, Kans.

116. The afternoon of January 9, 1956, Mr. Monroe had a telephone conversation with Respondent Sue Jenkins. Miss Jenkins told him that she had received calls from hospitals about Mr. Monroe's letter and that she had sent a special delivery letter to each one of the hospitals asking them not to answer Mr. Monroe's letter until they had heard from her. She also said that the

hospital association was having a meeting in a very short time in reference to establishing a community blood bank (Tr. 736–37).

117. The special delivery letter of Miss Jenkins on the letterhead of the Kansas City Area Hospital Association reads as follows: (CX 182.)

URGENT

TO: ADMINISTRATORS—MEMBER HOSPITALS IN METROPOLITAN AREA AND THE COMMUNITY BLOOD BANK COMMITTEE

You may have received a letter by now from Mr. Kenneth L. Monroe, Secretary-Treasurer of the Kansas City Employees Hospital Association, Inc., asking for a reply to specific questions regarding the Mid-West Blood Bank and Plasma Center, and also about your own charges for administration of blood. A copy is attached.

Mr. Monroe's organization is a prepayment plan covering the Kansas City Post Office employees. We were aware that Post Office employee groups had been discussing an advance credit plan with the local commercial blood bank. This letter is to ascertain the hospitals' position on this.

Bishop DeLapp, president of the Association, and Mr. Reid, chairman of the Administrative Council *urge you not to reply to this letter until we can get out to you a suggested statement* that will contain assurance that the Area Hospital Association is to announce very soon its own program for meeting the blood needs of the community.

In the meantime, I have already talked with a representative of the postal employees' group and will be talking with Mr. Monroe when I can reach him later today. We believe the group will be very cooperative about waiting for a statement from the Hospital Association if it is not unduly delayed.

You will have a further report on this, probably within the next one to two days.

It is suggested that all inquiries which may come to you about the commercial blood bank or about the hospitals' position on community blood banking be referred immediately to the Association office.

Sue Jenkins
1/9/56

(Emphasis in original.)

118. Only three replies were received to Monroe's inquiry as follows:

a. On January 10, 1955, Mr. A. Neal Deaver, Administrator of the Independence Sanitarium and Hospital, wrote to Mr. Kenneth L. Monroe in which he stated in part as follows:

I would suggest before you sign with any such group that you discuss your own proposed needs and desired type of affiliation with the Kansas City Area Hospital Blood Bank organization first (CX 198).

b. On January 13, 1955, Mr. Bruce W. Dickson, Jr., Administrator, Bethany Hospital, wrote to Mr. Kenneth L. Monroe, in part as follows:

Bethany Hospital does not have any agreement nor arrangement assuring the availability or the replaceability of blood from Mid West Bood Bank. . . (CX 196).

c. On January 13, 1955, Mr. William B. Schaffrath, Administrator, the Menorah Medical Center, wrote to Mr. Kenneth L. Monroe in part as follows:

I am sure you have had information about blood bank facilities from the Kansas City Area Hospital Association. This Association of Hospitals is on the verge of reorganizing its blood banking services. . . . I should prefer not to give a definite answer to your letter, . . . but would refer you with all courtesy to Miss Jenkins. . . . (CX 197)

119. Closing the correspondence on January 18, 1955, Miss Jenkins of Area Hospital Association wrote a memorandum to the Administrators of the Kansas City metropolitan area hospitals in which she stated:

We sent you a memo on January 9 regarding an inquiry about a blood banking matter. We wish it were possible to give you today complete details about the Association's program on community blood banking. However, discussions are still under way on it though progress is being made and it is hoped a conclusion may be reached by at least next week.

In the meantime, it would appear that the inquiry made to you might best be answered by each individual hospital as it may itself determine, *perhaps after consultation with your legal counsel.*

We have, incidentally, had some conversations with the group making the inquiry to you and find them very interested in the Hospital Association's plans for helping meet the blood needs of the community. (Emphasis Supplied.) (CX 183.)

By this date Mr. Jacques, an investigator for the Federal Trade Commission, had been in communication with Mr. Monroe (Tr. 752). This circumstance may have caused the reference to consultation with counsel.

The Aftermath of the Monroe-Jenkins Correspondence

120. Bishop DeLapp and members of a Committee of the Area Hospital Association, including Dr. Coffey, Messrs. Reid and Molgren, and Miss Jenkins and Dr. Bryant, met with the board of directors of Community in the evening of January 9, 1956, the day Monroe dispatched his letter and Miss Jenkins her "urgent" memorandum (CX 184; CX 380). At that meeting, according to the minutes:

a. Dr. Spelman presented the recommendations of his Committee and advised the directors of Community that his Committee was empowered to act with in the limits of authority granted it at the Hospital Association's annual meeting on January 4, 1956.

b. Dr. Hungate inquired concerning the report and was advised that the report represented a recommendation developed by the Area Hospital Association Committee in accordance with its instructions to investigate and evaluate available material and to make recommendations concerning the blood bank proposal.

c. It was determined to have a meeting of the members of Community on January 17, 1956, at which Dr. Spelman and Dr. Coffey would be present.

d. The directors of Community deferred final decision on the recommendations of Dr. Spelman pending the further report anticipated from Dr. Spelman and Dr. Coffey on January 17, 1956 (CX 380 a-c).

According to Respondent Jenkins' "Review of the Community Blood Bank Situation" (CX 184), Bishop DeLapp made "A request that the hospital group implement the plan on at least a pilot basis, since it would mean immediate action." He thus indicated his concern that the matter be expedited (although this request does not appear in Community's minutes).

121. The Executive Committee of the North Central Blood Bank Clearing House was apparently still concerned about Dr. Lapi's report at the November 18, 1955 meeting for on January 16, 1956, the following appears in the minutes:

The committee agreed that the Executive Secretary write Dr. Angelo Lapi asking that he make every effort to attend the next Board meeting. In the interim, they would like for him to obtain a statement from the local medical society as to their opinion of the operation of the Mid-West Blood Bank, and present this statement to the Board. * * *. (CX 162 b).

122. The following day, January 17, 1956, the members of Community held a special meeting. At this meeting, Dr. Spelman reported on the recommendations of the Committee of Area Hospital Association and replied to the proposals which had been submitted to his Committee by the officers of Community. Dr. Spelman then asked Dr. Bryant of Community Studies, Inc., to present the counter-proposals. Both the proposals of the Commitee and the counter-proposals of Dr. Bryant related to the area to be served and the composition of its corporate membership and board of directors. In essence, the proposals of the Area Hospital Committee were: for a blood bank servicing a far greater area than Jackson County; for a change of name to connote its enlarged area of service; for representation in the corporate membership of doctors of medicine from areas outside Jackson County; and for a different method of selecting hospital members from that then provided in the blood bank corporation's by-laws.

The membership of Community approved the suggestions, except the proposal relating to what doctors of medicine would be

members of the corporate body. Dr. Spelman and Dr. Coffey were advised of this action and agreed to report the action to the full Committee of Area Hospital Association (CX 381 a-f). Bishop DeLapp was also advised of the results of this meeting (Tr. 8510).

Two days later, on January 19, 1956, the Committee of Area Hospital Association met and received Dr. Spelman's report concerning the negotiations that had been carried on with the officers and directors of Community. He reported that good faith existed on both sides in all their discussions and that neither was trying to take advantage of the other. He advised that negotiations had resulted in agreement whereby there would be representation in the corporate membership of thirteen physicians, thirteen hospital members and thirteen public members with no more than six of the physician members from the Jackson County Medical Society. The thirteen public members, who at that time were all from the Jackson County area, would be replaced, as their terms expired, with representatives from the entire area. Dr. Coffey said there had been an attempt to establish a central blood bank as far back as 1950 and that it did not seem unusual to him that all of the groups interested and concerned had not been able to agree upon a program prior to the present time. He added that the negotiations just concluded represented the best thinking of all those involved.

Dr. Spelman reviewed, point by point, the sub-committee's counter-proposal to the proposal of the officers of the blood bank corporation. Changes were suggested in the method of selecting the physician members and the hospital members, the latter being chosen from any one of the three councils of the Association; *i.e.*, the Administrative Council, the Trustee Council and the Medical Staff Council, rather than only from the Trustee and Administrative Councils.

The report of the sub-committee was approved with a proviso that the minor changes in the mechanism for selecting the physician and hospital members be made and that Bishop DeLapp be requested to discuss such changes with representatives of Community to make certain that each group was in full agreement (CX 180).

123. On January 23, 1956, Bishop DeLapp met with directors of Community. He reported the Area Hospital Association's Committee's recommendations. Following Bishop DeLapp's statement the directors of Community adopted a resolution approving and accepting the suggested changes in the by-laws of Community.

These changes related to the "compromise" previously adopted January 17, 1956 including a new name denoting an area service and the composition and method of selecting the corporation's membership utilizing the various medical societies to secure medical representation (CX 382).

124. F. H. Bass, the business manager of Midwest, was generally aware of the steps being taken to form the Community Bank, for the following day, January 24, 1956, he wrote to J. Harvey Jennett, the president of Jackson County Medical Society, with copies to respondent Jenkins and to a number of others including: Dr. Hungate, Dr. Coburn, Dr. Ferris, Dr. Bryant of Community Studies, and labor, Better Business Bureau, and Red Cross representatives. In his letter Bass charged that his "institution has received the most severe, unfair and unwarranted persecution, motivated by those whom we believe to have special interests in mind." He also stated that there have been attempts "to create patterns which would eliminate competition" and asked Dr. Jennett and other physicians to become better acquainted with the service of Midwest which he averred is prepared to meet competition (CX 12).

125. On January 25, 1956, the Administrative Council of Area Hospital Association met and reviewed the blood bank situation. Leslie D. Reid, chairman, recounted the developments to date. Bishop DeLapp thought the Committee had done excellent work and, *taking into consideration present and future problems, stressed the necessity for concluding the negotiations.* It was suggested that the Administrative Council recommend to the directors of Area Hospital Association that the board adopt the federated plan as proposed by the Association to be operated by the Area Hospital Association. Bishop DeLapp commented that if the federation plan was to be operated exclusively by the Area Hospital Association it would discard all that had been achieved by the Committee of the Association in its negotiations with Community. Others concurred that such a result would not be desirable. Bishop DeLapp then reviewed the negotiations between Area Hospital's Committee and Community and advised that Community had made two proposals. One proposal was for the immediate establishment of a central procurement, drawing and processing center. The other proposal, which had been accepted by the Area Hospital Committee, was for the operation of a federation of blood banks by Community.

It was mentioned that the pathologists believed the federated plan should be operated by the Area Hospital Association. Mr.

Molgren agreed that such was the pathologists' view. However, he stated that if Community would pursue the federated program, that also might be acceptable. He considered professional control of any blood bank operation should be by pathologists and that the board of directors of Community should be expanded to represent equally the medical profession, hospitals and the public (CX 187 a).

The Administrative Council of Area Hospital Association then approved the proposal for a federation of hospital blood banks to be operated by Community, provided the bylaws of that corporation be further amended to establish a board of directors consisting of four physicians, four hospital members and four public members, and *further that pathologists from the member hospitals serve on a technical advisory committee for the professional administration of the blood bank* (CX 187 b). (Emphasis Supplied.)

126. Following the meeting of the Administrative Council and on the same day, January 25, 1956, the board of directors of Area Hospital Association met. Mr. John Murphy, of counsel, by vote became the representative on the board in place of Sister Mary Placida, and the following additional members of the board were present: Bishop G. L. DeLapp, James H. Schuler, Tom J. Daly, G. O. Lindgren, Dr. B. I. Burns, Henry J. Meiners, Dr. Malon H. Delp, Dr. Russell W. Kerr, and Dr. Arch E. Spelman (CX 186). Bishop DeLapp reviewed the situation regarding negotiations with Community. He said agreement had been reached on the composition of the corporate membership of the blood bank corporation and the area to be served, with area representation both among physician and public members. He further pointed out that the federated plan of operation proposed by the Committee had been accepted by the blood bank corporation.

Dr. Kerr did not favor the compromise. *He believed that the blood bank should be controlled by the administrators and the pathologists of the member institutions of the Area Hospital Association.* Mr. Lindgren differed with Dr. Kerr and said he thought that all interests would be fairly represented.

The directors, Dr. Kerr dissenting, approved the compromise with Community, as recommended by the Administrative Council. This was subject, however, to the condition that the board of directors of Community be composed of four physician representatives, four hospital representatives and four public representatives, *with pathologists from the member hospitals comprising a technical advisory committee* (CX 186a). (Emphasis supplied.)

127. Despite the agreement in principle, there were still matters to be worked out (Tr. 5409–10) and Miss Jenkins, with the approval of Bishop DeLapp, called an informal meeting of the administrators and pathologists at St. Luke's Hospital on January 28, 1956 (RX 162). Miss Jenkins prepared a ten page series of introductory remarks (RX 163a-j). She noted that the hospitals present (which included administrators and pathologists from the following hospitals) were the hospitals involved in the proposed federation whose pathologists and administrators would have to make the plan work: St. Joseph's Queen of the World, General, Trinity Lutheran, St. Luke's, St. Margaret's, Providence, Menorah, Independence Sanitarium, Research and Children's Mercy. John Murphy, of counsel for St. Mary's, appeared on behalf of Sister Mary Placida, administrator of St. Mary's Hospital, and its pathologist who were absent. The administrator of the University of Kansas Medical Center was also not present but that hospital was represented by Dr. Firminger (RX 162a).

128. In her ten page introductory statement (RX 163a-j), Miss Jenkins made it clear that although approved as a compromise with Community by the board of directors, on recommendation of the Administrative Council of Area Hospital Association, the federation plan was disapproved by five of the pathologists representing ten member hospitals, including six operating major blood banks.

She reviewed in some detail the events which had led up to the compromise between the original position of Area Hospital Association that it should operate a federation of blood banks and the original position of Jackson County Medical Society that it should control Community as a single central bank. She then pointed out that there were practical problems of increased load on the centrally located hospitals which might cause a breakdown of operation as well as legal problems of having an alien corporation control hospital operations.

She stressed that the present proposal must work if the hospitals were not to lose public confidence and in that connection referred sympathetically to the Federal Trade Commission investigation which had been carried on for the preceding two weeks. She emphasized that the complaints "were in no sense trivial or promoted by one carping critic" and while claiming that the public had erroneous ideas about the hospitals' present operations reiterated that they must not fail in the present endeavor or they would lose completely public confidence, the public

being the user and only producer. Miss Jenkins summarized the then present posture including the following points:

a. Community, a corporation with equal representation of doctors and the public, was under the board of directors' decision to start operating the federation.

b. There was some disagreement on legal and functional aspects.

c. An expressed feeling on the part of several hospitals that a central procurement, drawing and processing center is the simplest and most efficient handling devoid of risk to the hospital, both financial and in adverse public relations.

d. The understanding that such a central operation would place blood in the category of other biologicals and sera procured from outside sources . . . but with non-profit status and giving the public the voice they are demanding in blood procurement.

129. Dr. Burns of General Hospital acted as chairman of the January 28, 1956 meeting, which was introduced by Miss Jenkins' statement, and urged careful consideration to the point that high quality blood must be secured efficiently at the lowest possible cost. A number of pathologists made statements as follows:

a. Dr. Helwig of St. Luke's was "first to speak," and after commending Miss Jenkins stated that he had changed his mind and felt "it would be best to have a central blood bank take over for the hospitals, the procurement, processing and drawing of blood. This would give the public the voice they seem to be demanding and would remove the hospitals from criticism now apparent in their blood procurement operation."

b. Dr. Kerr spoke against Dr. Helwig's position, stating that he wanted a federation under "total control of hospital administrators and pathologists as initially proposed, * * *."

c. Dr. Allebach, pathologist for Research, was agreeable to go along with any plan but wanted to "feel our way" into any program.

d. Dr. Cohen of Menorah Medical Center, after praising Miss Jenkins, took the position that while improvement was desirable the hospitals had been able to provide blood as needed and he would like to see the federation tried.

e. Dr. Firminger of University of Kansas agreed with Dr. Cohen.

f. Dr. Buhler approved the idea of a corporation operating a federation of blood banks and said he did not think the federation would work because of the heavy load on certain hospitals and the impracticability of all securing N.I.H. licenses. He said he felt criticism was not justified but that if the public demand is as

great as has been thought by some, then there probably should be some type of a community banking operation which should be run by hospital administrators and pathologists. He even suggested withdrawal from the present activity and establishment of a central blood banking program run by pathologists and administrators.

g. Dr. Holman questioned whether the larger hospitals could carry the burden of the federation which, in any event, he felt should not be controlled by a corporation.

h. Dr. Bridgens felt the federation would be difficult to work out.

i. Dr. Hill of Trinity Lutheran and president of the Kansas City Pathological Society agreed with Dr. Helwig on the community plan which he said should be financed by the community and not the hospitals.

Then the administrators discussed the matter:

j. Mr. Lindgren and Mr. Reid both favored a separate corporation operating a central bank.

k. Reid proposed the hospitals continue to operate as at present for about six months until the central bank could take over but felt "that there should be a specified time limit at which the corporation should be prepared to accept full responsibility for the community handling of blood."

l. Dr. Buhler interjected the suggestion that more study was required and Mr. Lindgren replied that the new corporation should go into it and select the best method.

m. Mr. Schaffrath claimed that action of the association had been taken foreclosing change of program. He also made other remarks which he asked "not be made a matter of record."

n. Mr. Murphy, counsel, representing Sister Mary Placida, favored the central blood bank and said he had Dr. Lapi's expression to that effect in writing.

o. Sister Michaella Marie of St. Joseph's wanted the blood bank under the control of Area Hospital Association without public representation.

p. Sister Mary Mercy of Queen of the World, on the other hand, felt the proposed corporation with representation for pathologists was desirable.

q. Sister Rita Louise said she preferred Mr. Reid's proposal to continue present operation for six months and then turn operations over to a central banking operation.

r. Mr. Riley of Research also took substantially the same position.

s. Mr. Deaver of Independence said the future course of action was up to the blood bank corporation as revised by negotiations of the Association's Committee.

Dr. Burns then called for a vote and 16 favored the central banking operation, 2 (Drs. Cohen and Firminger) opposed. There was also a vote concerning public representation. This was favored 11 to 7.

There were no proposals for "officially presenting opinions as expressed by the group" (RX 162a–f).

130. Between January 28, 1956 and March 12, 1956, all interested groups agreed that the best means of meeting the blood needs of the Kansas City area was through a central blood bank operated by Community with its name changed and revisions in its corporate organization as negotiated between it and the Area Hospital Association (RF 148). This was accomplished by change of name (CX 383–384).

131. Prior to the meeting of March 12, 1956, and on March 8, 1956, there was a meeting presided over by Dr. Bryant of Community Studies of both the old board and the newly appointed board of directors of Community (RX 188). Present at that meeting among many others were: Members of the old board: Carroll P. Hungate, Joseph Welch, Homer Wadsworth; Hospital Association Members: Tom J. Daly, John Murphy, Adolph R. Pearson, F. K. Halsby, Leslie D. Reid, Henry J. Meiners, A. Neal Deaver, Robert Molgren, Robert E. Adams, Harry M. Walker; Jackson County Medical Society: Donald F. Coburn, Harry C. Lapp, James E. McConchie, Maurice B. Simpson; Wyandotte County Medical Society: Marjorie Sirridge, Morris Walker; Johnson County Medical Society: H. F. Coulter; Clay County Medical Society: Arch E. Spelman; Member at Large: Joseph S. Cope. Miss Jenkins acted as Secretary. There was discussion about procedural matters and about the powers and composition of the Technical Advisory Committee of Community (RX 188c). It was the consensus, as suggested by Mr. Murphy, that the Technical Advisory Committee should have powers as delegated by the board of directors. The hospitals took the position that all pathologists supervising hospital banks should be included on the advisory committee but that would not bar the inclusion of additional persons including hematologists and clinicians. There was no clear cut consensus according to Miss Jenkins.

132. With respect to the selection of public members for Community, Dr. Bryant met with Dr. Arch E. Spelman, John Murphy, Bishop DeLapp and Miss Jenkins at Area Hospital Association on March 15, 1956 (RX 189A). According to Miss Jenkins' report, the meeting resulted from some difference of opinion expressed in the nominating committee which had been named to discuss public corporate board members of Community. Some problem had arisen about the carry over members from the public members selected prior to the reorganization and the individuals present agreed upon designees whom Dr. Bryant undertook to notify and to seek information concerning availability.

The annual meeting of Community was held on March 26, 1956, and Dr. W. D. Bryant of Community Studies acted as chairman pro tem (RX 190A). After reviewing how Community had been reorganized in accordance with the recommendations of Community Studies Report (CX 244), Dr. Bryant urged that "the Board must move very quickly" toward the following: 1) employing a director, 2) determining the type of operation, 3) deciding on geographical location, 4) and 5) formulating contracts with hospitals and blood donor groups, 6) raising capital, 7) securing civil defense equipment.

In closing, Dr. Bryant said he felt the community "owed a great deal to a small number of people who have spent innumerable hours on the blood banking problem[.]", mentioning: Dr. Hungate, Dr. Spelman, Mr. Leslie Reid, Mr. Robert Molgren, Mr. Bartelson, and Miss Jenkins. At this meeting there were members elected by the board of Area Hospital Association, members named by the medical societies and public members (RX 190B).

The Thomas Howell Investigation and Pathologists' Reaction

133. Sometime about March 1956, Midwest employed Thomas Howell, a young attorney, to conduct an investigation and to make recommendations to them (Tr. 768). During the course of his investigation, Mr. Howell talked to Doctors Buhler, Lapi and Upsher (Tr. 892). He also talked to a young lady who was a pathologist assisting Dr. Sloan Wilson (*id.*). He accompanied Bass on an attempt to make delivery of two pints of blood for replacement for a patient at Research Hospital (Tr. 902). The named pathologists told Howell: that the sale of blood was immoral; that a private corporation organized for profit should not be in the blood banking business, and that the entire operation should be under

the control of a pathologist (Tr. 892–899). He denied that he had threatened to sue any doctors or hospitals (Tr. 906), but he did threaten American Association of Blood Banks and North Central District Blood Bank Clearing House with suit (Tr. 906). He reached the conclusion in his report of investigation that while there might be a suit against particular individuals there was insufficient evidence on which to base a conspiracy action (CX 306; RX 7).[7]

Community Moulded to Pattern of Existing Non-Profit Banks

134. On April 16, 1956 the directors of Community Blood Bank of the Kansas City Area, Inc. appointed a steering committee of five composed of Dr. Sloan Wilson, University of Kansas Medical School, chairman, Mr. Joseph Welch, vice chairman, Mr. Homer Wadsworth, Mr. Charles Aylward and Mr. Alex F. Sachs to study and recommend to the directors at their next meeting a plan of action for the establishment of the Community Blood Bank (CX 385; RF 150).

135. At a meeting of the finance committee of the Community Blood Bank on May 9, 1956, it was decided that the financial requirements of the new blood bank should be met, if possible, by outright contributions. If that effort was unsuccessful, then the necessary capital would be borrowed. It was agreed that the initial effort to raise funds should be directed to the medical societies, Area Hospital Association and unions, but that other interested groups and individuals should be requested to support the venture financially (CX 386; RF 151).

136. In the period between May 9, 1956 and early February 1957, officers, directors and members of Community attempted to obtain the necessary funds to establish the blood bank and to develop the details for its operation (Tr. 4545–4552; RF 152).

137. Between February 27, 1957 and March 8, 1957, Mr. Robert Molgren made a trip during which he visited and inspected the Milwaukee Blood Center at Milwaukee, Wisconsin, the Minneapolis War Memorial Blood Bank, the Blood Bank of Dade County, Florida, and the Topeka Blood Bank, Topeka, Kansas. The purpose of this trip was to obtain information concerning the organization and methods of operation of those blood banks (Tr. 4545, 4718–73; RX 194a–f; CX 388; RF 153).

138. At the March 15, 1957 meeting of the Board of Directors

[7] Both exhibits physically attached and placed at RX 7 in docket.

of Community, Mr. Molgren reported on his inspection visits to the blood banks in Milwaukee, Wisconsin, Minneapolis, Minnesota, and Dade County, Florida (CX 390). Mr. Molgren had made a report to the Planning and Personnel Committee the previous day (CX 392), and was paid his expenses and an honorarium of $50.00 per day by the Board. The planning committee report was adopted and sent to the Chairman of the Public Relations Committee with directions to issue a release to the newspapers the Sunday prior to the annual meeting. According to the minutes of the Planning and Personnel Committee (CX 392), it was concluded, among other things, that the blood bank would require a qualified full-time executive director who would be a non-medical person, a part-time medical director who perhaps would serve on a voluntary basis and be responsible for donor screening and all other technical aspects including the testing and processing of blood, a business manager, and a donor club director.

It was also determined: that Community should deal with hospitals not individuals; that a responsibility fee of between $25.00 and $30.00 and a processing fee of $7.50 to $10.00, not including cross matching, should be charged; that there be plans set up for individuals, families and groups and a special pre-deposit plan in maternity cases; that hospitals serving the indigent should pool all accounts and by replacing twice the number of units transfused would meet their obligations; that donors clubs be asked to transfer credits to indigents and that mobile unit equipment be used at the earliest possible date "consistent with financial ability" (CX 392; RF 154).

Community Attempts to
Placate the Pathologists

139. The adjourned annual meeting of Community was held April 2, 1957 at the office of counsel and presided over by John Murphy until a new group of officers was elected including: Robert Molgren, St. Luke's Administrator, President; Rev. Rodney Crewse, a Priest, 1st Vice President; Sloan J. Wilson, M.D., KUMC, 2nd Vice President; Gilbert C. Murphy, a Minister, Secretary-Treasurer; Adolph Pearson, Assistant Secretary-Treasurer.

A Program Planning and Personnel Committee under the chairmanship of Dr. H. C. Lapp included among its twelve members: Drs. Marjorie S. Sirridge, Arch E. Spelman, Russell Kerr and Hilliard Cohen.

A Guidance Committee of ten was appointed under the chairmanship of Dr. Carroll Hungate who was given authority to appoint additional members.

Dr. Sloan Wilson of the Technical Advisory Committee (which also included Drs. Ralph R. Coffey, Hilliard Cohen, Ferdinand Helwig and Jack Hill) was appointed chairman of the Committee-at-Large of Technical Advisors. This committee-at-large consisted "of the physician in charge of the Blood Bank in each hospital located within the represented areas of the Corporation * * *." (RX 196 A–E; see CF p. 334.)

Midwest's Ostensible Attempts to Capitulate; the August 1957 Meeting with Drs. Buhler, Kerr and Mantz and Its Aftermath

140. Mr. Howell, Midwest's attorney, and Mr. Bass called on Drs. Buhler, Kerr and Mantz at St. Joseph's Hospital on August 30, 1957 (Tr. 870–874; RX 6; Tr. 8018). Drs. Kerr and Buhler were present during the entire meeting but Dr. Mantz was called out. Dr. Buhler did most of the talking (Tr. 777, 8018). According to respondents' version (RF 315):

Mr. Bass opened the conversation by asking for advice from the three doctors concerning his blood bank. He indicated he felt Midwest had not been accepted by the medical community, that he recognized that perhaps this resulted, or could have resulted, from the type of medical direction at Midwest and said he wanted to know what could be done to make his blood bank acceptable to the medical community (Tr. 8018). The term "acceptable to the medical community" was a term used by Mr. Bass and Dr. Buhler inferred that he meant by it that he had not been able to supply Kansas City hospitals with blood (Tr. 8019).

Mr. Bass then wanted to know what he could do to interest Dr. Kerr, or Dr. Mantz, or Dr. Buhler, or the three of them, in serving as medical directors of Midwest. Dr. Buhler told him that he could not act as medical director of a commercial blood bank that bought and sold blood for profit; that he considered the purchase and sale of blood for profit wrong and that the first thing Mr. Bass would have to do would be to establish a not-for-profit type of organization where blood would be procured and dispensed without the profit motive and without purchasing blood for a low price and selling it at a higher price (Tr. 8019–20).

Dr. Buhler also told Mr. Bass that the bank would have to operate on the basis of voluntary donors because in his opinion the voluntary donor was the best type of blood donor; that the blood should not be obtained from individuals in economic distress but rather should come from those members of society who were the healthiest and thus permit the bank to obtain the best unit of blood for use in their hospital (Tr. 8020).

Mr. Bass indicated that such might not be too difficult for him to do. Dr. Buhler said that if Mr. Bass did establish such a non-profit corporation with

the intention to use voluntary donors and would abandon the idea of buying and selling blood, that he would consider acting as medical director (Tr. 8020). Mr. Bass wanted to know whether if Dr. Buhler acted as medical director, or if the three doctors did so, such would insure his being able to get blood into the various Kansas City Hospitals. Dr. Buhler told him that he could give him absolutely no assurance that other hospitals would use Mid-west blood and recommended that Mr. Bass discuss the matter with pathologists at other hospitals in Kansas City and also with the hospital administrators because they too were responsible for adequate medical care being given at their hospitals (Tr. 8021). Dr. Buhler advised Mr. Bass and Mr. Howell that in his opinion the screening of the donor, the drawing of the blood, the processing of the blood, the technical examination of the blood, the laboratory procedures involved, the storage and delivery of the blood were all part of a medical service and therefore should be under the direction of a physician and further that in addition to his knowledge and the knowledge of any other pathologist that might want to participate, it would be necessary to have someone who could offer expert advice in the field of blood banking (Tr. 8021–22). Mr. Bass seemed receptive to the suggestions, but Dr. Buhler reiterated that if such a not-for-profit corporation was established, the income would have to be derived from the processing fee and could not come from the purchase and sale of blood (Tr. 8022).

Mr. Howell's recollection differed somewhat. He testified:

> [Buhler] said that they would not permit blood to be brought in from Mid-West Blood Bank and used in St. Joseph's Hospital unless three conditions were met, unless, first of all, the Mid-West Blood Bank became a non-profit corporation; that, second, it had to be approved by the Area Hospital Association of Kansas City; and, third, that it had to be approved by the Jackson County Medical Society. (Tr. 781; CF p. 338.) (Bracket supplied.)

Mr. Howell also testified on cross-examination that during the meeting, as he later wrote the Federal Trade Commission,

> * * * three of the pathologists * * * plainly stated to Mr. Bass in my presence that there was nothing wrong with his product. (See Tr. 916–18.)

In a letter to Mr. Bass dated October 31, 1957, Mr. Howell stated that his notes,

> * * * set out the requirements (of the doctors) in this way.
> 1. We must be a non-profit corporation.
> 2. We must be blessed by the Area Hospital Association and the Jackson County Medical Society.
>
> It is upon the performance of these conditions that the gentlemen said they would be willing to serve. (Parenthesis supplied.) (RX 6.)

In a postscript Mr. Howell recalled that:

> * * * the doctors took strong stands as follows:
> 1. That the drawing and processing of blood is a medical matter.
> 2. That paying for blood is morally wrong.
> 3. That a profit-making organization makes blood cost more. (RX 6.)

141. The hearing examiner concludes from all of the testimony and the exhibits relating to this meeting:

a) That at the meeting of August 30, 1957, Drs. Buhler, Kerr and Mantz were well aware of the fact that Midwest had not been successful in providing blood for the hospitals.

b) That Bass and Howell made it known to the pathologists that they wanted to place themselves in a position where Midwest could serve the community as a blood provider.

c) That Buhler acting as spokesman for the group made it clear that to be acceptable Midwest would have to become a non-profit organization and in addition would have to sell the hospitals and the doctors who were members of the Area Hospital Association and Jackson County Medical Society (see Finding 125).

142. After the meeting Dr. Buhler discussed the meeting and what had been said with Dr. Kerr and Dr. Mantz. Consideration was given to whether they should offer their services as medical directors. Dr. Mantz was skeptical about doing so because he believed that the community blood bank organization had progressed to the point where it would become an operating blood bank. Dr. Buhler said that while he had been in favor of the not-for-profit community blood bank proposal, if the project was not going to get off the ground and his helping Mr. Bass would improve blood banking in the area, he was inclined to be willing to serve as medical director (Tr. 8023–24; RF 316).

143. About one or two weeks later Dr. Buhler met Mr. Bass at the latter's office. At that time there was discussion concerning compensation of the medical director and Dr. Buhler advised Mr. Bass that it was contrary to the code of ethics of the College of American Pathologists for a pathologist to receive a salary for being the medical director of a commercial, profit-making blood bank, but that if a non-profit corporation was operating a blood bank, a pathologist could ethically serve on a fee-for-service or a percentage type basis. Dr. Buhler gave Mr. Bass a copy of the bulletin of the College of American Pathologists in which the ethical principles were stated (Tr. 8025; RF 317).

144. After this meeting at St. Joseph's and in the fall of 1957, Mr. Bass called on Dr. Bridgens at Independence Sanitarium, bought his lunch and asked if Bridgens would be interested in patronizing a blood bank "run on a voluntary non-profit basis with competent medical direction and with capable technologists and providing services for solving transfusion problems" (Tr. 7703). Dr. Bridgens indicated he would give it serious consideration. Bass mentioned that he had already rented space and was contemplating renting more (Tr. 7704).

145. The next meeting between Dr. Buhler and Mr. Bass occurred either in late 1957 or early 1958. At that time Mr. Bass came to Dr. Buhler's office with the representative or owner of a medical supply house in Lincoln, Nebraska. After introducing this individual Mr. Bass announced he was contemplating utilizing the man's facilities in Lincoln, Nebraska as a depot from which blood could be distributed to areas in the vicinity of Lincoln, Nebraska. Dr. Buhler did not approve of this suggestion and interpreted it as an attempt on Mr. Bass' part to make the contemplated non-profit operation actually a commercial undertaking. The meeting broke up on a rather unfriendly basis (Tr. 8028–30; RF 318). Dr. Bridgens heard no more from Mr. Bass after the luncheon meeting about the non-profit plan (Tr. 7704–5).

Community Completes Its Preparations
Securing Civil Defense, Red Cross,
Public, NCDBBCH, and Pathologists' Backing

146. Following the annual meeting of Community, April 2, 1957, (Finding 139; RX 196 a–e), the directors and committee had the task of making detailed plans for the operation of the blood bank, the selection of a suitable location and the employment of a director and full time staff as well as the raising of necessary funds (see RF 157; CX 383–397). In addition, it was essential to further placate some of the pathologists who were ready as late as August 1957 (see Findings 140–144 inclusive) to consider a rival operation so long as it was operated to conform to ethical as well as medical standards prescribed by them.

The selection of a director caused inquiry to be made as far afield as England. Dr. Stratton of Leeds was asked to visit Kansas City in the hope he might accept the position. He declined for personal reasons (see RF 155; Tr. 8738).

Securing the equipment which had been used by the Red Cross during the Korean Emergency and later stored by Civil Defense required additional effort. It was finally secured from Frank Starr of Civil Defense in September 1957 after Starr attended a meeting of directors and succumbed to the arguments of General Thrasher, who later was made a public member of Community (CX 395 f).

The search for a director and business manager was not concluded until the December 26, 1957 meeting of the directors at which time Dr. Perry Morgan (not an M.D. but a holder of a

Ph.D. degree from the Department of Bacteriology and Immunology of the University of Minnesota (Tr. 2816)), an associate professor at the University of Kansas Medical School, was appointed director and William W. Henderson, a former Naval Officer, was appointed business manager (CX 393).

At the same meeting of December 26, 1957, the responsibility fee for blood was set at $25 a unit and the processing fee at $10 (*id*). (The processing fee was later changed to $9 (CX 396 c).) The directors referred to Dr. Morgan, the new director, to the Technical Advisory Committee and to the Program Planning Committee the problem of securing a part time medical director. A medical director was not secured until March 18, 1958 when the board of directors selected Dr. Ferdinand Helwig, the pathologist at St. Luke's Hospital, as medical director and additional pathologists named by him as associate medical directors (CX 396 d).

147. The significance of the selection of Dr. Helwig as medical director was attested to by Dr. Sloan Wilson, Professor of Hematology at Kansas University Medical Center, when he testified:

* * * I think without him saying yes, this entire effort would have fallen by the wayside, primarily by his saying that he would be a medical director, were they (the pathologists, internists, and surgeons) willing to bet on a beginning institution to replace a well organized, well run (series of) individual blood banks in this community (Tr. 8718–19). (Parenthesis Supplied.)

148. At the same meeting of directors held March 18, 1958 at which time Dr. Helwig was selected, the following officers were elected:

Robert Molgren, St. Luke's, President
Rev. Rodney Crewse (a Priest), 1st Vice President
Dr. Marjorie Sirridge (a hematologist), 2nd Vice President
Mr. Gilbert Murphy (a Minister), Secretary-Treasurer
Mr. Adolph Pearson, Asst. Secretary-Treasurer

An Executive Committee consisting of the officers and Mr. John Murphy, of counsel, was also selected and given all the interim powers of the board of directors (CX 396 d). The processing fee was reduced to $9.

149. The newly selected executive committee met March 20, 1958 without Mr. John Murphy but with Dr. Morgan and Mr. Henderson and established finance, publicity, insurance, personnel and program planning, and technical advisory committees. The Technical Advisory Committee consisted of Dr. Ferdinand C. Helwig, Chairman, and the following doctors: Russell Kerr, Victor

Buhler, Frank Mantz, H. K. B. Allebach, John E. Johnson, Lauren Moriarity, Irwin Joffe, James Bridgens, Hilliard Cohen, Evelyn Peters, David Gibson, Tom Hamilton, W. W. Sumerville, Sloan Wilson, Charles Wheeler, Jack Hill, James Turner, and Angelo Lapi (CX 397).

Thus, by March 20, 1958, a bare two weeks before Community began drawing blood, the pathologists were finally named, not "at large," but *the* technical advisory committee of Community. And, as they were in control of the supply of blood to their hospitals, would necessarily be disposed to patronize their own Community bank rather than a commercial one.

150. Two other matters were completed prior to Community opening its doors on April 3, 1958. The first consisted of making peace with two Red Cross Chapters and the second, was procuring membership in North Central District Blood Bank Clearing House (NCDBBCH) and preventing Midwest from securing membership for its non-profit enterprise. Dr. Morgan executed for Community on December 6, 1957 contracts with Wichita Regional Blood Program, American Red Cross (RX 26 a) and with Springfield Regional Blood Program, American Red Cross (RX 22 a) which ran from January 1, 1958 to January 1, 1959 and remained in operation, although technically expired, until the hearings in this matter (CX 362-365). By these contracts the Regional Red Cross Chapters agreed to replace blood to Community for persons eligible to receive blood from the Chapters, where Community's blood had been used to transfuse such persons. Community was required to pay a $3 processing fee (later raised to $6).

The second matter that involved NCDBBCH commenced sometime in March 1958 when Dr. Morgan on behalf of Community and Mrs. Bass on behalf of her new non-profit organization, Community Blood Bank and Donor Service, both sought membership. The similarity in names caused confusion (RX 326) and so Dr. Pheteplace, the President of NCDBBCH, sought advice from Dr. Lapi (*id*). Dr. Lapi wrote March 17, 1958 approving Dr. Morgan's application and stating with respect to Mrs. Bass' application:

> Since the Midwest Blood Bank was not approved for membership in the A.A.B.B., I doubt whether this new Bass enterprise will be, since to quote from Mrs. Bass' letter, "The two banks will be working together under the same plan and direction."
>
> It is my opinion that this proposed new non-profit blood bank operated by Mrs. Bass is nothing more than a dummy corporation to confuse the public just as you were by the similar names. It was probably designed to rate prior

listing in the telephone directory and by use of the word "Community" to divert unsuspecting donors from the other bank. The simultaneous appearance of two community blood banks was probably not fortuitous.

I do not hesitate to recommend that the Community Blood Bank and Donor Service, Inc. of 1115 Grand Avenue be refused membership in the clearing house until they can show membership in the A.A.B.B. (RX 328)

During the Board of Directors meeting of Community held also March 18, 1958, at the suggestion of Mr. Henderson and on motion of John Murphy, of counsel, the matter of registering Community as a trade mark to prevent other organizations using the name was referred to Mr. Hovey, an attorney, (CX 396 d). Thus, before opening, Community took steps to prevent the non-profit membership corporation which the Basses were attempting to start from using the name chosen by them.

In Practical Operation a Hospital's Affiliation with Community Excludes Purchases from Others

151. We have heretofore described Community's method of operation (see Finding 20 a–k). Although Community's contract was not in terms exclusive, its method had the practical effect of insuring that hospitals would use only blood supplied through Community (*id*). Only two exceptions were noted.*

152. In a number of instances, hospitals in declining offers to deliver blood by Midwest, have refused to deal with Midwest and have expressly placed their refusal to deal with it on the basis that they secured all their blood from Community and that replacements must be made there.

The following are examples of written communications to that effect:

In returning a bill to Harold Hammer, a patient, on February 8, 1961 showing $25 due, Menorah Medical Center appended the following unsigned note:

In regard to your note on the 2–2–61 statement, we have not credited your account with the one unit of blood from Midwest Blood Bank as it has already been explained to you we do not work with the Midwest Blood Bank. We work strictly with the Community Blood Bank so you are responsible for this bill. Won't you please clear your account right away? (CX 90 b)

On March 28, 1962, Dr. Ralph Rettenmaier, pathologist at Providence Hospital, wrote James E. Remer, an employee of Midwest, with respect to Mrs. Satterley, a patient, in part as follows:

*St. John's Hospital of Leavenworth after refusing Midwest decided to use it in one instance, the Hunt matter, and Kansas University Medical Center which Community originally was unable to service maintains supplies from Red Cross, Midwest and Community. (RX 47; CX 233 a; 366–372; Tr. 2773–6; 1753 *et seq.*; RX 65 j)

As I stated in our conversation, Mrs. Satterley's debt for blood is with the Community Blood Bank of Kansas City, Missouri, from whom we obtained the blood which was given her. The blood cannot be replaced nor the debt satisfied by giving us a pint of blood.

* * * * * * *

The blood bank of Providence Hospital does not relish the position of being put in the middle of a fight between a commercial blood bank and a non-profit blood bank. It is our position to support the non-profit, community sponsored, blood bank. As a participating hospital we have a direct voice in the operations of Community Blood Bank and continuous, direct supervision over the handling and the processing of blood.

* * * * * * *

Since we have no way to be sure that your blood is always, drawn, processed, and otherwise handled in accordance with the strict requirements that we have, (and I might add these are a lot more strict than the N.I.H. requirements) we have decided not to accept your blood. (CX 213 a)

Community's Position with Respect To the University of Kansas Medical Center Blood Supply From It and From Red Cross Demonstrates That An Exclusive Arrangement Was Contemplated

153. In 1960, a committee of Community, including: Robert Molgren, Dr. Perry Morgan, Dr. Marjorie Sirridge, Homer Wadsworth, and Dr. Hilliard Cohen; was set up to consider affiliation with the University of Kansas Medical Center (K.U.M.C.). Such affiliation had been refused in 1958 because Community did not as yet have the blood providing facilities in an amount necessary to carry on with both K.U.M.C. and the other hospitals (see RX 130 a & b).

After meeting with officials of K.U.M.C., the committee reported to the board of directors of Community that K.U.M.C. would like Community to supply their blood needs in part.

Dr. Hilliard Cohen then wrote Dr. Miller, the Dean of the University September 1, 1960, stating that adverse action had been taken by the Board of Community (RX 132). He explained:

It was the unanimous opinion of the Board that such an arrangement could not be accepted because it was not consonant with our concept of blood banking and with the arrangements of every hospital associated with us.

Dr. Cohen agreed, however, to help out when emergency situations arose as in the past.

154. Almost three months later, on December 27, 1960, Dr. C. Arden Miller of K.U.M.C. wrote Dr. Cohen in part as follows:

Our current contract with the World Blood Bank does not expire until October of 1962. We have indicated to Mr. Bass our intentions for affiliating entirely with the Community Blood Bank and for discontinuing services from

him as soon as possible. We will continue to explore with Mr. Bass the possibility of terminating our contract by mutual consent as soon as possible. (RX 134)

Dr. Miller then stated that the World (Midwest) contract did not include blood for cardiac surgery and that they had discussed plans for Community taking this over "In order to hasten and facilitate our eventual complete affiliation with the Community Blood Bank . . ." (RX 134).

155. On October 2, 1962, Dr. Russell T. Eilers of University of Kansas Medical Center wrote to Springfield Regional Blood Center of the Red Cross in part as follows:

. . . we at the Medical Center will appreciate it if blood indebtedness due to Red Cross patients in our hospital could be transferred to us via the Community Blood Bank of Kansas City, Missouri. As of October 1, 1962, we signed an agreement with the Community Blood Bank. *The Community Blood Bank personnel and we at the Center feel this would facilitate our bookkeeping and record keeping at both institutions.* (Emphasis supplied) (CX 366)

He then points out that whereas previously the patient only had $4.50 left in his account, "on a transfer through Community Blood Bank . . . the patient would . . . be obligated to a $9.00 processing charge unless a second donor is brought in." (CX 366)

Although this change was not put into effect, due to objections by Red Cross (which continues to make direct shipments to the Medical Center (Tr. 1753)), the letter reflects Community's position in the matter as seen by K.U.M.C. As heretofore pointed out, Red Cross blood replacements for other Community affiliated hospitals went through Community by contract (Finding 150).

Reaction to Midwest's Blood Provider Contracts Demonstrates Widespread Avoidance of Dealing by Hospitals and Pathologists

156. Early in 1960, James E. Remer was employed by Midwest to sell blood provider contracts. There was an extensive sales promotion of these contracts (see RX 76a–z 18), which in effect provided for the delivery of blood ordered by hospitals in the event the contractee was transfused and needed blood (RX 12a–b; CX 296a–b). Mr. Remer testified in great detail concerning incidents in which he participated either by personally delivering blood to a hospital or to Community which was refused or referred to some other agency (Tr. 2953–98, 3141–86, 3264–3486, 3966–4049, 4197–4222, 5485–5594, 5968–6357, 6450–77, 6594–6687). He also described how he personally and through use of telephone and personal solicitors sought to sell these contracts.

Mr. Remer methodically kept records of each call he made (see CX 595) and equally methodically sent confirmatory letters to hospitals, to his customers and to Community. In general, the pattern of behavior of the hospitals and of Community was confirmed by witnesses called by respondents and by documentation. Hence, while there are minor discrepancies in the versions given by Mr. Remer and those by respondents' witnesses, in general, Remer was corroborated as to the occurrence of the incidents (RF 329–58 inclusive, pp, 152–204). The incidents described by Mr. Remer are tabulated in Appendix A hereto attached and made a part of these findings.

157. In addition to attempting direct deliveries on behalf of contract holders, Mr. Remer made a number of telephone calls posing as a Mr. Rogers, a prospective purchaser of a Midwest contract, to ascertain from a number of the hospitals whether or not the hospitals would accept processed blood from Midwest, delivered pursuant to one of Midwest's blood provider contracts. These telephone calls were surreptitiously recorded by Mr. Remer by an electronic device attached to his telephone. Respondents, after first objecting to Mr. Remer's activities as in violation of the Federal Communications Act and Regulations, later caused the tape recordings to be produced and to be transcribed and themselves offered the transcriptions in evidence (RX 258–75). Also transcribed and within the group were transcripts of conversations, similarly recorded, where Mr. Remer, admitting his identity, sought to have one or more of the hospitals accept Midwest blood and thereby secured statements of their position.

158. The following are examples of statements in telephone conversations made May 28, 1960 by several of respondents corroborating the other incidents in demonstrating that hospitals and pathologists regarded affiliation with Community as creating an exclusive relationship and as being very widespread in the area:

a. Remer, disguised as Rogers, asked Dr. Angelo Lapi if Midwest's blood provider contract would be recognized by St. Mary's Hospital. Then the following transpired:

Dr. Lapi: Well, we wouldn't use it, no, because we have just one source for blood and that's the Community Blood Bank. (RX 268, p. 5)

* * * * * * *

After further discussion:

Mr. Remer: Well, then, it couldn't be used originally and neither could it be used as a replacement, could it?

Dr. Lapi: No, at least not here, not at the hospital. We just don't use any blood except from Community Blood Bank so that any negotiation that you

want to make in that respect, you would have to do with Community Blood Bank. (RX 268, p. 7)

b. Remer, disguised as Rogers when talking to Dr. Victor Buhler, obtained the following answer:

Dr Buhler: Well, we refuse their blood here and it's not because it is not good or anything else, it's just because most of the hospitals in Kansas City have been cooperating with the Community Blood Bank and if you want to investigate that program, that's fine * * * (RX 267, p. 9)

* * * * * * *

When asked what hospitals Midwest and Community handle, Dr. Buhler replied:

Well, sir, Midwest, I don't know, I don't know how many Midwest handles, but I think that all of the hospitals in Kansas City are connected, except for the University of Kansas, with the Community Blood Bank. (RX 267, p. 13)

Still later in the conversation, Dr. Buhler stated:

Any blood we get comes through our Community Blood Bank so that if there was any interchange, it would be through our Community Blood Bank, being the one at this end that it would be cleared through. (RX 267, p. 17)

c. When talking to Dr. Hilliard Cohen under the same pretext, Mr. Remer procured the following statement:

Dr. Cohen: The Community Blood Bank is hospital sponsored by the great majority of the hospitals in this area, great majority, in Kansas City, yes, just by almost all the hospitals, not all, but almost all. The hospitals are affiliated with Community Bank and this is a manner in which we procure our blood. (RX 268, p. 18)

d. Sister Robert Margaret at St. Joseph's in a taped conversation made it clear that she thought they were not allowed legally to accept blood from any other blood bank except Community (RX 260, p. 7). An unidentified person had stated in another taped conversation that blood would not be accepted from anyone but Community, even the Red Cross. (RX 261)

Contemporaneous Correspondence Written by Hospitals, by Community, and by Pathologists Demonstrates Consistent Insistence That Midwest Blood be Sent Through the Clearing House to Community and not Delivered as a Replacement to the Affiliated Hospital

159. Utilizing the existence of North Central District Blood Bank Clearing House as a reason to refuse to accept Midwest blood commenced long before Community commenced operating. Originally, Edith Bossom, one of the Technologists of the University of Kansas Medical Center, objected to the receipt of Midwest blood as a replacement (Tr. 6478–6539) and gave as her excuse that credit should be sent through the NCDBBCH (RX 88). This

caused considerable confusion on the part of Midwest in dealing with the clearinghouse (RX 82–85). When coupled with Dr. Angelo Lapi's (the Missouri representative to the Blood Bank) obvious antagonism (see CX 308) and the fact that a transaction fee, a 2–1 replacement ratio, and a processing fee was in some cases added to cost of Midwest blood, it is quite understandable that the Basses would hesitate to use NCDBBCH particularly when there seemed, to Midwest, no necessity to make contact with a Chicago-based blood bank to replace blood at a non-member hospital in the same community. Moreover, Midwest could never be certain that their membership, often threatened, would not be terminated. (See *e.g.*, CX 214A, 158; RX 326–28.) In addition, they had been told that they were required to make certain shipments directly (CX 214A; RX 85). Dr. Morgan's attempt (RX 72a–b) to secure a definite ruling from NCDBBCH in Midwest's case had never resulted in a firm policy statement requiring that Midwest transfer blood to local non-clearinghouse member hospitals because of their affiliation with Community which had become a member even before it started to draw blood. Despite these uncertainties, there was consistent insistence that Midwest not deliver blood directly to the hospital which transfused a patient having a Midwest contract but that it issue replacement credits to Community through NCDBBCH.

160. The following excerpts from the correspondence of Community, of hospitals and of pathologists illustrate a consistent pattern of insistence by Community, by the hospitals and by pathologists that Midwest cannot replace blood directly to the non-member hospitals but must do so through the NCDBBCH:

a. On June 14, 1960, Mr. Henderson, business manager of Community, wrote to Mr. Bass (Midwest) regarding the George R. Bassett case at Providence Hospital in part as follows:

> We request that you transfer this credit through the North Central District Clearing House to us so that proper credit may be issued to clear our books (CX 201).

Three days later Dr. Ralph J. Rettenmaier, pathologist at Providence Hospital, wrote regarding the Bassett and Farris cases. After referring to the statement of policies of NCDBBCH Items 3 and 4 and to the fact he had instructed Remer to transfer credits through the clearinghouse, he concluded:

> In order that our patients may receive the credit which they deserve, please transfer these credits through the District Clearing House to Community Blood Bank. As this is an accepted and established policy of blood

banks participating in the Clearing House Program, please follow this same procedure on any subsequent occasion (CX 202).

b. On July 5, 1960, Helen M. Stevenson, Blood Bank Supervisor of Osteopathic Hospital, wrote Midwest:

At the time you first notified us of this credit, you were instructed by telephone and also thru your representative to credit this blood to the Community Blood Bank thru the Clearing House. This is the only way we can help you to clear your books as Elmer Fugate's account with our Blood Bank is closed (CX 196b).

c. Robert A. Molgren, Administrator of St. Luke's Hospital, on July 7, 1960, wrote Mr. Remer in response to Remer's letter that he had established 7 units credit for Harry Darling, in part, as follows:

We have authorized the Community Blood Bank of the Kansas City Area, Inc., to accept these credits by transfer through the North Central Bank Clearing House and would request that you implement such transfer (CX 79).

d. On July 19, 1960, Dr. Ralph J. Rettenmaier, pathologist at Providence Hospital, wrote to James Remer at Midwest, in part, as follows:

St. John's Hospital is one of the participating hospitals in the Community Blood Bank Program. In your conversations with Sister Myra on 7-16-60, she indicated to you that the proper procedure would be to transfer credit for the blood through the District Clearing House to the Community Blood Bank. As you know, this requested transfer of credit is in agreement with the "statement of policies between the District Clearing House and member blood banks." (CX 57a)

e. On August 4, 1960, Mr. Henderson, Business Manager of Community, wrote James Remer:

We will be happy to issue credits to Mrs. Genevieve Hunt (patient at St. John's Hospital in Leavenworth, Kansas) upon receipt of the credits transferred via the North Central District Blood Bank Clearing House. (CX 62)

A second substantially identical letter was written August 15, 1960 (CX 65).

f. On August 12, 1960, Sister Mary Seraphia, Administrator of St. Mary's Hospital, wrote Mr. Remer of Midwest, in part, as follows:

Since Saint Mary's Hospital is currently affiliated with the Community Blood Bank of the Kansas City Area of 4040 Main Street, we suggest that you arrange to transfer the credits for Miss Frances Dickason to the above named Blood Bank through the North Central District Blood Bank Clearing House of which your bank and the Community Blood Bank of the Kansas City Area are member banks (CX 134a).

g. Even when the Kansas City Records Center Post Blood Bank Group attempted to donate Midwest blood, held to the credit of that group on its dissolution (CX 579a), John F. Stockwell at Mercy on November 11, 1960, wrote Remer at Midwest, in part:

I am enclosing a copy of a letter which we have written to Dr. Morgan at the Community Blood Bank, authorizing him to arrange for the transfer of the credits to the Community Blood Bank. (CX 581a)

The enclosed letter (CX 581b), after referring to a conversation between Dr. Morgan and Miss Clark of Children's Mercy relating to the credits for Army Records Center held at Midwest, stated:

This is your authorization to arrange for the transfer of these credits, through the clearing house, from the Midwest Blood Bank to the Community Blood Bank for Mercy's use. (CX 581b)

h. On December 1, 1960, Perry Morgan, Director of Community, wrote World Blood Bank referring to a letter that stated 11 replacement units had been credited to Community by World (Midwest), stating in part:

As you know the Community Blood Bank has no account with your Bank and you have no authority to establish any account for us.

While we have no obligation to your Bank, we are in this particular case, as our previous correspondence with you has repeatedly indicated, willing to make available the proper number of credits to Mrs. Hunt upon our receipt of the same number of credits properly transferred through the A.A.B.B. North Central District Blood Bank Clearing House. (CX 70)

i. Sister Miriam Leah, Blood Bank Supervisor of Queen of the World Hospital, replied January 4, 1961, to a letter from Remer about a patient, Ruby Lee Gordon, in part, as follows:

No one here has refused to accept delivery of blood, although you have stated that such was the case. In response to a telephone message from the World Blood Bank we requested that the credit for the replacement blood for Ruby Lee Gordon be transferred through the usual clearing house channels to the Community Blood Bank of the Kansas City Area, Inc. We are a member bank of the Community Blood Bank, and it is only proper that all transactions for blood replacements be handled by said blood bank. (CX 100)

j. Perry Morgan, on August 2, 1961, wrote (CX 509a) both Midwest and World regarding Gordon E. Wesner and Gertrude LaHue, in part, as follows:

The reference in your letter to a purported refusal on our part to accept delivery of tendered replacement bloods is wholly inaccurate. We will accept replacement donors at our blood bank who can qualify under our established procedures, or, as above indicated, we will effect transfers through the Clearing House. What we will not do is acquiesce in the persistent attempts of your blood banks to dump human blood units on our doorstep that we have neither ordered nor have any need for (CX 509a)

k. On August 2, 1961, Perry Morgan also wrote World Blood Bank (Midwest), in part, as follows:

In the case of Mrs. Hunt and upon the request of Saint John's Hospital we are willing to either accept qualified replacement donors for Mrs. Hunt at our blood bank or other drawing centers operated by us, or upon the request of the hospital we will be willing to effect transfers through the Clearing House so that credits could be issued to Saint John's Hospital in the name of Mrs. Hunt. (CX 147)

l. Bothwell Memorial Hospital in Sedalia, Missouri, on November 7, 1961, indicated that it would accept a unit of blood from Midwest (CX 546) and might be willing to make an affiliation with them. However, by December 4, 1961, Dr. Charles M. Edwards, the Administrator, wrote:

This morning I talked with Dr. McPhee, an associate of Dr. Upsher, who is professionally responsible for our laboratory and Blood Bank.

I have been advised that they will accept blood replacements from your organization; however, such replacements must go through the Blood Bank Clearing House, in Kansas City (CX 550).

Still later, on January 26, 1962, Edwards wrote:

. . . I refer you to the Community Blood Bank of Kansas City Area, Inc., 4040 Main St., Kansas City, Mo.

We have been advised by Dr. A. E. Upsher that clearing may be done through this Blood Bank . . . (CX 555a).

m. On December 11, 1961, G. DeWitt Brown, Assistant Administrator of Baptist Memorial Hospital, wrote Remer at World telling him that in the case of Wesner's account, the patient had been fully credited,

. . . but this in no way establishes a precedent to be followed in the future. May we suggest that you advise those with whom you contract that Baptist Memorial Hospital practicipates through the clearing house only, and that blood replacements cannot be made directly to the hospital (CX 545).

n. Sister Madeline Maria of Queen of the World Hospital, on January 15, 1962 (CX 499a), in apparent response to a form letter, after thanking Remer for offering an opportunity to meet with him and stating it was not necessary, wrote in part:

Our patients' needs for blood are satisfactorily met. Should an emergency arise where we could not obtain blood, we would not hesitate to use your facility since we recognize your qualification. Should there be at any time a deposit made at your World Blood Bank for one who happens to be our patient, this blood could be transferred through the Chicago Clearing House (CX 499a).

With respect to a unit of blood which Mr. Remer said was available without charge in a December 16, 1961, letter (CX 498), Sis-

ter stated she had intended to use the blood for a patient but he expired before she could do so.

I still intend to request this blood the next time we have a patient in the hospital whose blood replacement would be a problem for him (CX 499a).

The Area Hospital Association Warning

161. On May 31, 1960, three days after Remer's talks, posing as Rogers, with the pathologists, Nathan Stark the chairman of the Legal Advisory Committee of Area Hospital Association sent out a two page warning memorandum to the Administrators of the member hospitals (RX 184 a and b).

This memorandum alerts the member hospitals that questions are being asked, warns that they may not act jointly and at the same time tells them that they are under no obligation individually to deal with any supplier. The memorandum incidentally refers to an informal stipulation which administrators and pathologists had been asked to sign following the Federal Trade Commission investigation in 1957 and 1958.

In the initial paragraph the memorandum states in part:

Presumably, the blood bank enters into a contract with its policyholders to furnish blood, but so far as we know, *the bank does not have formal arrangements with all hospitals to accept the blood.* (Emphasis supplied) (RX 184 a)

The description of the Federal Trade Commission proceeding and settlement includes a statement:

. . . Needless to say, such a conspiracy did not exist, nor was formal hearing held by the Federal Trade Commission.

Then the following appears:

It must be clearly understood by our hospitals that any current question regarding dealings with a commercial blood bank cannot be the subject of discussion or joint action by the Kansas City Area Hospital Association, nor by any of its hospitals working informally together. (RX 184 a)

Following the warning, the area of permissible action is set forth:

Each hospital, individually, *has every right to make its own decisions* about dealing with any supplier of any such product or service used by that hospital. *Such decisions are arrived at independently and very properly so.* (Emphasis supplied) (RX 184 a)

The memorandum further warns not to discuss ". . . even verbally with one another, what action you are going to take on this matter" (RX 184 a). And it avers that the Area Hospital Association does not know and does not want to know what the

action is. Finally the association memorandum states what position it has taken:

. . . we have advised the callers that we know nothing about the blood insurance program about which they inquire, and that any individual hospital's position regarding procurement of supplies of any type is its own affair. (RX 184 a)

A copy of this memorandum was also sent to counsel and to the Board of Directors.

Refusals to Deal Except Through the Clearing House Continued Even After This Proceeding Commenced

162. As shown in Appendix A, incidents continued involving refusal of hospitals to accept Midwest blood directly in replacement of blood transfused into a patient having a contract with Midwest.

163. More significantly, hospitals wrote Midwest concerning their position even following the commencement of hearings in this proceeding.

On May 6, 1963 Walter V. Coburn, Administrator at Bethany Hospital, wrote Remer that he was sorry to have caused him to take two trips. He then explains:

For a number of years Bethany Hospital has not owned blood, but, instead, holds a rotating supply provided by another bank, which until the unit is withdrawn from storage is owned by that bank. This eliminates any possibility of blood outdating on our shelves. (CX 516)

He then says he will give credit to Shrewsbury and Leonard ". . . as soon as we are notified . . . that such replacement has been made." He also suggests credit through the clearing house (CX 516).

E. H. Best, Controller of St. Luke's Hospital, on June 30, 1963, after the commencement of hearings in this case, wrote to World Blood Bank with respect to Francis Hammett in part as follows:

You were advised at least as long ago as July 7, 1960, that St. Luke's Hospital had authorized the Community Blood Bank of the Kansas City Area, Inc., to accept credits by transfer through the North Central District Blood Bank Clearing House and that in any instance in which you believed such credits were due, you, as a member of the Clearing House, should initiate such reciprocity credits through the Clearing House. (CX 504)

With respect to Hammett, however, Best stated that the latter had had donors make replacement so that his obligation had been completely satisfied.

Inconsistent Blood Buying Policy of Community

In the following findings the direct purchases made by Community from banks other than Midwest, together with respondents' explanation of such purchases, are described. No instance of a purchase from Midwest by Community was disclosed.

164. On December 12, 1958, Community Blood Bank ordered 20 units of O-positive blood from Bergen County Blood Bank (Tr. 3255; RX 89). This was a direct order and did not go through the Clearing House. Community Blood Bank felt itself to be in an emergency situation for the blood ordered because of the possibility of running out of that type of blood (Tr. 8224) and it was faster to get blood flown in by air shipment from banks having it already processed than to call in donors and professional personnel to process it. When the Clearing House was open Community Blood Bank always called to determine what banks were reporting available blood (Tr. 8225). On only one occasion did the Clearing House advise that blood was available at Midwest and on that occasion the blood had already been obtained from Wichita Red Cross (Tr. 8226).

165. On December 14, 1958, an order was placed by Community Blood Bank with Bergen County Blood Bank for 20 units of A-positive blood. When the blood arrived it was completely hemolyzed and useless (Tr. 3258; RX 90 a–b). It was immediately returned to Bergen County Blood Bank. No transaction resulted through the Clearing House or otherwise on this order (Tr. 3258).

166. On September 20, 1958 and June 4, 1960, orders were placed by Community Blood Bank with Chicago Blood Donor Service for a total of 9 units of A-negative and B-negative bloods (Tr. 8337; RX 348). Both requests were on Saturday when the Clearing House was closed (Tr. 8228). The blood could be obtained by air shipment from Chicago Blood Donor Service faster than Community Blood Bank could secure donors and call technical personnel to its bank. In both cases, Chicago Blood Donor Service was requested to handle the transaction through the Clearing House but refused to do so (Tr. 8229). Rather than be without the blood should an emergency arise, Community Blood Bank ordered and accepted the blood at a cost of $35.00 per unit (Tr. 8228–29).

167. On April 11, 1959, July 18, 1960, October 12, 1960 and January 26, 1962 (RX 349), Community Blood Bank ordered a

total of 26 units of O-negative blood from Michael Reese Hospital, Chicago, Illinois. In each instance, Community Blood Bank called the Clearing House before calling Michael Reese and the Clearing House could not provide the needed blood (Tr. 8232). Michael Reese did not accept blood through the Clearing House (Tr. 8234–35), and refused to channel these units through the Clearing House although requested to do so. Community Blood Bank was required to pay $35.00 for each unit (Tr. 8235).

168. Between June 6, 1960 and June 12, 1962, Community Blood Bank placed 17 different orders with Southwest Blood Bank, Inc., totaling 73 units of positive and 69 units of negative bloods (RX 351). In each instance, Community Blood Bank called the Clearing House which could not supply the blood. Community Blood Bank could not locate the blood at Denver, Minneapolis War Memorial or other blood banks that they had previously dealt with through the Clearing House. It was necessary to have these units in inventory to meet possible emergencies and Community Blood Bank obtained the blood from Southwest rather than be without the supply even though the supplying blood bank would not clear the transactions through the Clearing House (Tr. 8236–38).

169. In addition to the units received not through the Clearing House, Community received for the five years until the end of December 1962, 3,914 units of blood through the Clearing House and shipped through that medium 1,253 units. There were a total of 10,213 separate transactions involving the Clearing House (Tr. 8239).

Community's Donor Fee Policy Set to Attract Midwest Donors

170. Prior to the formation of Community, fees paid by hospitals to "Professional Donors" in many instances equalled the responsibility fee charged the patient. In such cases, the hospital did not make any gross profit on each unit transfused (CX 244 p. 21).

171. When Community started drawing blood, it paid individual donors $15 for each unit withdrawn (Tr. 2560) and at the time blood was transfused, placed a charge against the hospital of $25 responsibility fee and $9 processing fee, or $34 (Tr. 2556–2560; RX 469 & note 2). Thus on the transaction there was a "gross profit" of $19 per unit from which, of course, the actual costs of typing, drawing, storage and marking must be deducted. The responsibility fee was eliminated by a donor presenting him-

self to Community and the responsibility fee and processing fee would be cancelled if two donors were presented. The hospital would be credited and it in turn would credit the patient (CX 233, 234).

Midwest had been paying donors $10 less than the price set by Community (CX 244 p. 28). This was known to Community as it was a part of the Community Studies Report (CX 244 p. 28). It charged hospitals $20 per unit (*id*), and required three replacement donors to completely obliterate the charge.

FACTS CONTROVERSING EXISTENCE OF A CONSPIRACY

Initially in these findings the hearing examiner discussed facts relating to the jurisdiction of the Federal Trade Commission (Findings 11–34). These jurisdictional arguments are respondent's first line of defense and although based on facts are primarily concerned with the applicable law.

The prime fact which respondents urged in their defense apart from the jurisdictional issues was that there was no conspiracy because each of the doctors and each of the hospitals were merely doing what was natural for them to do in the circumstances and that each did this wholly apart from what someone else was doing. As Mr. Lane expressed it:

> That is precisely the point I am getting at now—the question of keeping this entire record in proper perspective, so that a meeting, a chance remark, a letter, does not get so blown up as to become something that obscures what really is the background of this entire situation. (Tr. 9034)

This answer was given in response to the hearing examiner's question:

> I take it that that is the gist of your defense, is it not—that the doctors were merely doing what they thought was appropriate in the circumstances and natural for doctors to do. And that it wasn't a conspiracy at all. (Tr. 9034)

In the ensuing findings we shall deal with this factual defense under the subheadings relating to particular facets of that proposition.

The Ethical Problem

172. Respondents point to the facts which have been gathered under the subheading "Motivation" under the heading, "Facts Supporting the Charge of Conspiracy" as a reason why there is no conspiracy (Findings 62 and 63).

Respondents also point out that compensation of pathologists may not be considered as a motivating factor. Pathologists either received a straight salary as was the case with Dr. Cohen (Tr. 3886) or a percentage of the earnings applicable to the laboratory as was the case with Dr. Buhler (Tr. 7944). This remained constant no matter where the blood supply was secured. It was regarded as unethical to secure compensation based on transactions involving the transfer of human blood (Tr. 8025).

The American Medical Association, the Red Cross, the American Association of Blood Banks, and the AFL–CIO as was brought out in the testimony and exhibits referred to in such findings, all regarded "trafficking in blood" as unethical and immoral (RX 319). Hence, it is the position of respondents that any doctor would avoid utilizing a blood bank which existed for the purpose of enriching its owners through the purchase and sale of blood, except of course in emergency situations, where, as Dr. Helwig stated, "Awful" shortcuts might sometimes be taken (Tr. 7338–39; see Finding 73).

173. The following are some examples of testimony indicating opposition to commercial buying and selling human blood:

a. Sister Cornelia of the Governing Board of the Sisters of Charity (Tr. 8674–78; RF 277).

b. Dr. Victor Buhler, pathologist at St. Joseph's Hospital, testified that he as well as other pathologists in the Kansas City area believe that the purchase and sale of human blood, or any other part of the human body, is wrong (Tr. 8088). (See also the testimony of Dr. Moriarity (7364), Dr. Bridgens (7691–92).)

c. Dr. Frank A. Mantz recalled that his aversion to the buying and selling of blood stemmed from an incident where his father, then a physician, made him pay back the money he had received for donating blood while he was a medical student (Tr. 7881).

174. A similar position is taken by respondents that the character of the approach made by Midwest was so abhorrent and unethical that any doctor would decline to do business with an organization performing a medical service in this fashion. For example:

a. Dr. Lapi was disturbed because Midwest had borrowed a unit of O-negative blood from the night technologist who was a dental student and had not cleared with him (Tr. 7516–17). Dr. Graham sent a telegram that annoyed Dr. Lapi although it merely offered assistance in supplying a type of blood which a radio broadcast said St. Mary's needed (Tr. 7535). Dr. Lapi assumed that the com-

plaint that had been made to the National Institutes of Health had been made by Midwest (Tr. 7518–23; 7525–33). He also felt that inquiries by the Better Business Bureau, and suggestions of legal action against St. Mary's Hospital, had been made by Midwest (Tr. 7517).

b. Dr. Cohen when he visited Midwest Blood Bank in 1955 or 1956 was irritated by Mr. and Mrs. Bass' refusal to describe the blood bank's donor policy, its fee schedule, and matters of similar nature (Tr. 3884–86).

c. Edith Bossom at the Kansas City Medical Center regarded Mr. Bass' approach as unpleasant and belligerent (Tr. 6497).

d. Dr. Moriarity recalled the incident in which (see RX 185) Midwest circulated to the members of the Chamber of Commerce a news article by Drew Pearson which was derogatory of blood banking (Tr. 7383).

e. Dr. Gibson testified that he regarded Midwest's advertising in the Kansas City Star (RX 281) as misleading advertising and offensive (Tr. 7218).

f. Dr. Jack Kerr was insulted at the charge of profiteering contained in the Kansas City Star advertisements of Midwest (RX 280).

g. Dr. Mantz recalled that he objected to Midwest's advertisement (RX 284) because he felt this violated the time-honored view that physicians do not advertise (Tr. 7884–85).

h. Dr. Morgan related an incident during which Midwest attempted delivery of blood in a beer carton (Tr. 2615).

Denials of Conspiracy

175. Doctor Ferdinand C. Helwig, pathologist from St. Luke's Hospital and the Medical Director of Community Blood Bank, presented testimony which was typical of the attitude of the various pathologists.

He said he had given instructions to his technicians as to what to do when confronted with an attempt by Midwest to deliver blood to the hospital. He said, "Their instructions were to ask them in a nice way to take it through to the clearing house, that we give credit to a patient if they would send the blood through the clearing house." He denied that this was done with regard to any understanding or agreement with anyone else. He stated, "After all we had a contract with the Community Blood Bank to have them process our blood for us. We have had no experience in which they have been unable to supply us with the type and quan-

tity so there would be no reason for us to go outside unless we got into a spot where we had to have it and they were not able to furnish it" (Tr. 7319).

As to the condition prior to the formation of Community, Dr. Helwig testified: "As far as my hospital is concerned we never suffered from lack of blood at St. Luke's Hospital" (*id*).

Dr. Hilliard Cohen in testifying concerning the delivery of replacement blood testified that he made the decision independently and without consulting and advising with anyone else (Tr. 3882–83), and that his instructions and advice to Mr. Remer that the transaction be cleared through the clearing house represented his own independent individual decision (Tr. 3884).

Reverend Paul T. Jackson, the President of the Board of Shawnee Mission Hospital which had occasionally obtained blood from Midwest while it was a nursing home only (Tr. 2261–62), denied that any member of the medical profession or Area Hospital Association or any hospital ever attempted to influence Shawnee Mission's decision regarding its source of blood (Tr. 2261). The general feeling of the board of that hospital was favorable to Community Blood Bank because it was the board's opinion that Community Blood Bank was the choice of physicians (Tr. 2251–52).

This action was taken, however, before the board had selected as its pathologists, Doctors Buhler, Bridgens, and Kerr (Tr. 2252).

Dr. Buhler testified that he did not know nor had he ever heard of any agreement or common course of action among hospitals, hospital administrators, representatives of Community Blood Bank or anyone else, not to use or permit the use of Midwest or World Blood Bank in the hospitals in the Kansas City area (Tr. 8088). The decision Dr. Buhler made concerning the source of blood to be used by hospitals serving him was his own independent decision (Tr. 8087).

Dr. Frank A. Mantz testified that he did not agree, collude or discuss the possibility of colluding to suppress in any way the activities of Midwest and had no knowledge of any specific discussion being held among his colleagues (Tr. 7902).

Dr. David M. Gibson testified that he was never required or instructed by any person not to deal with Midwest nor did he ever agree with any of the respondents nor anyone else not to use blood obtained from Midwest or to permit that blood to be used in any of the hospitals in the Kansas City area (Tr. 7223). He also

denied knowledge of discussions, agreements, or tacit understanding with respect to the other matters alleged in the complaint.

Dr. Angelo Lapi testified that his decision not to use Midwest's blood at his hospital was his own decision (Tr. 7604–5).

Dr. D. A. Hoskins, pathologist, Osteopathic Hospital, had nothing to do in determining from whom the blood to be used at the hospital would be obtained and no one connected with the medical profession of any hospital or Area Hospital Association ever attempted to induce or persuade him to obtain blood from a particular source (Tr. 7174; 7175; 7176).

Similar denials were made by the other pathologists who testified (Tr. 7271; 7384–86; 7428–29; 7471–73; 7720–21; 7770–72). According to their testimony, neither Susan B. Jenkins, Executive Director of Area Hospital Association, Robert A. Molgren, Director of St. Luke's Hospital, A. Neal Deaver, Director of Independence Sanitarium, Perry Morgan, Director of Community Blood Bank, nor W. W. Henderson, Business Manager of Community Blood Bank, at any time agreed or entered into an understanding not to use or permit the use of Midwest blood in hospitals in the Kansas City area, nor did anyone ever suggest or request them not to use such blood. None of them ever attempted to obtain agreement from other hospitals or members of the medical profession in the Kansas City area not to use or permit the use in their hospitals of blood from Midwest (Tr. 4787, 5452, 8654–56, 8260–62).

Reference to Community Blood Bank and the Clearing House Was Natural

176. Substantially all of the recent incidents involving refusals by hospitals or by Community to accept Midwest Blood involved statements that credits would be received from Midwest but they must be received through the North Central District Blood Bank Clearing House (Findings 163; 159–60 a–n).

177. Respondents point out that NCDBBCH pre-existed the formation of Midwest by at least a year (RX 48, p. 11; Tr. 5678–79), and that it had continuously incorporated in its statements of policy a provision concerning the channeling of all transactions through the district clearing house.

178. At the time Midwest joined NCDBBCH on July 20, 1955, it agreed that it would "abide by and adhere to the basic policies established by the American Association of Blood Banks and its National Committee on Clearing House and by the District Clear-

ing House Committee, as set forth on the attached statement or as the same may be hereinafter changed, altered or amended; . . ." (RX 60 a).

Attached was a Statement of Policies which contained the following provisions among others:

2. Standard forms provided by the District Clearing House shall be used for all transactions.

3. All transactions shall be channeled through the District Clearing House and not sent directly to the individual bank.

4. Each blood bank shall honor the replacement policies of member blood banks (RX 60 b).

179. At the time Community joined North Central District Blood Bank Clearing House on March 17, 1958 (before it actually drew any blood), the Statement of Policies read in part:

> 3. Channel all transactions for other member and affiliate banks participating in the national clearing house program and/or in other reciprocal systems with which there are existing agreements, through the district clearing house (CX 529, p. 12).

180. By the date World (Midwest's affiliate) joined NCDBBCH in November 1959, subdivision 3 of the Policies read:

> Channel all transactions for banks participating in the National Clearing House Program through the District Clearing House. Banks indirectly sharing reciprocity through affiliation with a member bank shall channel all transactions to the District Clearing House through the coordinator bank, and vice versa (RX 61 b).

181. While there is ample proof that Dr. Angelo Lapi, the Missouri representative to NCDBBCH, was hostile to Midwest (Findings 75, 99; CX 158), there is no proof that the basic policies were adopted to offer an excuse to Kansas City Area hospitals to refuse to accept direct shipments. There is a clear implication from the testimony of Mrs. Hemphill (Tr. 5595–5962, 5730–73) and Dr. Mainwaring (Tr. 4794–4854) that there was no such intention. It is equally clear, however, that at the time Community became a member of NCDBBCH the basic policies had been in operation for several years and on one occasion, that involving Miss Bossom and KUMC (Finding 159), had been utilized as a means of avoiding acceptance of blood from Midwest. Community's contractual arrangements with hospitals were such that the hospitals felt bound to deal exclusively with Community (Findings 151–155). The blood in the hospital banks, moreover, remained the property of Community until transfused. This made dealing with some other blood bank very difficult. (See for exam-

ple the means used by St. John's Leavenworth to credit Mrs. Hunt (RX 65q).)

182. The principle upon which the clearing house system operates is similar to that followed by monetary bank clearing houses (Tr. 500, 3190; RX 37a). In essence it contemplates the cancellation of credits and debits between members of the clearing house district with a month-end settlement of any transactions not cancelled (Tr. 5660). The member bank, under the clearing house system and rules, is never indebted to or a creditor of another member bank. Instead, all debits and credits are between the member bank and the clearing house (Tr. 503). At the end of each month the member blood bank settles its account with the district clearing house either by a monetary payment or by a shipment of blood, whichever of the methods it designated prior to the close of the month (Tr. 501, 5660; RX 48, pp. 39–46; RF 263).

183. The clearing house settles accounts in the following manner. It maintains a daily worksheet for each of its member banks on which are entered all transactions handled for the individual bank (Tr. 5759–61). At the end of each month the clearing house determines indebtedness by computing the balance between:

(1) the total number of paper credits forwarded to a bank and/or the total number of bloods borrowed (new orders) by that bank;

(2) the total number of paper credits received from a bank and/or the total number of bloods loaned (new orders) by that bank.

If a bank has received more donor replacement credits (paper credits) than it has forwarded, and/or loaned more blood than it has borrowed, the clearing house would owe that bank.

If a bank has forwarded more donor replacement credits (paper credits) than it has received, and/or borrowed more blood than it has loaned, that bank would owe the clearing house (Tr. 5767–70; RX 227).

A bank is either indebted to the clearing house or the clearing house is indebted to the bank. Blood banks are not indebted to each other.

Indebtedness is cancelled by a payment of donor fees, by a shipment of processed units of blood, or by a combination of the two. This is accomplished pursuant to written instructions previously received from each member bank indicating to the clearing house how it wishes to regularly settle its account. The method of settlement may be changed by either the clearing house or the blood bank if the other party is notified prior to the first of the month;

however the member bank's request as to method of settlement is adhered to by the clearing house whenever possible (Tr. 5769).

All money is forwarded to the clearing house which in turn pays this money to those banks owed by the clearing house who have authorized a monetary settlement.

A bank wishing to settle its indebtedness by a blood shipment, is directed by the clearing house, on its monthly statement, to ship blood to a bank owed by the clearing house which has requested settlement by blood shipment. Thus both accounts are cancelled.

Payment of the processing fee is involved *only* when there is an actual shipment of processed blood. The payment of the processing fee in such instances is based upon the theory that:

(1) the bank drawing and shipping the blood is entitled to its processing cost;

(2) if the donors had given at the bank that dispensed the blood, this bank would have borne the cost of drawing and processing;

(3) the bank receiving the processed unit will dispense it to a patient and collect its own processing fee (Tr. 5754–71; RF 264).

184. Member banks do not have accounts with each other in the operation of the clearing house system. They maintain one account with the clearing house and all credits and indebtedness that arise from transactions with other member banks. The receipt of replacement donations for another blood bank, or from the borrowing and lending of blood, is reduced to a net balance resulting in a bank either being indebted to the clearing house or the clearing house being indebted to the member bank (Tr. 5870, 5871; CX 591 e; RF 265).

185. Although the language of paragraph 3 of the Statement of Policies of NCDBBCH appears to be clear and unambiguous (see Findings 178 through 180 inclusive), in practical operation it was not so clear. It was always recognized for example that it did not apply to situations where there had been a pre-existing arrangement between two blood banks (Tr. 433; RX 85).

186. Respondents point to the fact that Mrs. Cobb, who had been called as a witness by counsel supporting the complaint, testified:

Q. Did you, and by you I mean the North Central District Blood Bank Clearing House, Board of Directors, and you implementing their policy, interpret the word "all" to mean completely all?

A. Yes (Tr. 3209).

However, Mrs. Cobb immediately afterward stated that it was

her opinion that blood bank members of the clearing house program were by-passing the clearing house up until 1963 when she left (Tr. 3214–5), i.e., were making transfers directly where there were no pre-existing agreements (Tr. 3215). We need not rely on Mrs. Cobb's opinion, moreover, because Community in its practical operation, when purchasing blood from other banks, which did not desire to go through the clearing house, none the less made the transfers (Tr. 3251–59; RX 348, 349, 351, 89, 90). Its refusals to accept blood from Midwest unless it went through the clearing house, were, accordingly, not wholly consistent with its policy, when purchases were being made by it, of disregarding the clearing house if the other blood bank desired to do so.

187. Mrs. Bass' early experience with NCDBBCH, which Midwest joined promptly in July 1955 at the suggestion of Marjorie Saunders of American Association of Blood Banks (RX 82–84), was somewhat confusing. She was first told, July 28, 195 (RX 85), that her purchase of blood from Chicago Blood Donor Service, "does not enter into the picture" and then:

> To clarify this situation, which comes under #3 in the Statement of Policies, all transactions shall be channeled through the District Clearing House and not sent directly to the individual blood bank.
>
> A bank may use the clearing house and still maintain their previously established reciprocity with *local* affiliates. If this is done, the clearing house cannot be used for balancing out debits and credits thus incurred. Each bank would have to continue to do this as they have in the past. (Emphasis supplied.) (RX 85.)

When, at Miss Bossom's insistence, Midwest had sent a reciprocity credit through NCDBBCH for Fred Burns at University of Kansas, Mrs. Bass found that the Center was insisting upon a two for one replacement (RX 86), and wrote NCDBBCH November 14, 1956 for a clarification. Miss Cobb replied December 20, 1956 that Midwest must honor the two for one replacement policy of Kansas University and sent a copy to the KUMC (RX 87). On June 20, 1956, after Mrs. Bass had apparently attempted to make a direct replacement of the two additional pints to KUMC, Miss Cobb, sending a copy to Miss Bossom (RX 88), wrote in part:

> In the future, therefore, please abide by the Statement of Policies Governing Operations Between the Member Banks and its District Clearing House, to which you agreed by executing the Memorandum of Agreement. Shipments of blood are to be made, in settlement of indebtedness, only upon authorization by the North Central District Blood Bank Clearing House. (RX 88)

188. Even respondent Morgan, the Director of Community, was not entirely certain of the proper interpretation to be given to the

NCDBBCH statement of policy. He kept inquiring of blood bank clearinghouse officials but never seemed to get a specific reply which he could utilize (see *e.g.*, Tr. 2624–25, 2640–42).

189. On August 4, 1960, respondent Morgan attempted to secure confirmation from Mr. Ray Ambelang, the President of NCDBBCH, that Community's attempt to enforce on "two blood banks" its interpretation of the clearinghouse rules was justified, i.e., that "all transactions" included not only transactions between blood banks located at some distance from each other but even those in the same city. He pointed out in part (RX 72 a–b):

> During the past six months we have had requests from individuals who received transfusions in some of our affiliated hospitals and would like credit through advance blood purchase plans made with another bank or distributor representing two blood banks. These blood banks are members of the North Central District Clearing House.
>
> We have advised these patients to notify the distributor of the plan that the Community Blood Bank would be very happy, as coordinator for our affiliated hospitals, to transfer credits in their behalf via the clearing house for proper credit to the patients.
>
> To our knowledge the distributors of the blood purchase plans have failed to make such transfers for the patients via the clearing house. The distributor of these advance blood purchase plans on each occasion has attempted to deliver blood directly to our affiliated hospitals in order to replace blood used in transfusion. The hospitals have referred the problem to us and have authorized the Community Blood Bank to accept credits by transfer through the Clearing House System.

That Dr. Morgan was really not certain at that time of the validity of the excuse which he had been giving Midwest is apparent from the last two paragraphs of his letter:

> The Community Blood Bank feels that member blood banks in the National Clearing House Program are contractually obliged to make all transfers through the clearing house and desires to do so.
>
> We would appreciate *your consideration of this problem and upon resolution to notify all member blood banks* in the National Clearing House program. (Emphasis supplied) (RX 72b)

Copies of this letter were sent to Mrs. Olsen of Minneapolis War Memorial, to Miss Cobb of NCDBBCH and to Dr. Angelo Lapi, Missouri State Representative of NCDBBCH (RX 72a&b). However, there was no proof offered of formal resolution of the problem nor of formal notification of all the members.

190. Ownership of NCDBBCH passed on August 16, 1960 to American Association of Blood Banks (RX 72c). And, on April 3, 1962, Mr. Bass was informed by Melba Olsen, District Coordinator of A.A.B.B., in part as follows:

The participation of World Blood Bank in the A.A.B.B. Clearinghouse program was discussed at a recent meeting of the National Committee on Clearinghouse, and it was the opinion of the group that the World Blood Bank is not using the Clearinghouse for the purpose it was intended, that is, the exchange of donor replacement credits. (CX 214a)

This criticism was because during the period December 26, 1960, through January 26, 1962, "World" has transferred only 24 credits and has received none. During the same period, 509 bloods were shipped to the Mayo Clinic as 'new orders' and 199 bloods were received by your bank, but only 43 were in payment of indebtedness." The letter advised that since 99% of World's clearinghouse transactions were bloods shipped to Mayo, and it was unable to accept blood shipments in settlement, " . . . any blood supplied to the Mayo Clinic should be shipped directly to the Mayo Clinic . . . . and not handled as a clearinghouse transaction." (CX 214a) If there were a firm policy of NCDBBCH as a division of A.A.B.B. that "all transactions" should go through the clearing house, it is difficult to reconcile these instructions to World's to ship directly. It thus appears that the apparent firm policy that all transactions pass through the clearing house was utilized where it suited convenience to do so, but was never enforced or even consistently interpreted to require adherence by its members to what it seemed to require.

191. Midwest's reluctance to become dependent upon the American Association of Blood Banks or its affiliate North Central District Blood Bank Clearing House had some basis in the treatment of its attempts to become an institutional member of A.A.B.B.

Its application to A.A.B.B., although made prior to its opening, had been consistently stalled and finally rejected (CX 35). A.A.B.B. had in its by-laws and in its regulations with respect to commercial banks consistently discriminated against such banks. Although not accepted as institutional members, commercial banks were to be required to pay as an inspection fee an amount equal to the dues and must be inspected prior to shipping blood. Even when Midwest attempted to become a non-profit operation through the formation of a new corporation, the application of its new corporation was not accepted (see RX 326–28).

Moreover, Midwest was under attack by respondent Dr. Lapi, the Missouri representative to NCDBBCH, from the first year of its operation (CX 158; RX 326–28).

Respondent Dr. Angelo Lapi's part in attempting to block one

of Mr. Bass' operations is also disclosed by the Doctor's letter to Dr. Schenker dated January 4, 1960 (CX 308).

Dr. Lapi wrote in part referring to one of Mr. Bass' operations:

* * * I think I convinced the Clearing House Board that this Bank should not be granted membership.

It would probably pay the AABB to investigate thoroughly this incorporation and learn what tax status they enjoy. The administrator's name should also be revealed.

So far as I am aware Dr. McKee, the medical director, Dr. Eilers, the clinical pathologist at the University of Kansas, and the whole University group are staunch supporters of this bank in spite of the fact that one of their microbiologists on leave of absence (Dr. Perry Morgan) is director of the Community Blood Bank which we support. (CX 308)

192. On the other hand, clearing house witnesses testified without contradiction that if the clearing house is to operate successfully and to meet its expenses, it will require more transactions to be put through its books than it secures from interstate or intercity transfers alone (Tr. 4803). And, it is equally clear that it simplifies a hospital member's bookkeeping to have a single account, with the clearing house, rather than a series with each of the other hospital blood banks (Tr. 4803–04). It also reduces storage requirements and outdating problems to utilize Community. In light of the necessity for hospitals to reduce bookkeeping and to reduce storage space (see Tr. 7130, *et seq.*) in the absence of the background of hostility to Midwest, it would be wholly expectable, in the opinion of the hearing examiner, for a hospital to utilize the facilities of Community and of the clearing house as a means of reducing overhead due to bookkeeping, the maintenance of blood storage space, and the expense due to outdating of blood. Community absorbed outdated blood because no charge was made until blood was transfused (CX 233, 234). It also controlled storage of the hospitals' refrigerators. The hospital could rely on Community to supply it if an emergency arose.

Feasibility of Commercial Bank Using the Clearing House in Fulfilling Blood Provider Contracts

193. James E. Remer, an employee of Midwest, testified at considerable length as to the reasons why it was not feasible for Midwest to use the facilities of the clearing house in meeting the responsibility it had under the blood provider agreements its subsidiary had with business firms and individuals (Tr. 3975–76,

6199–6204; see also CX 296; CX 475). Acting on the assumption that there would be no offsetting transactions, he calculated that the cost to Midwest of using the clearing house would be $28.70 (i.e. two transaction fees of 35¢ and two units of blood at $14).

194. Respondents on the other hand point out that a single transaction cannot be used because the very principle of the clearing house is the cancellation of offsetting transactions. Respondents also point out that the overall cost to Midwest on the basis of 50 calls for units of blood in approximately 850 blood provider contracts (Tr. 5587–90; 6083) on the basis of Remer's own calculation of cost would only amount to $1435. (See Respondents' Reply Brief, pp. 23–24 a inclusive.)

195. The Medical Director of Municipal Blood Bank (Tr. 8386) which had been started by two pharmacists (Tr. 8387) in March 1960 (Tr. 8381) and operated for profit on sale of processed blood to outlying hospitals in small communities around Kansas City (Tr. 8387), testified at respondents' behest that that bank remained in operation until July 1, 1962 (Tr. 8388). The Medical Director, who served without pay (Tr. 8387), also testified that he was aware of Community at the time Municipal Bank had started and had advised its pharmacist principals that there was no conflict between Community and Municipal (Tr. 8390).

Municipal Bank cleared transactions through NCDBBCH to Community (Tr. 8391; 8392) and never attempted to make direct delivery to it (Tr. 8395). They also cleared blood through the clearing house to other blood banks and Red Cross (Tr. 8496). They also made direct sales to K.U.M.C. and to Veterans Administration hospitals without difficulty (Tr. 8397). They had difficulty only on one occasion which was prior to securing an N.I.H. license in offering blood as a donation (Tr. 8398). According to the Director, one of the principals was told by hospitals that "they were happy with the services of Community Blood Bank and that they preferred to continue on with them, but if ever Community was not able to fulfill any of their orders they would be glad to order from us" (Tr. 8400). Municipal went out of business because of the difficulty it had collecting their accounts in outlying hospitals (Tr. 8402). According to its former Medical Director, this was not caused by any hospitals or doctors in the Kansas City area (Tr. 8402). Its equipment was sold to Community (Tr. 8402) on a competitive bid (Tr. 8403). Municipal Bank also made some sales directly to Providence Hospital, Chillicothe Hospital, Carroll County Hospital and Wheatley Provident (Tr.

8404). They also exchanged credits through the clearinghouse (Tr. 8405). In view of the difference in the type of operation, i.e., direct purchase as distinct from blood provider plan and the testimony that there was no conflict with Community, the evidence with respect to Municipal Blood Bank appears to the hearing examiner to have little or no bearing on the issues in this proceeding.

Certain Alleged Incidents of Refusal Were Followed by Acceptance of Midwest Blood Replacement for Patient or Issuance of Credit to the Patient

196. Respondents point out that in some instances cited as evidence of a conspiracy to refuse Midwest blood (see Appendix A), there was either acceptance of the blood itself, issuance of credit to the patient or the matter was closed on the hospital's books because donors had replaced the blood. Examples of such situations are contained in ensuing findings.

197. A. Neal Deaver, of Independence Sanitarium, on January 8, 1962, wrote to Remer at World (Midwest) that they were sorry credit was not given immediately to Mrs. Fischer but asked that a credit be given rather than making delivery (CX 490). Thus the original refusal to receive the blood was withdrawn.

198. In connection with the case of Genevieve Hunt who was given 16 units of blood at St. John's Hospital at Leavenworth, Kansas, on two occasions, August 4 and August 10, 1960, respondent Henderson, business manager of Community, wrote Remer of Midwest that credit would be issued "on receipt of credits transferred via North Central District Blood Bank Clearing House" (RX 65 b & d). Henderson also wrote Sister Myra at St. John's (RX 65 f).

Some time later, Remer wrote on November 3, 1960, to the president of the company by whom Mrs. Hunt was employed. (Apparently he sent copies to both Henderson and Sister Myra.) In this letter he recounted that Henderson had stated that their contract does not preclude the hospital accepting blood from other sources (RX 65 g).

Sister Myra promptly wrote Henderson at Community on November 7, 1960 and asked what he suggested as "the next act in this case" (RX 65 h). Apparently nothing very definite was recommended except to send a carbon copy to St. John's (and blind carbon copies to Dr. Ambelang, Melba Olsen, and Ardyth Cobb at NCDBBCH) of another letter dated December 1, 1960 to World

(Midwest) telling them to transfer credits through the clearing house (CX 65 j).

Sister Myra waited until April 10, 1961 and then wrote Dr. Morgan (RX 65 o) in part as follows:

> The Hunt case is now in its eighth month. It seems to me that World Blood Bank would never send credits through the district clearing house for that was not in the contract with Mr. Hunt and with the $4 a pint clearing house fee the World Blood Bank would not only be out the 16 pints, but also $64 in fees. I do not therefore think they will ever come through in that matter.
>
> *You have your own reasons for not using their blood even when you are short* so this avenue of solving our problem is closed. (Emphasis Supplied.) (RX 65 o)

She then said she was willing to use World blood and asked how it could be accomplished.

Dr. Morgan replied July 1, 1961 (RX 65p) and reiterated that Community was ready to receive credits through the clearing house but that, "* * * there is nothing in the contract between St. John's Hospital and Community Blood Bank (which contract embodies our urban blood program) that in any way prevents or prohibits the hospital from ordering Mrs. Hunt's blood requirements from sources other than Community Blood Bank."

Sister Myra in July 1961 (RX 65 q) decided to give (World) Midwest blood to a patient and then when a donor came in to credit the donor's blood to Community and asked to be notified if this procedure did not meet with Community's approval. Apparently that was done as by August 11, 1961 Remer wrote Henderson that the credit of 16 units previously established had been exhausted (RX 65 u).

199. In connection with the case of Mrs. Emma Goff, her obligation was discharged by donations of blood by her son and Walter Boyd at Community (TR 1555).

200. In connection with the Harry Darling case, Dr. Helwig of St. Luke's on November 18, 1959 directed that the account be credited with the blood tendered by Midwest although the latter would not send credits through the clearing house because Dr. Helwig felt "it was too bad if they [Darlings] were stuck for seven pints and thought they were getting blood to replace it" (RX 313; Tr. 7314). Credit was given to the account (RX 333; Tr. 7799).

201. In connection with the case of Elmer Fugate, three friends made blood donations (Tr. 2217) at Community and the obligation was discharged (Tr. 7185–87).

202. In connection with the case of Lola Smith, St. Luke's Blood Bank technician received a unit of blood from Midwest. Credit by check was given to Mrs. Smith by St. Luke's (RX 336 a).

203. In connection with the George Bassett case, Midwest transferred a credit to Community via North Central District Blood Bank Clearing House (Tr. 3074–75).

204. In connection with the John Mann case, the blood was actually replaced by transfer of a donation by Mann's son to another blood bank (CX 517 a-b; Tr. 3377).

205. In connection with the Francis Hammet case, donors made replacement at Community and his indebtedness was satisfied (CX 504; Tr. 3293; 7787; RX 330 a-f).

Refusal of Midwest Blood Due to Alleged Knowledge of Defect in Midwest Operation

206. Throughout the hearings in this proceeding, attempts were made to introduce evidence concerning the relative merits of Community and Midwest as blood banks and to point to instances in which some practice or qualification of Midwest was deemed improper or inadequate (see RF 178–252 inclusive).

207. The hearing examiner on a number of occasions took the position that unless such information was shown to have been brought to the attention of respondents in time for them to act upon it in their refusals to accept blood, it was inadmissible to show that there was no conspiracy. However, the hearing examiner in most instances permitted respondents to record the testimony and in other instances counsel supporting the complaint agreed that witnesses if called would testify in accordance with a proffer of proof. The material is thus available to the Commission for review (Tr. 8555–6).

208. Evidence that action was taken to refuse Midwest blood because of some deficiency was vague and contradictory. The following examples demonstrate the character of proof which was offered:

a. Dr. Arch Spelman considered visiting Midwest Blood Bank but decided not to do so because he did not like the people he saw outside (Tr. 4915). Yet his group ordered blood from Midwest as much as six times (Tr. 4914). He had no problem with the blood (Tr. 4914). Admittedly his recollection was vague on details which occurred in 1955 (see Tr. 4948–49).

b. Doctors Buhler and Kerr visited Midwest Blood Bank in late

May or June 1955. Dr. Buhler had been invited by Mrs. Bass at the suggestion of Miss Saunders of the A.A.B.B. Drs. Buhler and Kerr told Mr. and Mrs. Bass that they regarded selling blood as morally reprehensible and Dr. Buhler became offended when Mrs. Bass objected to his picking up a piece of paper from her desk. Dr. Buhler had previously talked to Dr. Graham and told him he thought that the opening of Midwest was terrible and in effect that Dr. Graham (who was considerably his senior) didn't know enough to act as Medical Director of a blood bank (Findings 78–81). Despite this early misunderstanding, Dr. Buhler was willing to discuss with Mr. Bass becoming Medical Director of Midwest (Findings 140–145).

c. Dr. Hilliard Cohen visited Midwest and was disturbed because Mr. Bass would not give him information unless he wanted to sign a contract (Tr. 3884–3886). Yet Menorah Medical Center had purchased blood from Midwest on several occasions (Tr. 3891).

d. The store manager at a Katz Drug Store in the vicinity of the downtown drawing station of Midwest testified that 95% of the persons who cashed Midwest checks at his pharmacy were "winos" of the derelict type (Tr. 8528, 8534). Checks were not cashed there until the fall of 1961, however (Tr. 8522). Hence, the evidence is much later than the refusals which commenced shortly after Midwest opened in 1955. (This material was received for its bearing on the type of order which might issue (Tr. 8527).) A corroborating witness who made even stronger derogatory statements had been observing Midwest donors a little over a year which would be even later in time (Tr. 8547).

e. Several months after the filing of the complaint, three young men presented themselves as replacement donors at World (Midwest) for a classmate who was transfused at KUMC. The waiting room was crowded and dirty and there were worms all over the floor (Tr. 6370). The donors were dirty and their clothes were dirty (Tr. 6376). The boys left after being discouraged by what they saw and later gave blood at Community Blood Bank (Tr. 6372). The mother of one of the young men corroborated that there were worms all over the floor and stated that she had told Dr. Eilers at KUMC and had called the Board of Health (Tr. 6378, 6382). Generally corroborative evidence was given by another of the prospective donors (Tr. 6386). (This testimony was also received for the character of the order which might be is-

sued). Mr. Bass explained that an exterminator took care of these insects.

f. Betty Jean Brown, an employee of Morton Memorial Hospital at Tulsa, testified that she worked at Midwest and World commencing January 1959 after finishing her schooling in Minneapolis and remained until March of 1960 (Tr. 7648). She had previously worked at Independence Sanitarium as a laboratory receptionist and glassware cleaner (Tr. 7649). She was taught by Mrs. Schouse, a registered nurse, how to make venepunctures (Tr. 7659) and the laboratory work by Shirley Fisk and by Mrs. Bass (Tr. 7650–51). Donors were paid $4 for positive and $5 for negative blood (Tr. 7658). Some came from the mission at Grand Street and Mr. Bass or the delivery boy would go there sometimes to get them (Tr. 7658–59). When Mrs. Schouse was at the desk, she would refuse known repeaters (Tr. 7659). Mrs. Bass gave instructions that they should get through rapidly (Tr. 7660). Mr. Remer worked only in the office when Miss Brown was there (Tr. 7661). She never saw Dr. McKee at World and saw him at Midwest only about once a month (Tr. 7663–4). Dr. McKee never talked to her about what she was doing or her procedures (Tr. 7663). Mrs. Bass usually was in in the afternoon but not every day (Tr. 7664). Mrs. Bass told Miss Brown that she had been trained as a blood bank technician, that she was a member of A.A.B.B. and a registered nurse. Miss Brown assumed she got her training in the East in Illinois (Tr. 7665). Miss Brown recalled an incident when William Fanniel refused to draw a donor whose blood pressure was low. He was drawn by Steven Rogers. When being drawn, the donor got a reaction. There was some suggestion about putting his blood back into him (Tr. 7669). The bottle was brought back into the laboratory and was half full so he could not have been transfused (Tr. 7676, 7682). He was later taken out and given something to eat (Tr. 7670). Mr. Bass said, "My God" or something, "all we need is for someone to die on the premises." Miss Brown didn't speak to any of the doctors in the Kansas City area until about a month before she gave her testimony (Tr. 7670–72). Consequently knowledge of these facts could not have come to their attention.

The hearing examiner struck the testimony with respect to the reaction of a donor on this basis as he had the testimony of William Fanniel and for the same reason that it was not evidence to disprove the conspiracy (Tr. 7674). Dr. Bridgens later stated that another employee of Independence kept in touch with Miss Brown

but he could not recall any specific report (Tr. 7774). He presumed he had heard from his colleagues who had had experience with Midwest about direct deliveries (Tr. 7775).

g. Dr. Rettenmaier testified that in the warmer part of the year 1957 an unidentified person whom he never saw again threatened him in a filthy manner about a delivery of three units of blood (7438). This blood had a Midwest label and two units were hemolyzed and the third showed a positive serology indicating that it was capable of transmitting syphilis (Tr. 7478–9). Dr. Rettenmaier testified on cross that Midwest was told to pick up the blood because it was clotted but was not told about the positive serology (Tr. 7478). No report was made to N.I.H. concerning the incident (Tr. 7478). On questioning by the hearing examiner, Dr. Rettenmaier said he had only made verbal reports not official reports (Tr. 7486). He made some statements about the serology to Dr. Gibson and to Dr. Wheeler but, since he could not prove it because he could not find the papers on it, thereafter said nothing (Tr. 7487).

h. Dr. Rettenmaier testified that he talked with Dr. Majorie Sirridge concerning her brother-in-law's experience in being refused as a donor at Midwest because his hemoglobin was too low. In early 1962, Dr. Sirridge said her brother-in-law had a normal hemoglobin and was glad he was refused because the place was filthy (Tr. 7464).

Dr. Sirridge corroborated this statement so far as the report on low hemoglobin is concerned (Tr. 8287–8). Dr. Rettenmaier also received a report in March or April of 1962 from an unidentified woman to the effect that her husband had refused to register to give blood at Midwest because the place was dirty (Tr. 7466). Dr. Rettenmaier said a report had been made to the Board of Health and that the local board felt it had no jurisdiction and the N.I.H. inspector had given Midwest a clean bill of health (Tr. 7468). (These statements were received only for the fact that the reports were received by Dr. Rettenmaier not for the truth of the facts stated (Tr. 7469).) Dr. Rettenmaier said that these reports played a "big part" in his attitude concerning Midwest (Tr. 7470).

209. The discussions at early meetings of pathologists and hospital administrators indicate that there was no adequate investigation made by pathologists to determine whether or not Midwest blood was properly drawn or processed:

a. Dr. Coffey for example in a meeting of the Spelman Commit-

tee (Finding 108) wanted to know how much risk might come from use of a commercial blood bank.

b. At the meeting at which there was a discussion of commercial banks held October 20, 1955, it was clear from statements by A. Neal Deaver, Dr. B. I. Burns and Leslie D. Reid that there had been no investigation of Midwest and that one would be premature (Finding 94).

CERTAIN SUSPICIOUS CIRCUMSTANCES DID NOT IN THEMSELVES AMOUNT TO PROOF OF CONSPIRACY

210. The Baptist Memorial Hospital conducted an investigation to determine what blood source it would utilize and Dr. O. Dale Smith prepared a report which was concurred in by Waldo Hill, the assistant administrator (RX 193). This investigation report did not mention the relative quality of the blood produced but recommended that Community's proposal be accepted. It concluded in part as follows:

> I feel that the policies of the community bank which are in fact welded by the consensus of the hospitals through the Hospital Administrations and through the hospital pathologist, can be more fluid and best reflect the needs of the community hospitals and the community they serve. (RX 193)

211. In connection with the choice of blood provider for Shawnee Mission Hospital, Rev. Paul T. Jackson testified that his organization had used World Blood Bank (Midwest) while it was a nursing home and found the source very satisfactory (Tr. 2242). When the hospital was being organized as a hospital in May of 1962, the board decided to accept Community's offer because:

> It was the thinking of the board that that would be the choice of the doctors and the pathologists (Tr. 2252).

The board's action, however, preceded the selection of the pathologists (Tr. 2252).

212. In an attempt to secure a contract for supplying the blood to Oklahoma Baptist Hospital and Muskogee General Hospital, James Remer from Midwest had a series of discussions commencing the end of October 1960 and concluding at the end of December (Tr. 4026–4044). These meetings were with administrators and with Dr. Tom S. Gafford, the pathologist for various hospitals in the area (Tr. 8607–8614). Thereafter and on or about December 2, 1960, Mr. Remer and Mr. Bass called on Dr. Gafford with a view to securing his signature to a contract for the various hospitals (Tr. 4044–46, 8619). As was his custom, Remer con-

firmed his previous conversations by letter stating what he understood had occurred (CX 558–561).

213. At the meeting of December 2, 1960, according to Remer, Dr. Gafford said he would not consummate the contracts and, on questioning by Mr. Bass, reluctantly indicated that Dr. Angelo Lapi and Dr. Victor Buhler had had uncomplimentary things to say about Midwest (Tr. 4044–4046).

214. Mr. Donnell, one of the administrators, in his testimony stated that the reason why they did not sign or recommend the signing of a contract was that the proposal would not have improved the blood supply and did not reach the standards that had already existed and that the costs could not be passed on the the patients, 70% of whom were under the Department of Public Welfare and secured a per diem allowance (Tr. 8633).

215. With respect to the allegation concerning statements by Drs. Lapi and Buhler, Dr. Gafford testified, referring to Remer's letter, allegedly confirming the visit:

Q. Now, there is in that paragraph the sentence reading, "The statements made to you by Dr. Victor Buhler and Dr. Angelo Lapi certainly are oblivious to the true facts of the services we render to the hospitals we serve * * *". In your meeting with Mr. Bass and Mr. Remer on this occasion did you say to them that you had had any conversations with Dr. Lapi or Dr. Buhler concerning World Blood Bank?

A. I certainly did not.

Q. What happened?

A. The situation came about, I don't recall the sequence of events, but I believe it was Mr. Bass either asked me if I knew any pathologists, or he specifically asked if I knew Dr. Lapi or Dr. Buhler, I said yes, he asked me if I ever heard any remarks made about the World Blood Bank and I answered yes, and then he asked whether they were derogatory or not, I said they were. As far as my saying that I had direct conversations with Dr. Buhler and Dr. Lapi nothing could be further from the truth because I had had no conversations.

Q. Between the time Mr. Remer first started to talk to you about this proposal that World might supply blood down in Muskogee and the date of this meeting, had you talked to any pathologists from the Kansas City area concerning World Blood Bank?

A. No, I had not. (Tr. 8620–21)

216. The hearing examiner finds that Dr. Gafford in answering questions by Mr. Bass unintentionally gave Bass the impression that he had refused to sign a contract with Midwest because of a conversation with Dr. Lapi and Dr. Buhler. No such conversation, however, took place and the contracts were not executed primar-

ily because the extra cost of securing blood by purchase would not be made up by the Department of Public Welfare for the large number of welfare patients in the Muskogee Hospital (Tr. 8613, 8634). Dr. Gafford had also had a previous experience with Mr. Bass and testified that Bass had offered him a kickback. This he felt was not morally or ethically right (Tr. 8608, 8620).

THE PUBLIC INTEREST

The hearing examiner takes the position that it is in the public interest to bring a proceeding to prevent collective action by any group, no matter how public spirited, where that group is attempting to usurp legislative or judicial authority to hamper or put out of business any other person who is lawfully in business, even though the activities of the latter are deemed unethical or even illegal. Hence no detailed summary of evidence of this character offered by respondents appears necessary (see RF 178–252; Tr. 8555–6).

On the other hand, it is deemed desirable to make findings of a generalized character, in this area, for whatever value they may have to the parties or, on review, to the Commission. Hence the ensuing findings of fact are made.

217. While the cost of blood to a patient appears to be less when Midwest blood is used (see CX 244), the comparative cost to a hospital of utilizing Community, rather than Midwest, is not entirely clear. Midwest initially required more replacement donors to wipe out replacement costs for blood and processing fees than did Community (RX 279). Community absorbs the cost of outdating (Tr. 2730–31) and supplies services which are not routinely supplied by Midwest in the form of: typing and classifying rare bloods (Tr. 2836); maintaining a training operation for hospital technicians, and for interns and residents (Tr. 2844, 2876); assisting in making difficult cross matches (Tr. 2844–5, 3621, 3681–2); and making tests in addition to those required under N.I.H. regulations (see for example Tr. 2830–39; RX 69 a–v, RX 70 a–h). Community also has a definitely prescribed method of taking care of indigent patients (CX 233).

218. Substantially all of the physicians who testified considered that the direction of Community by Dr. Morgan constituted direction by an outstanding expert in hematology. Similarly, Dr. Ferdinand Helwig, the Medical Director of Community, was highly regarded among physicians as the dean of pathologists (see Tr. 8718–9) and each of the hospital pathologists was auto-

matically made a part of the Technical Advisory Committee of Community (Tr. 7729) which tended to insure widespread distribution of experience. Technologists were accredited by the American Society of Pathologists and registered nurses were utilized normally to question donors and to perform the preparation for venepuncture and to observe donors for reaction.

219. Technical qualifications of personnel at Midwest, although determined to have been sufficient in the opinion of the licensing authorities and Medical Inspectors at N.I.H., were not clearly established in the proof. Mrs. Bass, who was the technical head of Midwest, was ill at the time of the hearings and, according to her physician, could not be called nor have her deposition taken (see RX 342 In Camera). She was not licensed as a registered nurse in either Kansas or Missouri (Stip.). The accreditations which Dr. McKee said she had were from schools that were not associated with hospitals recognized by the American Hospital Association nor by the American Medical Association and were not sanctioned by those associations or the American Society of Clinical Pathologists according to Dr. Buhler's testimony (Tr. 8064–69). None of the Medical Directors of Midwest had specialized in blood banking or hematology in their formal training. Mr. Bass, the business manager of Midwest, had been a farmer, a mandolin teacher, a used-car salesman and a commercial photographer before opening Midwest and had had no experience in blood banking (Tr. 6693–6700). James E. Remer who was employed January 4, 1960 (Tr. 5491) after high school and military service had been in the insurance business (Tr. 5487–91). He also had been a bartender (Tr. 5497–8). His training was all on the job—so far as processing blood was concerned—and under the supervision of Mrs. Bass (Tr. 6010).

220. The technical qualifications of the Midwest Medical Directors were known to many of the doctors in the Kansas City area. They are a matter of medical record.

221. There is no proof of the comparative hepatitis incidence between Midwest and Community but the evidence received concerning the incidence of hepatitis attributable to use of Midwest blood in KUMC is extremely low, when compared with the incidence of hepatitis in other sections of the country. This evidence may not be statistically important because a large proportion of blood used by University of Kansas Medical Center was in connection with multiple transfusions (see Tr. 3960–61).

222. Had Midwest used North Central District Blood Bank

Clearing House its costs of doing so on the basis of 850 blood provider contracts in force and calls for only 50 units of blood would have amounted to at most approximately $1,417.50 against gross profits of between $6,900 and $7,800 (Respondents' Reply Brief, pp. 24 a-b; Tr. 5587–90, 6200–10).

223. Most of the doctors gave the hearing examiner the impression that given a choice they would prefer blood where the donors were selected and the blood processed and stored by Community over blood offered by Midwest. Donors also preferred Community (see Tr. 6357–6388).

THE PARTICIPATION OF INDIVIDUAL RESPONDENTS

224. Attached hereto and marked Appendix B is a tabulation indicating the attendance of individuals named in the complaint in various meetings which are more fully described under the heading "Facts Bearing on Evidence of Conspiracy Charged," *supra*, page 778 *et seq.* A similar tabulation showing hospital attendance has been marked Appendix C. In addition, there have been tabulated in Appendix A the names of hospitals and individuals who had been involved in particular incidents in which hospitals avoided receiving blood attempted to be delivered in replacement of blood transfused. In this appendix also appear references to the incidents in which Community Blood Bank too took the position that it would not receive blood tendered by Midwest for delivery but it required that such blood be credited to it through credits in the North Central District Blood Bank Clearing House.

225. The hearing examiner finds that each of the following individuals with knowledge of the existence thereof was concerned in action in furtherance of a plan the necessary consequences of which resulted in a restraint of trade:

Dr. G. M. Bridgens
Dr. Victor B. Buhler
Dr. Hilliard Cohen
Dr. David M. Gibson
Dr. Ferdinand C. Helwig
Dr. Jack H. Hill
Dr. D. A. Hoskins
Dr. Carroll P. Hungate
Dr. Angelo Lapi
Dr. Frank A. Mantz
Dr. William McPhee
Dr. Perry Morgan
Dr. L. R. Moriarity
Dr. Evelyn Peters
Dr. Ralph J. Rettenmaier

Dr. Marjorie S.Sirridge
Dr . O. Dale Smith Dr. Arch E. Spelman
Walter V. Coburn
A. Neal Deaver
W. W. Henderson
Susan Jenkins
Robert A. Molgren
John Murphy

226. The hearing examiner finds, in accordance with recommendations made by counsel supporting the complaint, that the evidence concerning the following individuals is not sufficient to support an order against them in their individual capacities:

Miller Bailey
E. B. Berkowitz
T. R. Butler
Tom J. Daly
Abraham Gelperin
Meyer L. Goldman
Mack Herron Maurice Johnson
Thomas M. Johnson
Walter N. Johnson
James D. Marshall Russell H. Miller
Walter A Reich
James R. Rich
Nathan J. Stark
Harry M. Walker Gilbert C. Murphy
Adolph R. Pearson
James T. Sparks
Robert F. Zimmer

227. With respect to the following individuals, in accordance with the recommendations of counsel supporting the complaint, the hearing examiner finds that such individuals by reason of their removal from the Kansas City area and in some cases also by reason of their present state of health, are no longer in a position where there is any likelihood that they may resume activities of the character charged in the complaint and he accordingly finds that as to such individuals the complaint should be dismissed in their individual capacities:

Sister Michaella Marie
Dr. William C. Mixson
Dr . Ralph Coffey
Dr. William J. Sekola

REASONS FOR DECISION [8]

Initially, under ensuing headings, we consider questions concerning the jurisdiction of the Commission. Then, we examine the

[8] Pursuant to the provisions of §8(b) of the Administrative Procedure Act and §3.21(b) of the Rules of the Commission.

charge of unfair trade practice consisting of a conspiracy or common plan of action to boycott or otherwise interfere with the operations of a commerical blood bank.

I. Jurisdictional Issues

A. *The Not-For-Profit Corporations*

The stipulated data and the testimony all factually establish that both Kansas City Area Hospital Association (Area Hospital Association) and Community Blood Bank of the Kansas City Area, Inc. (Community) are corporations organized under not-for-profit statutes; that they have tax exemption from the Internal Revenue Service, and that none of their funds are distributed to their members, officers or directors. They have a paid staff, but all of the officers and directors are public spirited volunteers. All but two members of the Area Hospital Association and one affiliate of Community are also non-profit corporations (Findings 12 to 24).

Respondents point to the definition of "Corporation" found in §4 of the Federal Trade Commission Act claiming that it conclusively delimits the jurisdiction of the Commission.

The definition states:

> "Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares or capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members (15 U.S.C.§ 44).

As counsel for respondents ably demonstrated in their brief, by the ample citation of authority, commencing with biblical references; the terms "organized to carry on business" and "for its own profit or that of its members" are not entirely free from ambiguity in the context in which they are used.

Thus, we are free to consider the legislative history of the section, and the general purpose of the Federal Trade Commission Act as a guide to the resolution of the ambiguity, recognizing at all times that the party asserting jurisdiction must sustain the burden of establishing it.

The legislative history of the particular section demonstrated

only that amendments were made to insure that trade associations, which up to that time had been involved in conspiracies in restraint of trade to some extent, would be included. Legislation at the same session, the amendments of the Clayton Act, indicate a determination by Congress that labor organizations and farm cooperatives, as such, would not be regarded as conspiracies merely because of their joining together theretofore independent persons for legitimate group activity.[9]

The section of the Clayton Act reads in part:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agriculture, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. (15 U.S.C. §17)

It may be that the incorporation in the Federal Trade Commission Act of the language "organized to carry on business for its own profit or that of its members" was intended to express the reverse concept, that that Act was clearly designed to cover organizations organized to carry on business if either the "corporation" itself or its members secured "profit" from its operations.

Clearly both Area Hospital Association and Community were organized to carry on business in the broadest sense, *i.e.*, to maintain a place where their activity is continuously carried out and their articles of incorporation heretofore quoted (Findings 17 and 21) so contemplate. Area Hospital Association is to "act as an agency and instrumentality"; "to assist in the procurement and training of necessary personnel"; "to provide and extend comprehensive and coordinated planning and financing" among many other things. Similarly, Community was organized expressly "to create, establish and maintain a permanent blood bank of human blood * * * to collect * * * to process * * * to store * * *" and "to dispose of and distribute the same as the Board of Directors may determine."

Both of the corporations continuously carried on the activities which they were organized to carry on. They had permanent paid staff, a place of business and among other things kept records and

[9] See *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1920), and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutter's Assn.*, 274 U.S. 37 (1927), for the restricted interpretation of this exception prior to the passage of subsequent legislation.

files, collected dues, or fees and, in the case of Community, bought supplies for the processing of blood, maintained an elaborate laboratory and storage facilities, contracted with hospitals for supplying blood and actually received funds in excess of unit costs for blood which was transfused.

Although it is clear that neither Area Hospital Association nor Community ever utilized any funds received for distribution to members or for that matter to officers and directors, both organizations performed very valuable services for those affiliated with it. It was thus in the broadest sense exceedingly profitable for the doctors and for the hospitals to receive the services which were so well performed by both of these organizations. In connection with blood banking, Area Hospital Association was particularly useful to the hospital administrators in working with the Jackson County Medical Society and the Society of Pathologists, among others, to provide a reliable source of blood and to relieve the hospitals of the onerous task of securing blood donors and making elaborate borrowing arrangements for rare blood. The association was the forum which resolved the questions raised by the pathologists and it was the medium through which a portion at least of the corporate membership of Community was selected. Community, in addition to providing the means of relieving the hospitals and doctors of part of their responsibility for securing blood donors, actually secured a gross profit on several of its operations. For example, a $3 gross profit was secured on the transfer and storage of Red Cross blood and the return on its entire operation was sufficiently in excess of its total expenses so that it was able to repay some of the loans which were made to it at the time of its organization.

The hearing examiner does not consider the decisions under the Revenue Statutes of moment here. The Revenue Act exceptions were designed as subsidies and have nothing to do with the proper regulation of activities designed to, or having the effect of, injuring interstate commerce. He prefers, moreover, to place his decision that the Federal Trade Commission had jurisdiction on the broadest ground, i.e., that the Commission could not be expected to accomplish its primary mission, the prevention of substantial restraints of trade or monopolies in their incipiency,[10] if by the simple expedient of organizing a non-profit corporate shell, persons desiring to engage in a conspiracy in restraint of trade could do so with impunity.

[10] See *Fashion Originators Guild* v. *F.T.C.*, 312 U.S. 457, 466 (1941).

The operative language in §5(a)(6) of the Act, which empowers the Federal Trade Commission to act, is:

> The Commission is empowered and directed to prevent persons, partnerships, or corporations, . . . [except classes of no concern here] from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. (15 U.S.C. §45)

This direction, to be effective in preventing incipient restraints of trade, must be construed to cover those types of operation which include exempt corporations and non-exempt persons working together as they did here in a joint venture [11] or partnership.

It has long been held that a conspiracy in restraint of trade is such a partnership.[12] Thus under the express direction of the statute the Federal Trade Commission is empowered to order that such a partnership cease and desist its unlawful activity. To do so it acts on the partners.

The Supreme Court in a recent decision [13] has, in considering the jurisdiction of the Federal Trade Commission to act in merger cases, expressed, in dicta, an opinion that Congress had intended to remove all question concerning the Commission's power despite some apparently restrictive language in that Act.

In the sole case cited on this precise subject, i.e., jurisdiction over a non-profit concern, *Chamber of Commerce, et al.* v. *Federal Trade Commission,* 13 F. 2d 673 (8 Cir. 1926), Judge Stone dealt with the matter summarily. He said:

> The first ground is that the Chamber is not organized for profit. This is true. But it is a legal entity which can and does act and it is legally responsible for its acts and entirely amenable to lawful control. It is capable of entering into a combination or conspiracy or of being an effective instrumentality to execute the purposes of a combination or conspiracy formed by others. (p. 684)

He seems thus to recognize that such a combination or conspiracy is itself an entity, i.e., a partnership in crime and thus amenable to the control of the Commission.

We have, accordingly, concluded that the circumstance that non-profit organizations are here involved, does not create an immunity from suit,[14] particularly since natural persons who are

[11] See for example, address of Hon. Paul Rand Dixon before the Economic Club of Detroit, March 12, 1962, and cases there cited.

[12] *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229 (1917).

[13] *United States* v. *Philadelphia National Bank,* 374 U.S. 321 (1963).

[14] It is interesting to note that a bill, S. 2560, was offered in the United States Senate February 26, 1964, specifically exempting doctors and community blood banks from prosecution under the antitrust laws for concerted refusal to accept blood from other blood banks. (Congressional Record, Feb. 26, 1964, pp. 3593-3601.)

non-members of the organizations have also joined with such organizations in the pursuit of the alleged boycott. In such circumstances, even the express immunity found in the Clayton Act has been held ineffective.[15]

B. *The Commodity or Medical Service Issue*

Respondents during the trial appeared to take the position that the process of transfusing blood from one human being to another is a single medical service which cannot be broken down into parts. They further argued that the entire operation constitutes the practice of medicine and that, thus, there can be no restraint of trade because a professional service, not a trade, is involved. Further supporting this position, respondents contend that human whole blood which is to be transfused may not be bought and sold because it consists of living human tissue; it may only be utilized as a part of the practice of medicine.

The uncontradicted testimony of the experts makes it clear that human whole blood remains alive during the period in which transfusion may be performed. There is, however, something added before human whole blood can be preserved for use. This addition is an anticoagulant consisting either of a citric acid dextrose solution or heparin. If the additive is not used the blood will coagulate and become useless for transfusion within a very few minutes. Hence the argument that blood is living human tissue and thus cannot be an article of commerce fails to take into account the fact that it is human tissue specially treated, carefully refrigerated, and added to a chemical solution quite distinct from the blood itself although completely compatible with the continued existence and growth of some of the living blood cells.

It is also the uncontradicted testimony of the experts that several diseases may be transmitted through the transfusion of a donor's blood into a patient. Hence the selection of a donor is an extremely important factor to insure the quality and purity of the blood to be transfused. One particular disease known as viral serum hepatitis, for example, may be carried in the donor's blood without showing clinical signs or symptoms. There is no sure test which can be made on the donor's blood to insure that the virus of hepatitis is not present. The medical profession attempts to reduce the chances of the presence of viral serum hepatitis by

[15] *United States* v. *Borden*, 308 U.S. 188 (1939); *Allen Bradley* v. *Local 3*, 325 U.S. 797 (1945); *Columbia River Co.* v. *Hinton*, 315 U.S. 143 (1942); *Meat Drivers* v. *United States*, 371 U.S. 94 (1962).

screening the donor to determine his present health and his previous exposure to or symptoms of liver disease. A simple, not conclusive, test which might warn of a possible liver malfunction has not been generally adopted; if it were, ⅓ of the population would be excluded. The screening techniques usually employed consist of questioning the donor, testing his temperature, blood pressure and the hemoglobin content of his blood.

The administrative practice of the Department of Health, Education and Welfare, however, has treated whole human blood as a product under a Federal Statute.[16] Hence the suggestion that it cannot legally be sold is contrary to the intent of Congress and to the actions of the licensing authorities charged with regulating the manufacture of therapeutic serum, toxin, antitoxin or analogous products. Congress, in adopting the Public Health Service Act, clearly contemplated that there would be barter, sale and exchange of virus, therapeutic serums, toxins and analogous products.[17]

The Department of Health, Education and Welfare has issued Public Health Service Regulations §§ 73.300 to 73.327, whole blood inclusive, which are described as "additional standards; whole blood (human)." The Act specified (42 U.S.C.A. §262 (a)): "No person shall sell, barter or exchange, or offer for sale, barter or exchange * * *" such products in the District of Columbia or in interstate commerce unless it be made by a licensed establishment. Public Health Service has adopted rules and regulations and prescribed standards for the licensing of such establishments including the licensing of Community and of the establishments which respondents are charged with having boycotted. Although the language in the Act does not specifically mention whole blood (human) the administrative practice has included it[18] and this inclusion has been recognized by the courts in *Merck & Co.* v. *Kidd,* 242 F. 2d 592 (6 Cir. 1957). In this suit under the Food, Drug and Cosmetics Act of Tennessee, the court mentioned the fact that the manufacture of blood plasma was regulated by the Department of Health, Education and Welfare under the Virus, Serum and Toxin Act, 42 U.S.C.A. § 262. Certiorari was denied in 355 U.S. 814.

Two cases in the United States District Court for the Southern District of New York have upheld indictments for violation of

[16] See *Menzies, et al.* v. *Federal Trade Commission,* 242 F. 2d 81 (4 Cir. 1957), certiorari denied, 353 U.S. 957.

[17] 42 U.S.C.A. 262(a)(d).

[18] See *Menzies, et al.* v. *Federal Trade Commission, supra.*

the Public Health Service Act and Federal Food, Drug and Cosmetics Act. *United States* v. *Calise*, 217 F. Supp. 705 (S.D.N.Y., 1962). Judge Cashin stated at page 708:

The Government maintains that the term "therapeutic serum" or "analogous products," as used in Section 262 of Title 42 is broad enough to encompass normal human blood. It is defendants' contention, however, that whole human blood is not a serum, and does not come within the purview of Section 262. The same contention has heretofore been rejected in this district. See United States v. Steinschreiber (218 F. Supp. 426, May 25, 1962). It cannot be said as a matter of law that the statutory terms do not include any serous fluid used for medical purposes. The scientific facts will have to be determined at trial and of course, such determination will be dependent upon the expert and authoritative scientific evidence adduced at that time.

Judge Cashin also held that blood was a drug. In that connection he stated at page 709:

There can be no question that the defendants dealt in blood products for their use in the treatment of human disease. I, therefore, hold that the whole human blood referred to in the indictment would constitute a "drug" within the meaning of the statute.

Completely rejecting the defendants' contention that since blood cannot be "propagated" or "manufactured," except in the body of a human being, it could not be one of the products which Congress intended the licensing statute to apply; Judge Cashin said:

Although this argument is truly ingenious, it must be rejected because if it were correct then nothing which is ultimately derived from nature would ever be capable of subsequently being "manufactured and prepared."

The second case, *United States* v. *Steinschreiber*, 218 F. Supp. 426 S.D.N.Y. (1962) was a decision by Chief Judge Sylvester T. Ryan of the Southern District of New York on a motion to dismiss an indictment against defendants for unlawfully transporting unlicensed "normal human plasma." Against the contention there, that normal human plasma did not fall within the definition of the term of therapeutic serum or analogous product, Judge Ryan pointed out that, in the absence of any statutory definition, the terms used must be given their commonly accepted meaning. And continued:

We on this motion are to decide only whether as matter of law the facts alleged in the indictment are sufficient to charge a crime under the applicable statute. We do not have before us whether as a scientific fact normal human plasma and therapeutic serum are analogous products. This is a matter to be resolved on the trial by the expert and special knowledge of witnesses who may be called by the government or by the defendants.

Judge Ryan then said after quoting Dorland's dictionary:

We cannot say as a matter of law that the terms "therapeutic serum" or "analogous products" do not encompass any serous fluid used for medical purposes.

The court, in addition, pointed out that the regulations 42 C.F.R. 731 (b) provided in the definitions:

(5) a product is analogous:

* * * * * * *

(ii) to a therapeutic serum, if composed of whole blood or plasma or containing some organic constituent or product other than a hormone or an amino acid, derived from whole blood, plasma or serum and intended for administration by a route other than ingestion.

After trial, Judge Tyler held that human plasma (not whole blood) was an analogous product, *United States* v. *Steinschreiber*, 219 F. Supp. 373, 382 (S.D.N.Y. 1963), hence, to that extent, supporting the administrative interpretation of the Public Health Service. Judge Tyler's decision was affirmed by the Circuit Court of Appeals, 2nd Circuit, in a per curiam opinion (326 F. 2d 759 (1964)).

Thus, since there has been no scientific testimony to the effect that the regulations of the Department of Health, Education and Welfare are not within the statute and there has been a consistent administrative practice at least since 1955 of licensing establishments for the sale of human whole blood, respondents' contention that human whole blood is not an article of commerce must be rejected.

C. *Medical Moral Argument*

During the course of trial, counsel for respondents emphasized that in the opinion of their experts the practice of medicine requires consultation of one doctor with another, and advice and information with respect to the efficacy and safety of remedies. At final argument, respondents asserted doctors could even agree not to use any particular product. There must be, in the hearing examiner's opinion, no impingement of the free exchange of information among doctors, or the freedom of individual doctors, each independently to exercise judgment as to the use or the avoidance of any particular remedy. However, this does not mean that groups of doctors or doctors and hospitals, under the guise of the practice of medicine, may collectively combine to prevent the operation of an enterprise because of some objection to its method of doing business, no matter how sincere, as they were in this case, the groups may be.

The Supreme Court laid to rest any doubt that the medical profession was cloaked with some tonsure-like immunity and determined that the effort of the American Medical Association to prevent the operation of Group Health was wholly unjusitified.[19] It is equally clear that the fact that the participants sincerely believed that the practices they sought to prevent were immoral does not afford an excuse for a boycott.[20] No group can be permitted to usurp the functions of government by legislating the morals or method of carrying on business of other people through use of an illegal means, i.e., concerted refusal to deal.[21]

D. *Interstate Commerce*

On the final question, concerning jurisdiction which inheres in all Federal Trade Commission cases, i.e., that the restraint occurs in interstate commerce; it is abundantly clear that in the metropolitan area of Kansas City all parties were in interstate commerce. The state line bisects the centers of population, and, although perhaps not entirely equally, separates the hospital facilities which are used interchangeably by persons from the States of Missouri and Kansas. The two states are served by respondent Community and Midwest and World continuously offered their services to hospitals in both states.

Having thus been satisfied of the jurisdiction of the Commission to act in this proceeding, we reach the main issue which is whether or not the conspiracy charged actually took place.

II. The Conspiracy Issue

A. *Motive and Opportunity; Yet Denial of Conspiracy*

As the facts evolved from the evidence, it was clear that a large number of hospitals in the Kansas City metropolitan areas were members of the Area Hospital Association and that a large number of them were also participants in the blood banking operations of Community. Blood banking operations were under the direction of pathologists in the various hospitals and these pathologists met together in the Kansas City Society of Pathologists and served together on the Technical Advisory Committee of

[19] *United States* v. *American Medical Association*, 110 F. 2d 703 (D.C. Cir.) cert. denied, 310 U.S. 644 (1939), 130 F. 2d 233 (D.C. Cir. 1942), 317 U.S. 519 (1942). See also *United States* v. *Oregon Medical Society*, 343 U.S. 326 (1951), *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar* (Supreme Ct. April 20, 1964).

[20] *Fashion Originators Guild of America* v. *Federal Trade Commission*, 312 U.S. 457 (1941).

[21] *U.S.* v. *Parke Davis & Co.*, 362 U.S. 29 (1959), *Klor's* v. *Broadway Hale Stores*, 359 U.S. 207 (1959), *Fashion Originators Guild of America* v. *F.T.C.*, 312 U.S. 457 (1941).

Community. There were thus groups which held frequent meetings (see Appendices B and C), and there was substantial unanimity among them that commercial blood banking was immoral and destructive to the sense of community responsibility to share in providing the blood needs of the sick. There was also a consistent pattern of avoidance of use of Midwest blood in circumstances where its use might be expected (see Appendix A). These facts are not contested but respondents state, through counsel and as witnesses assert under oath, they each acted individually in their avoidance of the use of Midwest blood and therefore that there was no conspiracy. They pointed out that the program for a community blood bank was launched long prior to the existence of Midwest as a factor in the Kansas City area, that Midwest was offensive in its advertising, aggressive in its attempts to foist its services on the hospitals in the area, and that its management and direction were such that the doctors did not have confidence in its operation.

B. *Records Versus Recollection*

With one or two exceptions hereafter described, the hearing examiner was impressed with what he regarded as the subjective honesty of the witnesses called by the respondents and by their devotion to their profession and to securing the best possible blood supply for Kansas City. It was clear to him, however, that this subjective honesty was colored by a deep-seated abhorrence possessed by the medical profession as a whole, and finding expression even in the American Medical Association's Journal, against commercial operations in human blood.

Moreover, the recollection of many of the witnesses was at variance with the contemporaneous documents, or they had no recollection of some of the recorded events. For example, Bishop DeLapp, who had been president of the Area Hospital Association during the critical period of the development of Community, had regarded the matter as a closed book when his other obligations diverted his attention. Thus, he disposed of his records as unnecessary and even erased his recollection, so that he could not recall the details of the discussions which contemporaneous documents indicated had occurred. The hearing examiner entertains not the slightest doubt about Bishop DeLapp's integrity and subjective truthfulness. But, the matters concerning which he was questioned had long since lost their importance to him and he did not

remember what had occurred, although he made no effort whatever to challenge the recorded material.

Dr. Angelo Lapi exhibited a singular lack of recollection of several facts and, even during his testimony, appeared not to recall in the afternoon matters to which he had testified during the morning (see Tr. 7552, 7555, 7640). On the crucial point of whether or not he had told the Board of Directors of the North Central District Clearing House that the hospitals had gotten together in the Kansas City area and decided to do business with Midwest only in an emergency,[22] his memory was at variance with the record of the transcript of his remarks made by the executive secretary of that organization (CX 158). He recalled in detail the other matters which were contained in the transcript made by the executive secretary and said they had been accurately transcribed. The significant remark he denied. He also denied that Dr. Buhler appointed him as Missouri representative to NCDBBCH (Tr. 7608).

Dr. Van Pernis, who also testified concerning the report made by Dr. Lapi on Midwest at NCDBBCH, on questioning by the hearing examiner during the first occasion on which he testified, stated in effect that Dr. Lapi had made the remarks attributed to him but not at the board of directors meeting—on some other occasion. His later denial was wholly unconvincing.

So, also, concerning the operation of the Society of Pathologists, several pathologists gave the impression that this organization was engaged solely in the investigation of scientific problems. However, when the records were produced it was quite clear from Dr. Buhler's testimony that the organization, in several instances, took part in much more mundane activities. It was there that the informal federation—which minimized the possibility of any hospital purchasing commercial blood—was adopted. Knowledge was soon spread through action at an Area Hospital Association meeting.

Thereafter attempts by Midwest to form donor groups failed because blood was not accepted at hospitals and Midwest could not guarantee it would be.

In January of 1956, about six or seven months after Midwest had started its operations, the postal workers, casting about for an organization they could utilize to pool the blood of their mem-

[22] Dr. Helwig's testimony while not on all fours with this recorded statement, when considered as a whole, gave the hearing examiner the distinct impression that pathologists, at least, had gotten together to decry the use of commercial blood. Dr. Helwig was forthright in his statement that there had been discussions and that he had participated in them.

bers, were seriously considering entering into an arrangement with Midwest. Before doing so, and because of difficulties which they had been told Midwest was having in supplying blood to the hospitals, Monroe, the spokesman of the group, wrote a number of the hospitals seeking advice as to whether or not the blood would be accepted if an arrangement with Midwest was made. Miss Jenkins of the Area Hospital Association became aware of this effort very promptly and immediately reacted, under the direction of Bishop DeLapp, the president of the Area Hospital Association, and Mr. Reid, the head of the Administrative Council, to ask the hospitals to delay replying until such time as the Area Hospital Association agreed on a statement.

This action, which had the sanction of the Association made up of a large number of hospitals, apparently carried heavy weight. Although there was no legal obligation created, substantially all of the hospitals avoided making any answer and those which did answer were either non-committal or referred to the Hospital Association (Findings 113—133).

C. *Repeated Action and Rapid Joint Reaction Preclude Individual Coincidence*

It was noteworthy also that in a number of instances reaction by representatives of groups of respondents, often in a meeting, followed rapidly upon some action taken by Midwest, or some other event, which might affect its operation, or steps which had limited such operation.

The informal federation was implemented at the meeting of the Society of Pathologists immediately upon Midwest's announcement that it was opening for business. Area Hospital Association, shortly thereafter at a meeting, broadcast the improved method (Findings 64–67). This action made it unnecessary for a hospital to buy rare blood—or blood of a type it lacked temporarily. It could borrow from another hospital after one call to the hospital bank which maintained the records.

A formal federation proposal followed on the heels of the N.I.H. approval of the informal federation (Findings 86–89).

The Society of Pathologists reacted to Midwest's Labor proposal the day it was announced and the Area Hospital Association, very soon thereafter, held a meeting designed to hear the pathologists' recommendations and to take action concerning Midwest (Findings 90–94).

Action on Monroe's letter to the hospitals seeking information

on whether or not they would accept Midwest blood, if the Post Office group entered into an arrangement with Midwest, was precipitate. Sue Jenkins was told immediately and by special urgent message, after consultation with Bishop DeLapp (the president), and Mr. Reid (the chairman of the Administrative Council), asked the hospitals not to reply. That very evening a committee of Area Hospital Association called on Community and urged that the Area Hospital Plan be implemented on a pilot basis as this would mean immediate action (Findings 115–120).

Area Hospital Association sent out a warning to its member hospitals just three days after Mr. Remer, posing as Rogers, sought information concerning the acceptability of the Midwest Blood Provider Plan to hospitals (Finding 161).

The fact that there was a repetition of this pattern of rapid reaction by the Association, itself a group of hospitals, or by groups including respondents in meetings, is a circumstance which is persuasive that there was concerted action rather than an individual response by a particular doctor or hospital.

The succession of these incidents with the other proof is ample justification to disregard the opinion of the individual respondents that they had not made agreements or entered into a conspiracy.[23]

Here is much more than conscious parallelism[24] and, there is but a single thread throughout.[25]

Respondents here meant to keep and did keep that hold on the business of blood banking which was possessed by them when the hospital blood banks were operating and continued when each hospital and each doctor became affiliated with Community to the exclusion of all others.[26] (Findings 151–152.)

Added to this was the consistent, almost invariable, refusal of hospitals and pathologists to accept or to use Midwest blood.[27] The fact that the evidence primarily concerned one blood bank does not make respondents' activity the less illegal.[28]

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[23] *Schine Theaters* v. *United States*, 334 U.S. 110 (1948); *United States* v. *Griffith*, 334 U.S. 100 (1948); *Bond Crown and Cork* v. *Federal Trade Commission*, 176 F. 2d 974, 979 (4 Cir. 1949); *Paoli* v. *United States*, 352 U.S. 232, 236 (1957); *Klors* v. *Broadway Hale Stores*, 359 U.S. 207 (1959); *United States* v. *Parke Davis & Co.*, 362 U.S. 29 (1959); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *United States* v. *The Singer Manufacturing Company*, 374 U.S. 174 (1963); *In the Matter of American Cyanamid Company, et al.* Docket No. 7211.

[24] See *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

[25] Cf. *Kotteakos* v. *United States*, 328 U.S. 750 (1946).

[26] See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 432 (2 Cir. 1945) sitting as a court of last resort by Supreme Court reference.

[27] See Appendix A.

[28] *Klors* v. *Broadway Hale Stores*, 359 U.S. 207 (1959).

D. *The Clearing House Contract Defense*

While the respondents must concede that, from the outset, the hospitals and pathologists were unwilling to utilize the services of Midwest in collecting, processing, and distributing blood and that this continued even after the complaint had been served, they point out that an overwhelming number of the later incidents, in which Midwest was involved, were not real refusals but merely a refusal to accept blood tendered to the hospital. Usually this was accompanied by a statement that the hospital would be happy to have a credit transferred to Community through the North Central District Clearing House of which both Midwest and Community were members (see Appendix A).

Two factors militate against the acceptance of this explanation as a defense. First, a number of the refusals initially made had nothing whatever to do with the North Central District Blood Bank. Second, the evidence is conflicting and confusing concerning the actual obligation of one member of North Central District Blood Bank to transfer blood through that clearinghouse system when the transfer was being made to a blood bank in close proximinty to it (Findings 176–195).[28a] It was the original concept of the clearinghouse that it would take care of patients who were receiving donations of blood from donors living at a considerable distance. Subsequently, according to some of the testimony, the clearinghouse realized that it could not continue in business solely for the purpose of making long distance transfers. However, there was doubt even in Dr. Morgan's mind as late as 1960 whether his interpretation of the rules was the correct one. There was an exception for pre-existing arrangements between blood banks and there were numerous occasions in which blood banks wholly bypassed the clearinghouse system. Community bought from distant blood banks who did not use the clearinghouse when it refused Midwest. It also received and distributed Red Cross blood.

In addition, the clearinghouse system was taken over by the American Association of Blood Banks. This association held a distinct bias against commercial blood banks and generally refused to permit them to become members on an institutional basis while charging them an amount equal to the dues of members for inspections without which they were to be prevented from full participation and told that their blood would not be shipped.

[28a] Even a clear-cut contractual arrangement may be utilized as a step in a conspiracy. *Richard S. Simpson* v. *Union Oil Company of California*, 32 L W 4864, April 20, 1964.

While the proof does not contain recorded evidence of any adverse AABB action taken which was specifically directed against Midwest, except refusal to make it an institutional member, the character of complaints made against it and the subsequent adoption of the stringent instructions applicable to non-institutional members, which included most commercial blood banks, creates an inference at least that this was part of the general plan to suppress commercial blood banks including Midwest.

E. *The Bad Blood Defense*

It was respondents' position also that Midwest was not producing blood of a character and purity which was acceptable to the pathologists of the hospitals. (Findings 206–209). In this connection, for example, Dr. Spelman said he had been going to call on Midwest but when he saw the character of individuals who were standing outside he was unwilling to do so. Evidence was offered also concerning alleged irregularities. The incidents related, in general, occurred much later than the evidence of concerted action which took place prior to Monroe's request for information as to whether the hospitals would accept Midwest blood. Clearly, no thorough inquiry was made by the pathologists or by the hospitals concerning Midwest's operations, and no complaints were made to N.I.H. In addition, Midwest's record of performance with the University of Kansas Medical Center and with Mayo Clinic appears to have been excellent.

The expert testimony concerning the preference of many doctors for the voluntary donor rather than the paid donor [29] was based, in part at least, on the experience of a Chicago institution with prison inmates as donors. It, of course, must follow that the dope addict would be likely to have a higher incidence of hepatitis if his addiction involved the use of the needle. This has been established statistically. On the other hand, the practice of accepting donors with a screening involving questioning and testing hemoglobin, temperature and blood pressure is no guarantee against acceptance of donors who are carriers of hepatitis. Community itself had a donor group at Leavenworth prison. Even if it were an established fact, which it is not, that Midwest practices created a higher incidence of hepatitis than is the case with Community, that would not be a justification for any group, no matter how well intentioned, to undertake to legislate concerning the mat-

[29] Despite the contradiction in terms, throughout the trial those persons who were paid for supplying blood were still described as donors.

ter.[30] Congress has entrusted the regulating of the collection and transportation of blood to the Department of Health, Education and Welfare, as we have heretofore pointed out. There has been no showing that this Department was unwilling or unable to take proper steps to insure the quality of blood. In fact, there was no proof that any respondent ever complained to it about Midwest.

An individual doctor may or may not choose to utilize a blood bank with which he is familiar rather than one he does not know about, but this will not justify a group of hospitals, acting through its organization, urging non-action when action might well have been expected. That is not to say that there is any duty on any doctor to accept blood simply because it comes from a licensed establishment. He is entirely free to choose whether he will have blood administered at all or whether he will have it administered from a particular blood banking system. He may not, however, take steps with other doctors and the hospitals to prevent any establishment from engaging in business so long as it is not unlawful for it to do so.

F. *The Objection to Commercialized Blood Banking*

Respondents' testimony concerning a meeting which Mr. Bass and Mr. Howell had with Doctors Buhler, Kerr and Mantz demonstrates that the three doctors who attended obviously knew that their activity in their hospitals was causing a diminution of Midwest's business. The doctors also told Mr. Bass that the first thing he would have to do would be to become a non-profit organization and they discussed with him the kind of direction which they desired. Such activity goes clearly beyond the right of each of the doctors to decide for any reason or no reason that they should deal or refuse to deal with Midwest. The fact that Dr. Buhler testified that he was willing to go along with Mr. Bass, if the form of organization were changed and there were proper medical direction, is some indication that it was not a matter of the purity of the blood but a matter of the character of the organization and control by a specialist in pathology which was desired.

The doctors' testimony that purchasing blood was abhorrent to them is motivation for their concerted action. Dr. Buhler was transparently honest and forthright in his belief that the pur-

[30] *Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457 (1941); see *Klor's* v. *Broadway Hale Stores*, 359 U.S. 207 (1959).

chase and sale of blood was immoral, despite the fact that his attempt to explain his belief was less than clear.[31]

Similarly, the revulsion which respondent pathologists expressed at the type of advertising direct to the public which Midwest carried on was reason enough for them to act together to prevent continuation of such activity.

CONSCIOUS ADHERENCE TO A PLAN KNOWING THAT IT'S OPERATION WOULD RESULT IN RESTRAINING MIDWEST'S TRADE IS ILLEGAL

As early as the May 18, 1955 pathologists' meeting, when Midwest's advent was announced, the pathologists agreed on the informal federation—conscious, of course, that this must reduce the need for purchase of blood from commercial banks (see page 780 hereof).

When Community was ready to open its doors, it already had made it almost impossible for another blood bank to sell blood to its affiliates. It secured the adherence of all the pathologists, by their appointment to the technical advisory committee, and it so arranged its operations that bookkeeping would be complicated if a second blood bank was used as a source. With the background of "harassment" by Midwest in attempting to secure for itself an opportunity to sell whole blood to the hospitals which was well known through meetings of Area Hospital Association and through the casual conversations between pathologists, it follows that each knew that the other was entering into a course of action which would inevitably circumscribe opportunities for Midwest to supply blood to the hospitals.

Such knowing adherence to a scheme or plan which will result in a restraint of trade, without more, constitutes unlawful action.[32] There is, of course, no direct evidence of an express agreement among the doctors, the hospitals, and the associations apart from Dr. Lapi's alleged statement to North Central District Blood Bank Clearing House. That there was any has been expressly denied. But, an express agreement is not necessary. There was consciousness that the activity in which each engaged would when joined with the actions of others result in a restraint of trade. With this knowledge the hospital members and the pathologists persisted in their activity.

[31] This, of course, is not at all the same religious problem raised in *Application of Georgetown* (D.C. Cir. Feb. 3, 1964).

[32] *Interstate Circuit* v. *United States*, 306 U.S. 208, 221; *United States* v. *Gypsum Co.*, 328 U.S. 364, 393–394. See also *United States* v. *Parke Davis & Co.*, 362 U.S. 29 (1959); *Klor's* v. *Broadway Hale Stores*, 359 U.S. 207 (1959); *United States* v. *The Singer Mfg. Co.*, 374 U.S. 174 (1963); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

The form into which Community was moulded by joint action was also a deterrent to the existence of other blood banks. Community insisted, sometimes unsuccessfully (as in the case of the University of Kansas Medical Center), that it should be the exclusive conduit for all blood replacements and that it should control the blood in the various hospitals until actually transfused. The hospitals by reason of this were generally unwilling to take on blood from another source, including Red Cross. The fact that this system was copied from blood banks in other areas is not an excuse. An instrument tried by someone else which will create a desired effect may well be adopted for that very reason. Respondents carefully studied the operations of other blood banks and selected what they liked. Certainly, from the point of view of excluding a commercial blood bank, no design could have been much better than the one which was actually adopted. Pathologists from each of the hospitals were placed on the board of Community. Community controlled the blood in the hospital refrigerators and Community attempted to completely control the flow of blood even from the Red Cross. These circumstances, taken with all the other evidence, have led the hearing examiner to determine that the preponderance of creditable evidence establishes the existence of a scheme or plan knowingly entered into by respondents each of whom knew it would, if entered into by others, restrain the trade of Midwest.

III. Limitations on Order

By reason of the nature of the medical profession, and our unwillingness in any way to detract from the responsibility that each doctor must bear for the care of his patient, we believe it is essential that in prohibiting collective activity, the order entered be clear that each doctor may independently determine whether he will utilize blood for transfusion from any source and that his action or inaction in that regard shall not be considered, in the absence of other proof, in violation of the order.

IV. The Class Suit

We are next concerned with the extension of the order in this case to the member hospitals and to the officers and directors named as a class. It is charged in the complaint that it is impracticable to name and serve all of the hospital members and all of the persons who served as officers and directors.

Based on the evidence in this case, it is deemed impractiable to name all the members of the class.

Those who were served were fairly representative of the whole and there was no substantial difference in their attitude or incompatibility between them. The proportion of those served to those in the class was adequate in light of the evidence concerning the substantial unanimity among hospitals as to the course of action adopted.

Under such circumstances the courts have consistently held that a class action is proper.

Advertising Specialty National Assn. v. *F.T.C.*,
238 F. 2d 108 (1 Cir. 1956)

Chamber of Commerce of Minneapolis v. *F.T.C.*,
13 F. 2d 673 (8 Cir. 1926)

Moore's Manual Federal Practice and Procedure,
(1926 ed.) p. 974 §14.07

The existence of some state, local and federal hospitals in the class of hospitals had given the hearing examiner some concern.[33] However, since the order adopted is limited to members of Area Hospital Association and Community and their successors, their joint action *qua* members rather than as governmental agencies is all that is circumscribed.

The Allegedly Illegal Recordings

Since there was no connection between the attorneys who conducted the investigation for the Federal Trade Commission or between counsel supporting the complaint and the allegedly illegal recording of telephone conversations by Mr. Remer, and since respondents themselves offered the transcripts of such recordings in evidence, they are deemed to have waived any irregularity which might otherwise have been claimed [34] because of Mr. Remer's actions.

CONCLUSIONS OF LAW

1. "Corporation" as used in the Federal Trade Commission Act is limited to corporations organized to carry on business for their own profit or the profit of their members.

2. Each of the named respondent corporations is a corporation

[33] *American Banana Co.* v. *U.S. Fruit*, 213 U.S. 347 (1909); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927); *Parker* v. *Brown*, 317 U.S. 341 (1943).

[34] In light of the decision in *Ferguson* v. *U.S.*, 307 F. 2d 787 (10 Cir. 1962) certiorari granted 374 U.S. 805, it is not clear that Remer's action was such as to vitiate even a criminal proceeding.

within the meaning of that term as defined in Section 4 of the Federal Trade Commission Act when considered in the broadest sense of the terms used consistent with the purposes of the Federal Trade Commission Act.

3. The non-profit or not-for-profit corporations are subject to the jurisdiction of the Federal Trade Commission despite the restrictive definition of "corporation" contained in Section 4 of the Federal Trade Commission Act (15U.S.C. §44), because in this case they are engaged in a combination or conspiracy with others and are thus in a partnership expressly subject to the Act, and because they are organized to engage in business and secure a profit for themselves or their members in the broadest sense of those terms.

4. The persons and corporations named as class respondents in the complaint are properly joined as respondents because (1) the respondents named to represent them fairly insure the adequate representation of the class respondents, and (2) the class respondents are so numerous as to make it impracticable to join them individually.

5. Whole blood (human) is viable human tissue mixed with an anticoagulant in a sterile container which must be stored and refrigerated and the admixture is a commodity and/or an article of commerce under the administrative practice of National Institutes of Health.

6. Whole blood (human), as defined in conclusion No. 5, is subject to "trade" and "commerce" within the meaning of those terms as used in the Federal Trade Commission Act.

7. The selection of donors, the drawing, processing, storage, and distribution of whole blood (human) to be used for transfusion to other human beings must be carefully performed under controlled conditions to insure the purity of the product. Minimum requirements for performing such operations are prescribed by the National Institutes of Health.

8. Respondent corporations are engaged in "trade" or "business" for profit as those terms may properly be construed in the context of this case.

9. Each respondent against whom the complaint has not been dismissed has been shown to have engaged in "commerce" within the meaning of that term as used in the Federal Trade Commission Act.

10. Respondents, as each of them against whom the complaint has not been dismissed, are now, and have been, at some time be-

tween 1955 and the date of the filing of the complaint herein, parties to an agreement, understanding, combination and planned common course of action and course of dealing in interstate commerce to unreasonably restrict and restrain interstate commerce in the offer to sell, sale, exchange, and distribution of whole blood (human).

11. Respondents against whom the complaint has not been dismissed, and each of them, are now engaged in a course of conduct and acts with respect to whole blood (human) that constitute unfair acts and practices within the intent and meaning of Section 5 of the Federal Trade Commission Act.

12. Respondents against whom the complaint has not been dismissed are engaged in a violation of Section 5 of the Federal Trade Commission Act.

13. This proceeding is in the public interest.

14. The following order should issue:

ORDER

It is ordered, That respondents Community Blood Bank of the Kansas City Area, Inc., a corporation, and its officers and members: Adolph R. Pearson, President,[35] Walter V. Coburn, First Vice-President, Hilliard Cohen, Second Vice-President, Carroll P. Hungate, Secretary-Treasurer, Gilbert C. Murphy, Assistant Secretary-Treasurer; and its directors and members: Walter V. Coburn, Robert A. Molgren, John Murphy, Hilliard Cohen, Carroll P. Hungate, Marjorie S. Sirridge, Arch E. Spelman, individually, as officers and directors, respectively, and as members, and Adolph R. Pearson, Meyer L. Goldman, Gilbert C. Murphy, James T. Sparks, Robert F. Zimmer, as officers and directors, respectively, and as members, and as representative of the entire membership of Community Blood Bank of the Kansas City Area, Inc.; all other members of said corporation, as representatives for whom the said members named above were made respondents herein, individually and in their capacities as members, and as representatives of other respondents; Perry Morgan, Administrative Director, and W. W. Henderson, Business Manager, individually and as administrative director and business manager, respectively, of the Community Blood Bank of the Kansas City Area, Inc.; Kansas City Area Hospital Association, a corporation, and its members: Baptist Memorial Hospital, a corporation, Menorah Medical Center, a corporation, Sisters of Charity of Leavenworth, a corpora-

[35] The offices in all cases are those held just prior to the filing of the complaint.

tion, d/b/a Providence Hospital, individually, and as members of and as representative of the entire membership of the Kansas City Area Hospital Association; all other members of said Association, as representatives for whom the said members named above were made respondents herein, individually and in their capacities as members and as representatives of other respondents; and its officers: Arch E. Spelman, President, individually, and as an officer, and James D. Marshall, Chairman of the Board, Tom J. Daly, First Vice-President, Thomas M. Johnson, Second Vice-President, Russell H. Miller, Secretary, Nathan J. Stark, Assistant-Treasurer; and its directors: Abraham Gelperin, Mack Herron, James R. Rich, Sister Michaella Marie, William C. Mixson, E. B. Berkowitz, T. R. Butler, Maurice Johnson, Walter N. Johnson, Miller Bailey, Walter A. Reich, Ralph R. Coffey, Harry M. Walker, as officers and directors, respectively, of the Kansas City Area Hospital Association, Susan Jenkins, individually and as Executive Director of the Kansas City Area Hospital Association; O. Dale Smith, individually and as pathologist of Baptist Memorial Hospital; Hilliard Cohen, and Evelyn Peters, individually and as pathologists of Menorah Medical Center; D. A. Hoskins, individually and as pathologist of Osteopathic Hospital; Victor B. Buhler, individually and as pathologist of Queen of the World Hospital and St. Joseph's Hospital; Frank A. Mantz, individually and as pathologist of St. Joseph's Hospital; Ferdinand C. Helwig, and David M. Gibson, individually and as pathologists of St. Luke's Hospital; Angelo Lapi, and Lauren R. Moriarity, individually and as pathologists of St. Mary's Hospital; Jack H. Hill, individually and as pathologist of Trinity Lutheran Hospital; James G. Bridgens, individually and as pathologist of Independence Sanitarium and Hospital; William McPhee, individually and as pathologist of North Kansas City Memorial Hospital; Ralph J. Rettenmaier, individually and as pathologist of Providence Hospital; Robert A. Molgren, individually and as Executive Director of St. Luke's Hospital; and A. Neal Deaver, individually and as administrator of Independence Sanitarium and Hospital; their respective successors and assigns, agents, representatives and employees, directly or through any corporate or other device, in, or in connection with the procurement, the offering for sale, sale and distribution in commerce of whole blood and blood plasma (human), as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, cooperating in, carrying out or continuing any planned com-

mon course of action, understanding, agreement or combination between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts and things:

1. Adopting, using, adhering to, or maintaining or attempting to adopt, use, adhere to or maintain any plan, system, method, policy or practice that restricts, hinders, limits, prevents or forecloses any blood bank operator licensed to engage in commerce in the sale and distribution of blood by the National Institutes of Health, United States Department of Health, Education, and Welfare, from selling or furnishing blood to any hospital, blood bank, person or other user or purchaser of blood.

2. Adopting, using, adhering to, or maintaining or attempting to adopt, use, adhere to or maintain any plan, system, method, policy or practice that restricts, hinders, limits, prevents or forecloses any person, firm or corporation from purchasing, acquiring or using blood from any blood bank operator licensed to engage in the sale of such blood, by the National Institutes of Health, United States Department of Health, Education and Welfare.

3. Agreeing upon, arriving at or adopting any plan, device or program or policy for the purpose or with the effect of hampering, hindering or preventing any blood bank operator licensed to engage in the business of blood banking in commerce by the National Institutes of Health, United States Department of Health, Education and Welfare, from becoming members of the American Association of Blood Banks, the North Central District Blood Bank Clearing House or other clearinghouse sponsored by the American Association of Blood Banks, or from carrying on trade in blood through such clearinghouse system.

4. Adopting, using, adhering to or maintaining or attempting to adopt, use, adhere to or maintain any plan, system, method, policy or practice that hampers, hinders or prevents any blood bank operator licensed to engage in such business by the National Institutes of Health, United States Department of Health, Education and Welfare, from carrying out contracts for the furnishing of blood to any person entitled thereunder, either for use by the contracting patient directly or as replacement blood for blood already given to the patient, or from preventing, hampering, or hindering any

person from purchasing, obtaining or using blood supplied or furnished under such contracts.

5. Adopting, using, adhering to or maintaining or attempting to adopt, use, adhere to or maintain any plan, system, method, policy or practice that restricts, hinders, limits, prevents or discourages any person, firm or corporation from entering into agreements, contracts or arrangements for a supply of blood with any blood bank operator licensed by the National Institutes of Health, United States Department of Health, Education and Welfare, or from enjoying the benefits of such contracts, agreements or arrangements for such blood supply.

Nothing contained in this order shall prevent any physician, responsible for the care of any patient, from exercising his individual medical judgment to determine what whole blood (human) and from what source, if any, shall be utilized in the care of such patient.

It is further ordered, That this case has abated against David T. Beals and Russell W. Kerr.

It is further ordered, That this proceeding is dismissed against the following persons in their individual but not their representative capacity:

Miller Bailey
E. B. Berkowitz
T. R. Butler
Dr. Ralph Coffey
Tom J. Daly
Abraham Gelperin
Meyer L. Goldman
Mack Herron
Maurice Johnson
Thomas M. Johnson
Walter N. Johnson
James D. Marshall
Sister Michaella Marie
Russell H. Miller
Dr. William C. Mixson
Gilbert C. Murphy
Adolph R. Pearson
Walter A. Reich
James R. Rich
Dr. William J. Sekela
James T. Sparks
Nathan J. Stark
Harry M. Walker
Robert F Zimmer

APPENDIX A

CHART SHOWING INSTANCES OF AVOIDANCE OF RECEIPT OF MIDWEST[1] BLOOD

Patient	Hospital and/or Community	Doctor or Individual	Action	References	Date	Remarks
Dorothy Allen	St. Joseph's Community	Dr. Buhler Dr. Mantz Dr. Kerr Sister Michaella Marie	Reference to Community[2] and to NCDBBCH[3]	CX 50–55; 258 Tr. 2974–84; 3025–29; 8038–40	6/8/60	
Katherine Baer	St. Joseph's	Dr. Buhler	Reference to Community and to NCDBBCH	Tr. 3030–56; Tr. 8052 CX 480	2/14/63	Gratuity by Remer
Wilda Babcock	Kansas City General Hospital	Telephone Conversation unidentified individual. "Send two donors."		Tr. 2134–2142	1/56	Donor club of Tabernacle Baptist Church
George Bassett	Providence Hospital Community	Dr. Rettenmaier Dr. Morgan Sister Joan of Arc Sister Rita Louise Mr. Henderson	Reference to Community and to NCDBBCH	Tr. 3063–74 Tr. 7446–47 CX 201–2	5/19/60 6/14/60	
Leslie Beemer		Dr. McPhee	Reference to Community and NCDBBCH	Tr. 4023–25 CX 549–553		
Mrs. Wenig	Bothwell Memorial Hospital Sedalia	Mr. Edwards			11/22/61–1/30/62	
Harry Darling	St. Luke's	Mr. Molgren Dr. Helwig	Reference to Community	Tr. 2341; 2397; 2399; 2412; 3676; 7314; 7799 RX 29; 313; RX 333	11/29/59	Dr. Helwig ordered credit be given to account.
Frances Dickason	St. Mary's Hospital	Dr. Lapi Sister Mary Seraphia	Reference to Community and NCDBBCH	Tr. 3085–91; CX 131–134; CX 483	8/10/60	
Eleanor Donahue	St. Mary's	Dr. Lapi	"Release" required	Tr. 1122–37; 1160; 7010; 7499; 7521; 8576 CX 49; 245		Blood actually administered after release. Donor club involved.
Dorothy Farris	Providence Hospital	Dr. Rettenmaier Dr. Morgan Mr. Henderson	Reference to Community and NCDBBCH	Tr. 2152–85; 3096–3107; 7448–56; CX 112–14; CX 202	6/13/60	

Alice Fischer	Independence	Dr. Pope (non-respondent) Miss Hazenzahl (tech.) Dr. Morgan	Reference to Community and to NCDBBCH	Tr. 3108–27 8648; 8650 CX 489–90	9/29/61 10/10/61	A. Neal Deaver, Administrator of Independence actually gave credit to Alice Fischer and apologized for delay. (CX 489–90)
Elmer Fugate	Osteopathic	Miss Stevenson	Reference to Community and to NCDBBCH	Tr. 1422–43; 2216–35; 3141–45; 7185; CX 104–09	2/19/60	Three friends of the Fugates made donations which cleared the account. (CX 104–05)
Annette Glaser	Menorah Medical Center	Dr. Cohen	Reference to NCDBBCH	Tr. 3147–52; CX 491–97	4/18/63	Miss Glaser actually given credit for $25.
James Goodell	St. Joseph's	Dr. Buhler Mr. Henderson	Reference to Community and NCDBBCH	Tr. 3159–72; CX 494–95; RX 272	3/23/62	
Ruby Lee Gordon	Queen of the World Community	Sister Miriam Leah	Reference to Community and NCDBBCH	Tr. 3175–82; CX 97–100 CX 499	12/21/60	
Bessie Hammer Harold Hammer	Menorah Community	Dr. Peters Dr. Cohen	Ref. to Cohen Referred to Community and to NCDBBCH	Tr. 1698–1705 1710–12; 3264–79; 3882–83; CX 84; 87; 90; 260–65; 500 RX 12 a–b	1/19/60 10/13/60 11/7/60	Hammer never paid his bill for blood.
F. M. Hammett	St. Luke's	Mr. Best	Referred to Community and to NCDBBCH	Tr. 3286–93; 7787–96; CX 502–04; RX 330–32	6/5/63	Donors made replacement so no charge was due for blood.
Genevieve Hunt	St. John's Leavenworth Community	Dr. Rettenmaier Dr. Morgan	Reference to Community and to NCDBBCH	Tr. 2460; 3294–3324 RX 57–73; 91; RX 505–06	7/16/60 to 7/19/60	St. John's Leavenworth, eventually accepted blood from Midwest and credited blood from donors of their patients to Community.
Barney Kurz	Menorah Medical Center	Dr. Peters Mrs. Adamson Mrs. Carroll Miss Goldsberry Miss Penner Mr. Griffith	Reference to Community and to NCDBBCH	Tr. 1308–28; 1336–74; 3326–42; CX 135–36; CX 318–19; 506 RX 265; 270	4/27/60	

See footnote on p.889.

APPENDIX A—Continued

Patient	Hospital and/or Community	Doctor or Individual	Action	References	Date	Remarks
Gertrude LaHue	Trinity Lutheran	Dr. Rickhart Dr. Hill Dr. Morgan Mr. Henderson Mr. Marshall	Reference to Community and to NCDBBCH	Tr. 3343–48; 7772–73; CX 507–09; RX 62	6/21/61	
Clyde Leonard	Bethany	Dr. Johnson Mr. Walter Coburn	First accepted then referred to NCDBBCH	Tr. 3366; CX 511–16	4/18/63 4/19/63	
John Mann	St. Mary's	Dr. Lapi Gertrude Minter Dr. Morgan	Reference to Community and to NCDBBCH	Tr. 3377–87; CX 517–21	4/18/63	Indebtedness already discharged by donation of patient's son.
Ann Martin	St. Joseph's	Miss Berkey Mr. Henderson	Reference to Community and to NCDBBCH	Tr. 3392–94; CX 82–83; 581; RX 261	12/12/60	
Mary Satterly	Providence Hospital	Dr. Rettenmaier	Reference to NCDBBCH	Tr. 3394–3402 7456–62; CX 212–13; CX 521; RX 314	3/21/62	
Lee Shrewsberry	Bethany	Dr. Johnson Mr. Walter Coburn	First accepted then referred to NCDBBCH	Tr. 3407–10; CX 516–23	3/18/63 3/19/63	
Lola Smith	St. Luke's	Dr. Helwig Pat Miller	Technician accepted Midwest blood Patient billed later Sent check	Tr. 3418–24; 7311–12 CX 126–29; CX 525; RX 334–36	4/21/60	Blood not used. Dr. Helwig indicated, according to Remer, that blood should go to Community but would be accepted. Dr. Helwig's recollection vague.

Mrs. Charles Staecy, Jr.	St. Joseph's	Dr. Buhler E. J. Huber	Buhler ordered Midwest's deliveryman out of laboratory	Tr. 3163–66; 3052–53; CX 531–35	6/4/63	Hospital wrote no indebtedness for blood.
John Thomas	St. Joseph's	Sister Robert Margaret Dr. Buhler	Reference to Community and to NCDBBCH	Tr. 259–73; 3470–72; CX 122–25; 294, 298; RX 258, 260 RF 243	11/25/60	
Gordon Wesner	Baptist Memorial DeWitt Brown	Dr. O. Dale Smith	Reference to Community thru NCDBBCH	Tr. 1250–59; 1268–69; 3999–4006; 7262–66; CX 272–74; 544–545	6/21/61	

[1] "Midwest" includes affiliated World Blood Bank and Midwest Distributors, Inc., where appropriate.
[2] "Community" means Respondent Community Blood Bank of the Kansas City Area, Inc.
[3] "NCDBBCH" means North Central District Blood Bank Clearing House as an independent entity and as a division of American Association of Blood Banks.

APPENDIX B.

LIST OF HOSPITALS REPRESENTED AT MEETINGS IN KANSAS CITY AREA AT WHICH BLOOD BANKING WAS DISCUSSED. 1955–1956

Hospitals	Finding 84 CX 173, 6/22/55 Adm. Coun. KCAHA	Finding 87 CX 174A–H, 9/28/55 Adm. Coun. KCAHA	Finding 92–93 CX 175, 10/26/55 Adm. Coun. KCAHA	Finding 94 CX 190A–H, 10/26/55 Adm. Coun. KCAHA	Finding 101 CX 176A–B, 11/23/55 Adm. Coun. KCAHA	Finding 109 CX 179A–K, 1/4/56 Annual Meeting KCAHA	Finding 125 CX 187A–B, 1/25/56 Adm. Coun. KCAHA	Finding 130 RX 164, 2/22/56 Adm. Com. KCAHA	Finding 128–9 RX 162–63, 1/28/56 Adm. & Pathologists
Baptist Memorial Hospital	X	X							
Bethany Hospital									
Children's Mercy Hospital	X		X		X	X	X	X	X
Chillicothe City Hospital									
Cushing Memorial Hospital	X	X	X		X	X	X	X	
Douglass Hospital			X				X		
Excelsior Springs Hospital		X							
General Hospital	X	X	X	X	X	X	X	X	X
General #2									
Independence Sanitarium & Hospital	X	X	X	X	X	X	X	X	X
Krestwoods Hospital	X								
Lakeside Hospital									
Lawrence Memorial Hospital									
Lexington Memorial Hospital									
Menorah Medical Center	X	X	X	X	X	X	X	X	X
Neurological Hospital									
North Kansas City Memorial Hospital									
Olathe Community Hospital	X	X	X				X	X	

Osteopathic Hospital		X								X
Providence Hospital					X		X	X		
Queen of the World Hospital	X		X		X	X	X		X	X
Ralph Foundation Clinic		X								
Research Hospital	X		X		X	X	X	X	X	X
St. John's Hospital		X	X		X	X	X		X	
St. Joseph Hospital		X	X	X	X	X	X	X	X	
St. Joseph's Hospital	X	X				X	X		X	X
St. Luke's Hospital	X	X		X	X	X	X		X	X
St. Margaret's Hospital	X	X			X	X	X	X		
St. Mary's Hospital	X	X	X			X	X	X		
Smithville Community Hospital			X	X	X	X	X			
Trinity Lutheran Hospital	X	X	X			X	X		X	X
University of Kansas Medical Center	X	X	X	X	X	X	X		X	X
Warrensburg Medical Center										
Wheatley-Provident Hospital										

APPENDIX C

MEETINGS HELD IN CONNECTION WITH BLOOD BANKING AND THOSE ATTENDING. 1955–1958

Respondent	CX 173A–G 6/22/55 Adm. Council KCAHA	CX 174A–H 9/28/55 Admin. Council of KCAHA	CX 190A–B 10/26/55 Admin. Council of KCAHA	CX 177AB 12/15/55 CBB of KCAHA	CX 178 12/29/55 CPB of KCAHA	CX 179A–K 1/4/56 Annual meeting KCAHA	RX 161A–E 1/9/56 Rpr. of S. Jenkins CBB AHA	CX 381A–F 1/17/56 Special meeting CBB JC	CX 180 1/19/66 Minutes of CBB KCAHA	CX 382A–D 1/23/56 Meeting Bd. Dirs. CBB JC	CX 186 1/25/56 KCAHA Bd. of Dirs. Meeting	CX 187A–B 1/25/56 Minutes Adm. Cou. KCAHA	CX 162–63 1/28/56 Admin. & Pathologists	RX 190 3/26/56 Minutes Meeting CBBKCAHA	CX 385 4/16/56 Minutes Bd. Dirs. CBB	CX 386A–B 5/9/56 Minutes Fin. Comm. CBBKCAHA	CX 390A–F 3/15/57 Minutes Bd. Dirs. CBB	CX 393A–B 12/26/67 Minutes Bd. Dirs. CBBKCAHA	CX 396 3/18/58 Meeting Bd. Dirs. CBBKCA	CX 397 3/20/58 Exec. Meeting CBBKCA
	Finding 84	Finding 87	Finding 94	Finding 106–7	Finding 107–8	Finding 109	Finding 120	Finding 122	Finding 122	Finding 123	Finding 126	Finding 125	Finding 128–9	Finding 132	Finding 134	Finding 135	Finding 138	Finding 146	Finding 146–8, 50	Finding 149
Bailey, Miller													X							X
Berkowitz, E. B.													X							
Bridgens, G. M.																				
Buhler, Victor B.	X			X																
Butler, T. R.																				
Coburn, Walter V.				X	X		X	X	X				X	X						X
Coffey, Ralph R.	X			X				X												X
Cohen, Hilliard											X		X							X
Daly, Tom J.					X			X	X			X	X	X						X
Deaver, A. Neal			X		X			X	X			X	X	X						X
Gibson, David M.													X							X
Goldman, Meyer L.	X																	X	X	
Helwig, Ferdinand C.																		X		
Henderson, W. W.																				
Herron, Mack																				

Hill, Jack H.	X							X	X				X							X
Hoskins, D. A.																				
Hungate, Carroll P.							X	X		X				X						X
Jenkins, Susan					X		X						X	X						
Johnson, Maurice																				
Johnson, Thomas M.																				
Johnson, Walter N.																				
Lapi, Angelo		X											X							
McPhee, William																				
Mantz, Frank A.																				X
Marie, Sr. Michaella													X							
Marshall, James D.																				
Miller, Russell H.																				X
Mixson, William C.								X												X
Molgren, Robert A.			X		X		X		X			X			X	X	X	X	X	X
Morgan, Perry																		X	X	X
Moriarty, L. R.																				X
Murphy, Gilbert																X			X	X
Murphy, John											X		X	X	X	X	X	X	X	
Peters, Evelyn																				
Pearson, Adolph R.					X									X			X	X	X	X
Reich, Walter A.																				
Rettenmaier, R. J.																				
Rich, James R.																				
Sekola, William J.																				
Sirridge, Marjorie S.														X					X	
Smith, O. Dale																				
Sparks, James T.																		X		
Spelman, Arch E.					X	X	X	X	X		X			X	X		X	X	X	
Stark, Nathan J.																				
Walker, Harry M.			X											X						
Zimmer, Robert F.																				

OPINION OF THE COMMISSION

SEPTEMBER 28, 1966

BY DIXON, *Commissioner*:

This matter is before the Commission on appeal of respondents from the initial decision of the hearing examiner holding that respondents were engaged in a continuing course of conduct having the effect of unreasonably restraining interstate commerce in the sale and distribution of whole blood (human), in violation of Section 5 of the Federal Trade Commission Act.[1] Generally, the complaint charged that the individual and corporate respondents attempted to hinder the development of two commercial blood banks by agreeing among themselves not to use whole blood (human) supplied by these two banks; not to permit such blood to be used in transfusions in hospitals located in and near Kansas City, Missouri, and Kansas City, Kansas; and not to accept or to permit such blood to be accepted as replacement for blood previously obtained from other sources. After extended hearings, the hearing examiner concluded that the respondents were in fact participating in a continuing conspiracy essentially as charged and issued an order designed to halt further concerted action. The order specifically states that nothing contained therein shall prevent any physician responsible for the care of any patient from exercising his individual medical judgment in determining the source of any whole blood (human) to be utilized in the care of his patient.

For the purposes of this opinion, the respondents may be divided into three groups. The first is composed of the Kansas City Area Hospital Association, hereinafter referred to as the Hospital Association, its officers, directors, agents, and hospital members.[2] The Hospital Association serves its membership, which is composed of various individuals interested in hospital administration

[1] 66 Stat. 632 (1952); 15 U.S.C. 45(a) (1) (1964 ed.).

[2] The examiner found that the following were subject to the order in their representative capacities as officers or directors of the Association, but not individually or in any other capacity: James D. Marshall, Chairman of the Board; Tom J. Daly, First Vice-President; Thomas M. Johnson, Second Vice-President; Russell H. Miller, Secretary; Nathan J. Stark, Assistant Treasurer; and Abraham Gelperin, Mark Herron, James R. Rich, Sister Michaella Marie, William C. Mixson, E. B. Berkowitz, T. R. Butler, Maurice Johnson, Walter N. Johnson, Miller Bailey, Walter A. Reich, Ralph R. Coffey, and Harry M. Walker, directors. Arch E. Spelman, Susan Jenkins, Robert A. Molgren, and A. Neal Deaver were subject to the order individually and in their representative capacities. Baptist Memorial Hospital, Menorah Medical Center, and Sisters of Charity of Leavenworth (Providence Hospital) were subject to the order individually, in their capacities as members of the Association, and as representatives of all of the hospital members of the Association.

and most of the hospitals located in Kansas City, by collecting information, making surveys, analyzing data, and providing a forum for discussion and solution of hospital problems. The results of its studies are available to its dues-paying members and to a number of nonmember hospitals and other interested agencies. Membership is voluntary and the Hospital Association has no authority to formulate or direct any of the activities of its member hospitals. Its operations are financed by dues paid by members and by grants, loans, and gifts.

The second group of respondents includes the Community Blood Bank of the Kansas City Area, Inc., hereinafter referred to as Community, and its officers, directors, and members. Community, which began operation in April of 1958, was organized through the joint efforts of the Hospital Association and its members, pathologists and other physicians, and a broad segment of public-spirited citizens.[3] Money for its operational budget comes from blood processing fees, blood responsibility fees, and from gifts, grants, and loans. In none of the years since it began operation have the funds received by Community from all sources been sufficient to pay all of its operating expenses and the principal and interest on loans. The corporate body of Community consists of thirty-nine individual members. Each of three groups—the Hospital Association, various local medical societies, and the general public—supplies thirteen of these members. These three groups have equal representation on the twelve man board of directors. Medical advice with respect to the operation of Community is supplied by the Technical Advisory Committee, a majority of which is staffed by pathologists.

The third group of respondents consists of pathologists affiliated with various hospitals located in Kansas City, Kansas, and Kansas City, Missouri.[4] Many of these pathologists are employed

[3] The hearing examiner held the following subject to the order in their representative capacities as officers or directors of Community, but not individually or otherwise: Adolph R. Pearson, President; Gilbert C. Murphy, Assistant Secretary-Treasurer; Meyer L. Goldman, James T. Sparks, and Robert F. Zimmer, members and directors. The following were held amenable to the order individually and in their representative capacities as officers or directors of Community: Perry Morgan, Administrative Director; W. W. Henderson, Business Manager; Walter V. Coburn, First Vice-President; Hilliard Cohen, Second Vice-President; Carroll P. Hungate, Secretary-Treasurer; and Robert A. Molgren, John Murphy, Marjorie S. Sirridge, and Arch E. Spelman, directors.

[4] The following pathologists were held subject to the order individually and in their represenative capacities as hospital pathologists: O. Dale Smith (Baptist Memorial Hospital); Hilliard Cohen and Evelyn Peters (Menorah Medical Center); D. A. Hoskins (Osteopathic Hospital); Victor B. Buhler (Queen of the World Hospital and St. Joseph's Hospital); Frank A. Mantz (St. Joseph's Hospital); Ferdinand C. Helwig and David M. Gibson (St. Luke's Hospital); Angelo Lapi and Lauren R. Moriarity (St. Mary's Hospital); Jack H. Hill (Trinity Lutheran Hospital); James G. Bridgens (Independence Sanitarium and Hospital); William

by particular hospitals and receive salaries from these hospitals. In their positions as hospital pathologists, they are in charge of the laboratories and hospital blood banks and exercise tremendous influence in determining the source of blood used in the hospitals. Many of these pathologists also serve in some capacity with the Hospital Association, and are members, officers, or directors of Community or serve on Community's Technical Advisory Committee.

The two commercial blood banks affected by the alleged combination are owned by individuals not connected with the local hospitals, the Hospital Association, or Community. The first, a partnership composed of Mr. and Mrs. Francis H. Bass and Mr. and Mrs. H. W. Dolph, began operation as the Jackson County Blood and Plasma Service in Kansas City, Missouri, in May of 1955. Shortly thereafter, its name was changed to Mid-West Blood Bank and Plasma Service. World Blood Bank, a corporation organized by the same individuals, began operation in Kansas City, Kansas, in 1958. Mid-West's operations were graduallly transferred to World and Mid-West ceased to function in 1961. Both Mid-West and World have obtained the appropriate licenses from the National Institutes of Health, United States Department of Health, Education, and Welfare.

I

Respondents take the position that the Commission lacks jurisdiction over the subject matter of the complaint—the conspiracy to hinder the development of the commercial blood banks—by arguing that the entire process of hemotherapy, which encompasses the span from the selection of the donor through the administration of the transfusion—constitutes the practice of medicine. As a result, they aver that the commercial banks' efforts to supply the local hospitals with blood are part of the practice of medicine and that the alleged combination to limit these efforts is nothing more than a legitimate attempt by the medical profession to regulate medical matters.

The extent to which the federal antitrust laws may be applied to agreements among physicians which have the effect of restraining the interstate practice of medicine or the interstate rendition of medical services is not yet settled. In *United States* v.

McPhee (North Kansas City Memorial Hospital); Ralph J. Rettenmaier (Providence Hospital). William J. Sekola was held responsible only in his representative capacity. Some of the above pathologists are also subject to the order by virtue of their activities with the Hospital Association, as corporate members of Community, and as members of Community's Technical Advisory Committee.

American Medical Ass'n,[5] an action brought under Section 3 of the Sherman Act,[6] the indictment charged a conspiracy to hinder the operation of Group Health Association, Inc., a nonprofit corporation organized by government employees to provide medical care and hospitalization on a risk-sharing basis. Group Health employed physicians on a full-time basis and attempted to secure hospital facilities for the treatment of members and their families. Because a plan of this nature was contrary to the code of ethics of the American Medical Association and the Medical Society of the District of Columbia, these organizations and their members combined to prevent hospitals in the District of Columbia from providing facilities for the care of patients of Group Health's physicians, sought to inhibit physicians from accepting employment with Group Health, and attempted to discourage practicing physicians from consulting with physicians employed by Group Health. The defendants argued that the practice of medicine was not a "trade" within the meaning of Section 3.

The court of appeals noted that the Supreme Court in *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427 (1932), had held that the words "trade" and "commerce" as used in Section 3 of the Sherman Act, which was enacted pursuant to Congress' plenary power to legislate for the District of Columbia, have a broader meaning than the same words when used in Section 1 of that Act, which was predicated upon the Commerce Clause of the Constitution.[7] After examining the common law concepts of "profession," "trade," "business," and "restraints of trade," the court concluded that the practice of medicine was a "trade" for purposes of Section 3, and that a restraint imposed upon such practice, and, *a fortiori*, upon the business of financing such medical services by Group Health, could be a prohibited restraint of trade.[8]

The Supreme Court thought it unnecessary to rule upon whether the practice of medicine was a "trade" for purposes of Section 3, since the restraint upon the "business" of Group Health—the procurement of medical services and hospitalization

[5] *United States* v. *American Medical Ass'n*, 110 F.2d 703 (D.C. Cir. 1940), *cert. denied*, 310 U.S. 644; *American Medical Ass'n* v. *United States*, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943).

[6] 26 Stat. 209 (1890); 15 U.S.C. 3 (1964 ed.). Section 3 states, in pertinent part: "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia . . . is hereby declared illegal . . . ."

[7] *United States* v. *American Medical Ass'n*, *supra*, 110 F.2d at 708.

[8] *Id.*, at 711; see also *American Medical Ass'n* v. *United States*, *supra*, 130 F.2d at 233.

on a risk-sharing, prepayment basis—was within the scope of the statute.[9] There have been no cases which have squarely considered whether the practice of medicine is a "trade" for purposes of Section 1 of the Sherman Act. Those cases which hold that Section 1 of the Sherman Act is inapplicable to restraints upon the practice of medicine have involved factual situations where, contrary to the facts in the present case, the effect of the restraint upon interstate commerce was only incidental, indirect, or remote. See *United States* v. *Oregon State Medical Society,* 343 U.S. 326 (1952); *Polhemus* v. *American Medical Ass'n,* 145 F. 2d 357 (10th Cir. 1944); *Spears Free Clinic and Hospital for Poor Children* v. *Cleere,* 197 F. 2d 125 (10th Cir. 1952); *Riggall* v. *Washington County Medical Society,* 249 F. 2d 266 (8th Cir. 1957), *cert. denied,* 355 U.S. 954 (1958); *Elizabeth Hospital, Inc.* v. *Richardson,* 167 F. Supp. 155 (D. Ark. 1958), *aff'd* 269 F. 2d 167 (8th Cir.), *cert. denied,* 361 U.S. 884 (1959). Resolution of this issue, however, is not necessary in the present case.

The evidence shows that most blood banks, whether commercial or nonprofit, have medical directors who exercise general supervision over all activities [10] and that medical skills are involved at various points throughout the various phases of acquisition and processing of blood. However, the evidence also shows that the individual steps in this process are routinely performed by persons who are not physicians and who do not function under the immediate supervision of physicians. For example, the first step in the process, the procurement of blood, includes the screening and selection of prospective donors and the performance of the phlebotomy (the drawing of the blood). Prospective donors are usually asked a series of predetermined questions to elicit relevant facts about their medical history. Such screening is designed to protect both the donor and the ultimate recipient of the blood.[11] If the prospective donor's answers show that the performance of a phlebotomy will adversely affect him or that he may be a carrier of disease, the donation is not permitted. Moreover, the prospective donor's pulse and blood pressure must fall within specified limits before the donation will be allowed.[12] Although the standards for acceptance of a donor are established by physicians, the routine administration of these standards and the

[9] *American Medical Ass'n* v. *United States, supra,* 317 U.S. at 529.

[10] See Tr. 1106, 1215–16, 3503.

[11] Tr. 3647–49, 3670–72, 3787–89.

[12] Tr. 460–67, 3649–52, 3787–89.

performance of the phlebotomy itself may be performed by registered nurses, by technologists, or by others subject to the general supervision of physicians or registered nurses.[13]

After procurement, the blood must be processed, stored, and ultimately transported to hospitals. The processing, which entails typing of the blood to ascertain blood group, the testing for the presence or absence of the various Rh factors and atypical antibodies, serology tests, and the titration of O negative bloods to determine antibody level, must be performed by specially trained technologists or technicians. Although physicians may participate in their training, there is no requirement that the technologists or technicians themselves or their immediate supervisors be physicians.[14]

The Commission does not think that the fact that blood banks may be generally supervised by physicians and the fact that medical skills may be utilized at various points in the process of acquiring or processing blood before it is transported to hospitals require a finding that the entire process of acquiring, processing, and supplying blood to hospitals, when performed by properly licensed commercial blood banks, constitutes the practice of medicine.[15] *Cf. United States* v. *Utah Pharmaceutical Ass'n,* 201 F. Supp. 29 (D. Utah), *appeal dismissed,* 306 F. 2d 493 (10th Cir.), *aff'd,* 371 U.S. 24 (1962); *Northern Calif. Pharmaceutical Ass'n* v. *United States,* 306 F. 2d 379 (9th Cir.), *cert. denied,* 371 U.S. 862 (1962). While it is apparent that certain technical procedures must be carefully administered in the acquisition and processing of blood, we think these procedures, which are designed to produce a usable "product"—*i.e.,* a properly labeled pint of whole blood (human)—and which are routinely performed by persons who are not physicians, are analogous to those followed in the manufacture of drugs. As a result, they are not within the realm of medical practice. Similarly, the requirements for storage and ultimate shipment of the blood at the proper temperatures must be meticulously observed, but again these procedures can hardly be considered to constitute the practice of medicine. The

[13] Tr. 1212–15, 3670.

[14] Tr. 479–80, 1103–05, 1212–15, 3502–03.

[15] The practice of medicine has been defined as the process of judging the nature, character, and symptoms of disease; determining the proper remedy for the disease; and prescribing the application of the remedy to the disease. *Kraus* v. *City of Cleveland,* 116 N.E. 2d 779 (Court of Common Pleas, Ohio, 1953); *State* v. *Catellier,* 179 P. 2d 203 (Sup. Ct. Wyo. 1947); *People* v. *Johnerson,* 49 N.Y.S. 2d 190, 194 (Kings County Court, N.Y., 1944); *Fowler* v. *Norways Sanitorium,* 42 N.E. 2d 415 (Appellate Ct. Ind. 1942); *State* v. *Heffernan,* 100 Atl. 55, 60 (Sup. Ct. R.I. 1917); *O'Neil* v. *State,* 90 S. W. 627, 631 (Sup. Ct. Tenn. 1905); *Underwood* v. *Scott,* 23 Pac. 942 (Sup. Ct. Kans. 1890).

Commission concludes, therefore, that the acts of acquiring, processing, and supplying whole blood (human) to hospitals, when performed by licensed commercial blood banks, are parts of a "business" rather than parts of the practice of medicine. The restraint charged in the present case, which was imposed upon the commercial banks' business of supplying hospitals located in Kansas and Missouri with blood, is thus not a restraint upon the practice of medicine. Moreover, the fact that physicians were among those charged as conspirators does not provide immunity. The Supreme Court disposed of a similar problem in *American Medical Ass'n* v. *United States, supra,* as follows:

> . . . As the Court of Appeals properly remarked, the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health. The court said: "And, of course, the fact that defendants are physicians and medical organizations is of no significance, for Sec. 3 prohibits 'any person' from imposing the proscribed restraints . . . ." [16]

Respondents also contend that the act of supplying whole blood (human) to hospitals, even if not the practice of medicine, nevertheless constitutes the furnishing of a service rather than the sale of a product or commodity and that the Commission thus has no jurisdiction over a restraint imposed thereon. This argument is predicated upon an assertion that the word "commerce" as used in Section 5 of the Federal Trade Commission Act encompasses the sale of products but not the furnishing of services. Contrary to respondents' position, there are many indications that the Commission has jurisdiction over restraints upon the interstate furnishing of services; [17] however, complaint counsel's evidence and

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[16] 317 U.S. at 528–29. While the definitions of the words "trade" or "commerce" as used in Section 3 of the Sherman Act may differ from the definition of these words as used in Section 1, *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286, U.S. 427, 435 (1932), the Supreme Court's statements with respect to the purpose and effect of the conspiracy in *American Medical Ass'n* v. *United States, supra,* would, we think, apply with equal force to a restraint of trade cognizable under Section 1 of the Sherman Act or under Section 5 of the Federal Trade Commission Act. *Cf. Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948).

[17] Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act were enacted pursuant to the power conferred upon Congress by the Commerce Clause of the Constitution. *Atlantic Cleaners & Dyers, Inc.* v. *United States,* 286 U.S. 427 (D.C. Cir. 1932); *Ford Motor Co.* v. *Federal Trade Commission,* 120 F.2d 175 (6th Cir. 1941). Congress' power to regulate commerce is not limited to the sale of tangibles. *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944). Several cases have indicated that Section 1 of the Sherman Act prohibits restrains upon the marketing of services. See, *e.g., United States* v. *Women's Sportswear Manufacturers Ass'n,* 336 U.S. 460 (1949); *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469 (1940); *Christiansen* v. *Mechanical Contractors Bid Depository,* 230 F. Supp. 186 (D. Utah 1964). It has been held that practices which run counter to the policy expressed

the examiner's decision are predicated upon the position that whole blood (human) may, for purposes of Section 5 of the Federal Trade Commission Act, be considered to be a "product" or a "commodity."

In support of their argument that the act of supplying whole blood (human) to hospitals constitutes the furnishing of a service rather than the sale of a product, respondents rely heavily upon a series of cases holding that where a hospital administers blood to a patient, the blood is an incidental part of the over-all hospital service for which the patient contracted, rather than a sale entitling the patient to bring suit against the hospital for breach of the implied warranty of fitness. *Sloneker* v. *St. Joseph's Hospital,* 233 F. Supp. 105 (D. Colo. 1964); *Koenig* v. *Milwaukee Blood Center, Inc.,* 127 N.W. 2d 50 (Sup. Ct. Wisc. 1964); *Goelz* v. *J. K. & Susie Wadley Research Institute & Blood Bank,* 350 S.W. 2d 573 (C.C.A. Tex. 1961); *Dibblee* v. *Dr. W. H. Groves Latter-Day Saints Hospital,* 364 P. 2d 1085 (Sup. Ct. Utah 1961); *Hidy* v. *State,* 143 N. E. 2d 528 (C.A.N.Y. 1957); *Gile* v. *Kennewick Public Hospital District,* 296 P. 2d 662 (Sup. Ct. Wash. 1956); *Perlmutter* v. *Beth David Hospital,* 123 N.E. 2d 792 (C.A.N.Y. 1954). The courts in many of these cases, none of which involved a private commercial blood bank, stressed the public policy argument that charitable and public institutions should not be insurers of the fitness of blood administered to patients and, primarily on this basis, found that the defendants were not selling blood to their patients. In *Gile,* the court concluded that all medication supplied to that patient, including not only blood but also penicillin, casts, and bandages, were incidental parts of the service relationship rather than sales. We do not think the courts' conclusions in these cases stand for the proposition that blood and other medication cannot be "products" for any purpose or that commercial processors or manufacturers of these items are not making sales to hospitals.

Respondents also rely on several federal administrative rulings defining the rights of blood donors. The Internal Revenue Service has ruled that a donor of blood is not entitled to a charitable deduction equal to the fair market value of the blood donated because the donor, by submitting to a phlebotomy, is considered to be performing a service for which no charitable deduction is al-

in the Sherman Act are actionable under Section 5 of the Federal Trade Commission Act. *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission,* 312 U.S. 457 (1941). Moreover, there is no affirmative indication that Congress expressly wishes to limit the reach of Section 5 to products or commodities.

lowed, rather than disposing of property. Rev. Rul. 53–162, 1953–2 Cum. Bull. 127; see also Nevada Tax Comm'n Admin. Bull. No. 6 (Feb. 23, 1959). The Comptroller General has held that military personnel have no right to be compensated for blood donations for the same reason. 5 Comp. Gen. 658; 6 Comp. Gen. 888. In addition, respondents argue that since the cells which comprise whole blood (human) can be produced only in the human body and remain living and viable throughout the time during which the blood may be used, such blood cannot be a "product" or "property" which is subject to sale.[18]

We are here concerned with whether a properly labeled bottle of whole blood (human) containing an anticoagulant can be considered to be a "product" when supplied to a hospital by a commercial blood bank. As a result, we do not think that the administrative rulings cited by respondents, which involve the rights of donors of blood, are in point. In addition, respondents' arguments that blood can be produced only in the human body and that its cells remain viable during its useful life do not mitigate against the conclusion that it is a "product." In disposing of an argument that such blood cannot be "manufactured" and thus that Congress could not have intended it to be included among the "biological products" regulated by the Public Health Service Act, the court in *United States* v. *Calise*, 217 F. Supp. 705, 709 (S.D.N.Y. 1962), stated:

> . . . Although this argument is truly ingenious it must be rejected because if it were correct then nothing which is ultimately derived from nature would ever be capable of subsequently being "manufactured and prepared." The word "manufactured" as employed in this statute obviously was intended to include "processing". . . .

Nor do we find any constitutional barrier which prevents blood from being treated as a "product" or from being purchased and sold merely because it is composed of living, human cells or tissue.

Moreover, we think there is authority for holding that whole blood (human) is a "product." Section 12(a) of the Federal Trade Commission Act declares that it is unlawful to disseminate through the mails or in commerce false advertisements which are likely to induce the purchase of food, drugs, devices, or cos-

[18] In making the latter argument respondents assert that its sale is prohibited by the Thirteenth Amendment of the Constitution in the same manner as is the sale of human beings. Respondents' Brief on Appeal, p. 87.

metics.[19] The definition of "drug," found in Section 15 of the Act, states in pertinent part:

(c) The term "drug" means (1) articles recognized in the official United States Pharmacopoeia . . . and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man . . . .

The Federal Food, Drug, and Cosmetic Act[20] which, *inter alia,* prohibits the introduction of misbranded or adulterated drugs into commerce, contains a similar definition of that term.[21] The legislative history indicates that the definition of "drug" which appears in the Federal Trade Commission Act was derived from the bill which subsequently was enacted as the Federal Food, Drug, and Cosmetic Act[22] and that the two Acts were intended to supplement each other.[23]

In determining the scope of the above definition of "drug" in a proceeding brought under the Federal Food, Drug, and Cosmetic Act, the court in *United States* v. *Calise, supra,* held that the term included whole blood (human). Thus, such blood is a "drug" for purposes of Sections 12(a) and 15 of the Federal Trade Commission Act.[24] We note also that "citrated whole human blood" is listed by *The Pharmacopoeia of the United States of America.* Since a violation of Section 12(a) of the Federal Trade Commission Act constitutes an unfair or deceptive act or practice in commerce within the meaning of Section 5,[25] whole blood (human) is a "drug" for purposes of that section also.

Moreover, the National Institutes of Health, United States Department of Health, Education, and Welfare, which, under the Public Health Service Act,[26] licenses organizations which barter, sell, and manufacture "biological products" in commerce, treats blood as such a product and requires blood banks operating in commerce to secure the appropriate licenses.[27] In *United States* v. *Calise, supra,* the court in denying the motion to dismiss the in-

[19] 52 Stat. 114 (1938); 15 U.S.C. 52 (1964 ed.).

[20] 52 Stat. 1040 (1938); 21 U.S.C. 301, *et seq.* (1964 ed.).

[21] 21 U.S.C. 321 (g) (1964 ed.).

[22] The Wheeler-Lea Act, which contains Sections 12–18 of the Federal Trade Commission Act, became effective on March 21, 1938. The Federal Food, Drug, and Cosmetic Act, a substantial revision of the earlier Act of 1909, became effective on June 25, 1938.

[23] 83 Cong. Rec. 3252–56.

[24] *Cf. N.L.R.B.* v. *John W. Campbell, Inc.,* 159 F.2d 184 (5th Cir. 1947); *L. Heller & Son, Inc.* v. *Federal Trade Commission,* 191 F.2d 954 (7th Cir. 1951); *Federal Trade Commission* v. *Reed,* 243 F.2d 308 (7th Cir. 1957), *cert. denied,* 355 U.S. 823 (1957).

[25] Section 12(b) of the Federal Trade Commission Act states: "The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5."

[26] 58 Stat. 702 (1944), 42 U.S.C. 262 (1964 ed.).

[27] See 42 C.F.R. 73.1(g)(5)(ii); 73.300–73.327.

dictment with respect to alleged violations of the Public Health Service Act on the theory the statute did not apply to whole blood (human), stated that it could not be said as a matter of law that the statutory terms did not include any serous fluid used for medical purposes and that the issue must be determined after receipt of evidence. See also *United States* v. *Steinschreiber*, 219 F. Supp. 373 (S.D.N.Y. 1963); 218 F. Supp. 426 (S.D.N.Y. 1962).

The Commission is of the opinion, therefore, that there is a sufficient basis in the record for a factual conclusion that whole blood (human) is a "biological product." [28] Moreover, the definition of "drug" contained in Section 15 of the Federal Trade Commission Act, and the interpretation of the corresponding definition found in the Federal Food, Drug, and Cosmetic Act by the court in *United States* v. *Calise, supra,* provide a legal basis for treating whole blood (human) as a "drug" and thus a "product" for purposes of Section 5 of the Federal Trade Commission Act. As a result, the commercial blood banks in this case, when acquiring, processing, and supplying such blood to hospitals in other states, are engaged in the business of producing and selling a product in interstate commerce. The Commission clearly has jurisdiction under Section 5 of the Federal Trade Commission Act to proceed against a combination or conspiracy designed to having the effect of hindering the operation of such a business, and we so hold.

II

The corporate respondents named in the complaint—Community, the Hospital Association, and three of the member hospitals —are organized under state not-for-profit statutes and have been classified by the Internal Revenue Service as organizations which are exempt from federal income taxation.[29] Corporations are defined in Section 4 of the Federal Trade Commission Act, as amended by the Wheeler-Lea Act of 1938,[30] as follows:

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

[28] See Tr. 1022, 1062–63, 1173–74, 5651–52.

[29] Initial Decision, Findings of Fact, Pars. 1, 2.

[30] 52 Stat. 111 (1938); 15 U.S.C. 44 (1964 ed.).

Each of these corporate respondents takes the position that it cannot be "organized to carry on business for its own profit or that of its members" within the purview of the Act because of their incorporation under state not-for-profit statutes and their tax exempt status.

It has been established that incorporation under a state not-for-profit statute does not always result in federal tax exemption.[31] Some state statutes require that the charter contain a clause providing that no part of the income or property may be distributed to the officers, directors, or members, while others require only that it be organized for a religious, charitable, or other exempt purpose. Some impose both. On the other hand, the Internal Revenue Code taxes all corporations except those specifically exempted.[32] Corporations organized and operated for religious, charitable, educational, and other specified purposes are exempted from taxation, provided no part of their net income inures to the benefit of any private person.[33] A corporation which does not distribute income to its shareholders may nevertheless be subject to federal taxation if it is not organized for one of the specified purposes.[34] The requirement in the Federal Trade Commission Act—that the corporation be organized to carry on business for its own profit or that of its members—differs significantly from both of the above tests. As a result, we do not think that incorporation under a state not-for-profit statue and exemption from federal income taxation are the criteria which delineate the Commission's jurisdiction. Other factors, including a review of the legislative history, must be considered in resolving the issue.

The definition of "corporation" found in the Federal Trade Commission Act prior to its amendment by the Wheeler-Lea Act evolved through legislative compromise. The version in the bill which passed the House on June 5, 1914,[35] differed from that in the Senate bill, passed on August 5, 1914.[36] On August 8, 1914, before a compromise had been reached, Joseph E.

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[31] See *Better Business Bureau of Washington, D.C., Inc.* v. *United States*, 326 U.S. 279 (1945); *United States* v. *Community Services, Inc.*, 189 F.2d 421 (4th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952); *Veterans Foundation* v. *United States*, 281 F.2d 912 (10th Cir. 1960).

[32] Internal Revenue Code of 1954, Sec. 11.

[33] *Ibid.*, Sec. 501 *et seq.*

[34] N. 31, *supra;* see also *Boston Terminal Co.* v. *Gill*, 246 Fed. 664 (1st Cir. 1917).

[35] " 'Corporation' means a body incorporated under law, and also joint-stock associations and all other associations having shares of capital or capital stock or organized to carry on business with a view to profit." H.R. Rep. No. 1142, 63d Cong., 2d Sess., Sept. 4, 1914, p. 11.

[36] "The term 'corporation' or 'corporations' shall include joint-stock associations and all other associations having shares of capital or capital stock, organized to carry on business for profit." H.R. Rep. No. 1142, 63d Cong., 2d Sess., Sept. 4, 1914, p. 14.

Davies, Commissioner of the Bureau of Corporations, conveyed to Senator Newlands, Chairman of the Committee on Interstate Commerce, certain suggestions with respect to both the House and Senate bills. Among other things, he voiced the opinion that the proposed Trade Commission's jurisdiction did not extend to associations of manufacturers or dealers (trade associations) many of which were organized "not-for-profit." He stated that the Commission's power ought to be sufficiently broad to permit it to inquire into the transactions of such associations, and recommended that the House and Senate definitions of "corporation" be amended by striking out those portions which required that the corporation have shares of capital or capital stock and be organized to carry on business for profit or with a view toward profit and substituting therefor the phrase "whether having shares of capital stock or not." [37]

The definition of "corporation" contained in Section 4, as enacted by Congress in 1914, applied both to incorporated and unincorporated associations, with and without shares of capital or capital stock. However, a corporation having shares of capital or capital stock was included within the definition only if "organized to carry on business for profit." On the other hand, a corporation without shares of capital or capital stock was included if it was "organized to carry on business for its own profit or that of its members." [38]

The legislative history fails to reveal whether Congress attached different meanings to the two above-quoted phrases. However, there is a fundamental difference between a corporation having capital stock [39] or shares of capital [40] and one which does not, and this fact lends support to the conclusion that the two phrases have different meanings. By definition, a corporation having capital stock or shares of capital is organized so that any

[37] "Letter from the Commissioner of Corporations to the Chairman of the Committee on Interstate Commerce, transmitting certain suggestions relative to the Bill (H.R. 15613) to Create a Federal Trade Commission." 63d Cong., 2d Sess.

[38] 38 Stat. 719 (1914). That definition was as follows: " 'Corporation' means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares of capital or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members."

[39] "Capital stock" is defined as the amount of money, property, or other means authorized by the corporate charter and contributed or agreed to be contributed by the shareholders as the financial basis for the business of the corporation. *Farrington* v. *Tennessee*, 95 U.S. 679 (1877); *Hecht* v. *Malley*, 265 U.S. 144 (1924); 18 *Am. Jur.* 2d, "Corporations," § 208; 18 C. J. S., "Corporations," § 193; 6 Words and Phrases, "Capital Stock."

[40] "Shares of Capital" is defined as the proportionate interests or rights in the management of the corporation, in its surplus profits, and, upon dissolution, in all of the assets

profits received may be distributed to shareholders or members in proportion to their capital contributions. The essence of its being is the fact that its shareholders or members own an equity in the corporation and its income, and are entitled to a proportionate distribution of profits while it is in business, and, upon dissolution, to a proportionate share of its assets. Thus, the phrase, "carry on business for profit," when applied to such corporations, should receive its traditional and most generally accepted definition—that the corporation is engaged in some undertaking for the purpose of realizing pecuniary gain which will ultimately be distributed to the shareholders or members.[41]

On the other hand, a corporation without capital stock or shares of capital is, by definition, a corporation in which the incorporators or others do not have an equity interest in the corporation or a right to a distribution of the profits. Such a corporation would, therefore, be some sort of nonprofit, municipal, or public corporation. Even if it engages in "business" and realizes an excess of receipts over expenditures, it is not organized so that such amounts can be distributed to its incorporators, officers, directors, or other persons. The phrase "organized to carry on business for its own profit . . ." when applied to such a corporation, must, therefore, have a different meaning from the traditional phrase "organized to carry on business for profit," which is applied to corporations having capital stock or shares of capital. Since a corporation not having capital stock or shares of capital does not distribute amounts realized to incorporators, officers, directors, or other persons, the words "business" and "profit," when applied to such corporations, must have broader meanings than those usually ascribed to these words.[42] The only logical meaning which the phrase "organized to carry on business

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remaining after the payment of debts. *Farrington* v. *Tennessee*, 95 U.S. 679 (1877); 18 *Am. Jur.* 2d, "Corporations," § 208; 18 C.J.S., "Corporations," § 194; 39 Words and Phrases, "Shares of Capital Stock" and "Share of Stock."

[41] "Carry on business" or "doing business" usually means engaging in activities in the pursuit of gain or doing a series of similar acts for the purpose of realizing pecuniary benefit. 6 Words and Phrases, "Carry on Business"; 13 Words and Phrases, "Doing Business"; Restatement, Conflict of Laws, § 167(a). "Profit" generally refers to economic benefit and has been defined as the gain from business or investment over and above expenditures or gain made on business or investment when both receipts or payments are taken into account. See, *e.g.*, *Rubber Co.* v. *Goodyear*, 76 U.S. 788, 804 (1869); *Maddox* v. *International Paper Co.*, 47 F. Supp. 829, 830 (D. La. 1942); 34 Words and Phrases, "Profit."

[42] A corporation can be engaged in business even though the excess of receipts over expenditures is not distributed. See *American Medical Ass'n* v. *United States*, *supra*, 130 F.2d at 237, n. 15 (D.C. Cir. 1942). Moreover, "profit," when interpreted broadly, has been held to mean accession of good, valuable results, useful consequences, and any sort of gain, benefit, or advantage. See *Union League Club* v. *Johnson*, 115 P. 2d 425, 426 (Sup. Ct. Calif.

for its own profit . . ." could have when applied to a corporation unable to distribute "profits" realized is that the corporation is organized to engage in some undertaking for which it will receive compensation in the form of fees, prices, or dues and is not prohibited by its charter from devoting any excess of income over expenditures or other benefit derived from doing business to its own use; *i.e.*, for its own self-perpetuation or expansion. If the corporation is a trade association, it is subject to the Commission's jurisdiction if it is organized to engage in a business which benefits its members in some manner.[43]

The Federal Trade Commission Act was amended in 1938 by the Wheeler-Lea Act which, *inter alia*, extended the reach of Section 5 to unfair or deceptive acts or practices in commerce. The definition of "corporation" was expanded by providing that it "shall be deemed to include" any "trust" or "so-called Massachusetts trust." There was concern that these entities, which operated businesses in much the same manner as corporations, but which were not generally considered to be corporations under state law, might not be subject to the Commission's jurisdiction under the old definition.[44] The phrase "organized to carry on business for its own profit or that of its members," which previously had applied only to organizations without shares of capital, capital stock, or certificates of interest,[45] was made applicable to corporations with shares of capital and the old phrase, "organized to carry on business for profit," was deleted entirely.

The legislative history does not reveal the reason for this latter change or shed any light on what meaning the Seventy-fifth Congress attached to either phrase. However, it is clear that Congress intended to extend the reach of the definition as a whole, and, as a result, we think it should be given the broadest possible interpretation consistent with its wording. Again, when applied

1941); *Commissioner of Cambria Park* v. *Board of County Com'rs. of Weston County*, 174 P. 2d 402 (Sup. Ct. Wyo. 1946); *Laurel Hill Cemetery Ass'n* v. *City and County of San Francisco*, 184 P. 2d 160 (D. Calif. 1947). In addition, "profit" may mean a saving of expense which otherwise would necessarily be incurred. See *State ex rel. Russell* v. *Sweeney*, 91 N.E. 2d 13, 16 (Sup. Ct. Ohio 1950); *Boston Terminal Co.* v. *Gill*, 246 Fed. 664 (1st Cir. 1917).

[43] See *Millinery Creator's Guild, Inc.* v. *Federal Trade Commission*, 312 U.S. 469 (1941); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Federal Trade Commission* v. *Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927); *Standard Container Manufacturers' Ass'n* v. *Federal Trade Commission*, 119 F.2d 262 (5th Cir. 1941); *Quality Bakers of America* v. *Federal Trade Commission*, 114 F.2d 393 (1st Cir. 1940); *California Lumberman's Council* v. *Federal Trade Commission*, 115 F.2d 178 (9th Cir. 1940).

[44] S. Rep. No. 1705, 74th Cong., 2d Sess. (1936); Hearings Before the Committee on Interstate Commerce, United States Senate, 74th Cong., 2d Sess., on S. 3744, February 17 to March 10, 1936, p. 6; 83 Cong. Rec. 3252–56.

[45] The phrase "certificates of interest," applicable to Massachusetts trusts, was inserted in the definition by the Wheeler-Lea Act.

to corporations which do not have shares of capital, capital stock, or certificates of interest, and which, therefore, do not distribute any so-called "profits," the phrase "organized to carry on business for its own profit . . ." must mean that the corporation may engage in an undertaking for which it is compensated and is not prevented from applying whatever "profits" or "benefits" it receives to its own self-perpetuation or expansion. If the corporation is a trade association, it must be organized to engage in an undertaking which "benefits" its members in some manner.[46] On the other hand, when applied to corporations having capital stock, shares of capital, or certificates of interest, we think the phrase may be interpreted to include not only the narrower, traditional definition of engaging in business for profit, but also the above-stated broader concept.[47]

Turning to the facts in the present case, it appears that Community, the various hospitals named in the complaint, and the Hospital Association are organized under state not-for-profit statutes which permit them to acquire and sell real estate, borrow money, and engage in other commercial activities.[48] In addition, their articles of incorporation empower them to perform these and other commercial acts.[49] Community and the hospitals perform their functions in much the same manner as commercial entities such as the commercial blood bank and "for-profit" hospitals,[50] and receive compensation for goods supplied and services rendered. Accordingly, they can be considered to be organized to carry on business. *Cf. American Medical Ass'n* v. *United States, supra,* 130 F.2d 233, 236–237. The Hospital Association, which, among other things, performs studies and supplies the results to dues-paying member hospitals, also carries on business. None are prevented by their articles of incorporation from devoting any "profits" received to their own use.[51] Moreover, the Hospital Association is also engaged in business for the benefit or profit of its members when it supplies to them information and other services

[46] See N. 43, *supra.*

[47] Under some state statutes, a so-called "non-profit" corporation may be organized with capital stock or shares of capital, but is prohibited from distributing its "profits" to the shareholders. See, *e.g., G. S. Kansas,* Chapter 17, Articles 1702, 2902, 2903.

[48] See CX 540; Order Taking Official Notice (May 3, 1963).

[49] See Appeal and Brief of Respondents Community Blood Bank of Kansas City Area, Inc. and Others from Interlocutory Ruling of the Hearing Examiner (filed November 21, 1962); Joint and Several Motions Requesting Leave to Intervene in Interlocutory Appeal of the Community Blood Bank of the Kansas City Area, Inc. (filed November 20, 1962).

[50] Two members of the Hospital Association, Thompson, Brumm and Knepper Clinic Hospital and Warrensburg Medical Center, Inc., are privately owned hospitals. Initial Decision, Findings of Fact, Par. 2(J).

[51] See N. 49, *supra.*

which they might otherwise have to gather or render themselves.[52] Accordingly, we hold that the corporate respondents named in the complaint are included within the definition of "corporation" found in Section 4 of the Federal Trade Commission Act and, therefore, are subject to the Commission's jurisdiction.

In any event, acceptance of the assertion that the corporate respondents named in the complaint are not embraced by the definition of "corporation" would not prevent the Commission from adjudicating their participation in the alleged conspiracy. On several occasions, the Supreme Court has held that a conspiracy is a continuing partnership for purposes of attributing the overt acts of one conspirator to others and for admitting in evidence the declarations of one conspirator against the others. See, *e.g.*, *United States* v. *Kissel*, 218 U.S. 601, 608 (1910); *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229 249 (1917); *United States* v. *Socony-Vacuum Oil Co.* 310 U.S. 150, 253 (1940); *Fiswick* v. *United States*, 329 U.S. 211, 216 (1946). Although conspiracies in restraint of trade are usually reached by proceedings against the individual conspirators, we think that the Commission may consider the alleged conspiracy in this case as a partnership and proceed against it pursuant to the statutory grant of authority over partnerships.[53] Moreover, it has been held that the fact that a corporation is not indictable for the making of an agreement in restraint of trade does not prevent it from being counted as one of the parties to the conspiracy. *Standard Oil Co.* v. *State*, 100 S.W. 705 (Sup. Ct. Tenn. 1907). Thus, the Commission may adjudicate the existence or nonexistence of the alleged conspiracy and determine the identify of the co-conspirators, whether they be individuals or not-for-profit corporations. While we do not think that treating the conspiracy as a partnership bestows individual jurisdiction over the not-for-profit corporations if such jurisdiction is otherwise lacking, the order may be enforced indirectly against any of the not-for-profit corporations found to be participants in the conspiracy by enforcing it against those officers, directors, and employees found to be subject to the order in their individual capacities.[54] Accordingly, a holding that the not-for-profit corporations named in the complaint are not subject to the Commission's jurisdiction would not compel dismissal of the complaint or

[52] See N. 42, *supra*.

[53] 15 U.S.C. 45(b), (c).

[54] See *Benrus Watch Co., Inc.* v. *Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965); *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F.2d 7 (2d Cir. 1954).

prevent adjudication of the existence and the extent of the conspiracy.

Finally, it is argued that the action cannot be maintained against the unnamed hospital members of the Hospital Association as members of a class, because such hospitals do not constitute a class for jurisdictional purposes.[55] The complaint listed three hospitals as representative of the forty-three members of the Hospital Association. Respondents agree that Rule 23 of the Federal Rules of Civil Procedure provides the authority by which the Commission may institute a class proceeding.[56] However, in contending that the elements of this rule have not been satisfied, respondents state that it would not have been inconvenient to name and join all members, that the membership of the Hospital Association is not an appropriate "class," and that neither the Hospital Association nor the named members can determine policy for the unnamed members and thus may not "represent" them in a class action.

The impossibility of joinder of all members of a class is not a prerequisite to the initiation of a class action. Instead, extreme difficulty or impracticability or joinder is sufficient.[57] Such impracticability has been found where membership in the class numbered seventy-six [58] and, in another case, only forty.[59] There is no requirement that the named members of the class be agents of the unnamed members in order to represent them in a class action. Instead, representation is considered adequate and is permitted if their interests are coextensive, although not identical, and if the interests are not antagonistic.[60]

In the present case, the evidence showed that the Hospital Association was the medium through which the individual hospitals participated in the community-wide effort to establish a central blood bank and, in fact, was the spokesman for the hospitals at meetings where other segments of the community were represented. In addition, the meetings of the Hospital Association provided a forum where the various hospitals voiced their views on community blood problems and, on occasion, discussed the com-

[55] The complaint named individually the then current officers, directors, and members of Community as representatives of its entire membership. The use of the class action in this regard is not contested. Respondents' Brief on Appeal, pp. 116–117.

[56] *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, 13 F.2d 673 (8th Cir. 1926).

[57] Barron and Holtzoff, *Federal Practice and Procedure*, 1961 ed., Vol. 2, p. 286.

[58] *Williams* v. *Humble Oil & Refining Co.*, 234 F. Supp. 985 (D. La. 1964).

[59] *Citizens Banking Co.* v. *Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944).

[60] 3 Moore's Federal Practice (2d ed.), par. 23.07.

mercial bank. Even though the membership of the Hospital Association was composed of religious, municipal, state, and federal hospitals, all participated in the Hospital Association's meetings and in the efforts to establish Community in the same manner and all are charged with being parties to a single conspiracy which had its roots in these meetings. As a result, the Commission holds that the membership of the Hospital Association constitutes an appropriate class and that the interests of the named and unnamed hospitals are, with respect to this action, coextensive and nonantagonistic.[61] The inherent difficulty in naming and serving all forty-three hospitals presents sufficient impracticability to permit use of the class action, and the naming of three of the members and the Hospital Association itself adequately insures proper representation of the interests of the unnamed members. Accordingly, the contention that the proceeding against the unnamed hospital members of the Association must be dismissed is rejected.

III

In the majority of conspiracy cases, the government is not able to produce direct evidence of the conspiracy and, as a result, must usually resort to proof of a number of factors from which the existence of the conspiracy may be inferred. Among these factors are the presence of a motive for a conspiracy, evidence of opportunities for agreement through scheduled meetings of official groups, whether the object of the alleged conspiracy was discussed at such meetings, commission of overt acts consistent with the existence of a conspiracy, and the accomplishment of an end which also is consistent with a conspiracy. Proof of a number of such factors has permitted the conclusion that there has been conscious adherence to a plan, scheme, program, or group consensus which had as its inevitable result the restraint of trade or commerce and has been held sufficient to establish a violation.[62]

[61] An additional indication of the similarity of interests is the fact that the Hospital Association and the named member hospitals were represented as a group by a single law firm. There is nothing to indicate that the unnamed hospitals, which are not formally represented in this proceeding, would have received different representation had they been named in the complaint. Presumably, the argument that the unnamed hospital members of the Association are not properly before the Commission is attributable to the attorneys retained by the Association. The record does not reveal whether these unnamed members have contributed to the Association's defense of the proceeding.

[62] *E.g.*, *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914); *Esco*

In the present case, the evidence offered by complaint counsel established many such factors and, contrary to respondents' position, shows substantially more than "conscious parallelism." *Cf. Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). As will subsequently be demonstrated, repondents possessed a motive for joint action—their belief that commercial blood banking was morally wrong or their opinion that commercial blood banks did not supply blood of equal quality with nonprofit banks. There was ample opportunity for discussion and agreement at the various meetings of the Society of Pathologists, the Hospital Association, the meetings of the corporate body of the proposed Community bank, and the joint meetings of representatives of these groups. The commercial blood banks were discussed at some of these meetings. Several affirmative steps by individuals and groups were taken to prevent the commercial banks from establishing donor clubs and otherwise to inhibit their growth. There was a consistent pattern of reaction to the commercial banks' efforts to expand and a universal reluctance to use blood supplied by them.

The Commission is of the opinion that all of these threads, when woven together, constitute a sufficient basis for the conclusion that those individual and corporate respondents found by the examiner to be co-conspirators knowingly joined in a common cause of action which had as its inevitable result the hindrance of the development of the commercial blood banks listed in the complaint. The existence of this course of action does not become apparent until the entire chain of events preceding and following the opening of the commercial blood bank is examined in detail. Our discussion of these events will be divided into three periods of time—the period prior to May 1955, when the first commercial bank began operation; the period between May 1955 and April 1958, when Community became operative; and the period after Community opened.

A

The transcript shows that before the opening of the commercial bank, the blood needs of the area were being supplied primar-

Corp. v. *United States*, 340 F.2d 1000 (9th Cir. 1965); *Standard Oil Co. of Calif.* v. *Moore*, 251 F.2d 188 (9th Cir. 1957); *Advertising Specialty National Ass'n* v. *Federal Trade Commission*, 238 F.2d 108 (1st Cir. 1956); *Bond Crown & Cork Co.* v. *Federal Trade Commission*, 176 F.2d 974 (4th Cir. 1949); *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F.2d 899 (7th Cir. 1946).

ily by hospital blood banks.[63] The American Red Cross Defense Blood Bank operating in Kansas City at that time channeled the blood it acquired to the Armed Forces in Korea.[64] On August 6, 1953, the Board of Directors of the Kansas City and Jackson County Red Cross Chapter passed a resolution addressed to the Jackson County Medical Society, noting that the Defense Bank was to be closed and offering to assist the Medical Society in sponsoring and operating a local community blood program utilizing the existing Red Cross facilities.[65] On August 19, 1953, after a "long and rough session" [66] the Jackson County Medical Society adopted a resolution voicing the need of a community bank and approving such a bank along the lines of community banks in other areas.[67] No mention was made in the resolution about the Red Cross offer to cooperate and the Red Cross was not invited to participate in subsequent conferences.[68] This may be explained partially by the Red Cross' insistence that no replacement fees be charged, a policy which the local physicians thought unwise, and by the fact that a few physicians thought that the Red Cross did not have a good public image.[69]

A committee composed of six physicians, three of whom were pathologists, was appointed to implement the decision to form a community bank.[70] The committee met on a number of occasions between August 27, 1953, and November 18, 1953, to discuss various organizational problems. It decided to request the use of the Red Cross equipment,[71] and, if it utilizied the location of the Red Cross center, to do so only temporarily.[72] The Red Cross was to be limited to no greater role in the proposed bank than any other community service agency.[73] The committee also concluded that

[63] Hospital blood banks are operated as part of the hospital's laboratory facilities and are supervised by the staff pathologist. Because of their small size, such banks usually serve only the hospital wherein located. A patient who receives blood is generally given the option of replacing the blood or paying a responsibility fee which may range between $25 and $35 per pint. The purpose of the responsibility fee is to encourage replacement of the blood in kind. Such banks sometimes purchase blood from commercial banks.

[64] The Red Cross also operates civilian blood centers which serve local communities and the surrounding regions. It relies chiefly upon voluntary donations for its supply and does not impose a responsibility fee upon patients who receive its blood. The Red Cross will not establish such a center in a community unless it receives the approval and cooperation of the local medical society (Tr. 995–96, 1396, 1412–14, 1640, 1804).

[65] CX 323.

[66] CX 354(j).

[67] RX 129; Tr. 3754–56.

[68] See CX 354(a), (j); RX 329.

[69] See Tr. 1645–49; CX 354–59; RX 19.

[70] RX 129; Tr. 3752–53.

[71] RX 329(A).

[72] RX 329(E), (F), and (G).

[73] RX 329(C).

the bank should be a community project directed by the Jackson County Medical Society with no other dominant supporting group.[74] At the September 21 meeting, it was thought that hospital administrators should be asked to participate, but that plans were not yet definite enough to invite them.[75] Some hospital administrators were invited to the October 20 and subsequent meetings, but it does not appear that they wielded significant influence.[76] The pathologists remained the dominant influence and their inability as a group to agree prevented the selection of a site.[77] At the October 23 and November 18 meetings, the final form of the proposed bank began to emerge. It would be known as the Community Blood Bank of Jackson County; and, although it would solicit community support, it would, when opened, be directed and managed by members of the Medical Society.[78] The organizational meeting, attended by members of the Medical Society, hospital administrators, and other public-spirited citizens, was held on December 11, 1953.[79]

Although the shell of the Community Blood Bank (Community) was organized on December 11, 1953, the bank did not begin operating until April of 1958. Between the organization of Community on December 11, 1953, and May 16, 1955, the date of the opening of the first commercial blood bank, there were a number of unsuccessful attempts to eliminate the sharp areas of disagreement between the pathologists, the Medical Society, and other groups with respect to control over the proposed bank.[80] It is apparent that the Medical Society desired to retain control over the bank to the exclusion of other groups. The Red Cross was not asked to participate as a group. Although some hospital administrators attended the December 11, 1953, organizational meeting and a few prior ones, they were given no voice between that date and November of 1954,[81] when they were suddenly asked to sign an agreement of participation.[82] There is some indication of resentment by individuals connected with the Hospital Association at being so excluded.[83]

On December 6, 1954, Leslie Reid, the administrator of St.

[74] *Ibid.*
[75] RX 329(F).
[76] RX 329(L).
[77] RX 329(E) and (F).
[78] RX 329.
[79] RX 329(Z-3).
[80] See RX 161.
[81] Tr. 8488, 8493; RX 161(b); CX 166 (b).
[82] Tr. 8491-92; RX 161(b).
[83] See RX 161(b).

Luke's Hospital suggested by letter to Dr. Carroll Hungate, a pathologist and the president of Community, that the entire blood bank proposal be formally submitted to the Hospital Association for its consideration.[84] Hungate extended an invitation to Bishop DeLapp, president of the Association, to meet with representatives of Community.[85] DeLapp asked the chairman of the Association's Administrative Council to appoint a special Blood Bank Committee which would report to the Council.[86] That committee met on January 4, 1955, with representatives of Community. Various operational problems were discussed, including the processing and responsibility fees. It was generally agreed that a community bank would not decrease the current cost of blood to the patient and would probably even increase it, but that this disadvantage was counterbalanced by the assurance that such a bank would have blood available when needed.[87] One hospital representative noted that there was no hospital representative on the Board of Directors of Community.[88] Hungate replied that selection of board members was not yet complete and he felt sure that a hospital administrator would be appointed. After Community's representatives left the meeting, the Hospital Association's committee continued discussion. The committee was of the opinion that the hospital blood banks were adequately supplying currently required blood and that there was no compelling need, or, for that matter, any particular advantage in establishing a central bank.[89] The committee concluded that more study was necessary before definitive action could be recommended.[90] This and the other conclusions were conveyed to the Administrative Council of the Association on January 12, 1955, which agreed that the need for a central bank was not acute. The fact that the formation of such a bank would not permit hospitals to release any technical personnel then employed, that such a bank would result in higher charges to patients and the present efficient operation of hospital banks were important factors in this consideration. The Council decided that additional study was needed.[91]

The Hospital Association's Blood Bank Committee continued its study in meetings held on January 20, February 2, and Febru-

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[84] RX 161.
[85] RX 161, 361.
[86] Tr. 5472, 8488–89; RX 161 (b), 362.
[87] CX 165, p. 3.
[88] *Id.*, at p. 4.
[89] *Ibid.*
[90] *Id.*, at p. 5; RX 362, 363.
[91] CX 166.

ary 22, 1955.[92] At the first of these meetings, there was discussion of the fact that the Medical Society through Dr. Hungate, was employing a "forcing action" to extract support from the Association's Blood Bank Committee by scheduling a public meeting and inviting hospitals without notifying or inviting the committee. It decided to send a special delivery letter to Dr. Hungate stating that the committee was the established group to deal with the project and that it had not had sufficient time to study the matter.[93] Dr. Helwig, the pathologist at St. Luke's attended the last meeting and indicated his opposition and that of St. Luke's staff to a central blood bank, because of the higher charge for blood and the fact that the hospitals would not be able to reduce their staffs of technologists. The committee as a whole felt that the probability of increased costs made the project undesirable. However, it was decided that a final decision would be postponed until after the Medical Society had conferred with its executive council. If a decision was made to drop the project, a carefully worded joint statement stressing the pirmary reason—increased costs—would be issued to the press.[94] These conclusions were reported to a meeting of the Administrative Council on February 23, 1955.[95]

No further steps were taken to iron out the areas of disagreement between the Hospital Association and the Medical Society until after the commercial bank opened in May of 1955, and each group acted independently of the other until that time. On March 17, 1955, Dr. Hungate of the Medical Society wrote a letter to Community Studies, Inc., an independent research and study group, requesting information relative to the cost of a survey of Kansas City blood needs.[96] Reid, the chairman of the Hospital Association's Blood Bank Committee, commented briefly at a meeting of the Administrative Council on March 23, 1955, on the past negotiations between the committee and the Medical Society and stated that the project was currently in *status quo*.[97] The minutes of that meeting show that the April meeting of the Hospital Association's Administrative Council was cancelled, so this group did not meet again until after the opening of the commercial bank. On March 24, 1955, the Hospital Association's Committee on Association Projects met and reviewed the history of negotiations between the Association and the Medical Society. It was

[92] CX 167, 168, 169.
[93] CX 167.
[94] CX 169.
[95] CX 170.
[96] RX 365.
[97] CX 171(b).

noted that the Medical Society, for reasons unknown, had rejected all Red Cross offers of cooperation.[98] The committee decided to recommend to the Association's Board of Directors that further study be given to the project.

The foregoing summary of events occurring prior to the opening of the commercial bank is significant because it contrasts dramatically with the spurt of cooperation beginning immediately after the commercial bank opened. Quite clearly, the above discussion shows that representatives of the Hospital Association and some of the pathologists saw no urgent need for a central bank and felt that little was to be gained by proceeding with the project. Many were of the opinion that the probability of increased costs to the patient offset whatever advantages were offered by a central bank. The pathologists were not in agreement with the other members of the Medical Society. Joint negotiations between the Hospital Association and the Medical Society had yielded little and these two groups were poles apart in their thinking regarding the feasibility of the central bank. The failure to achieve a meeting of minds had culminated in the eventual cessation of joint meetings in February. As characterized by Reid, the chairman of the Hospital Association's Blood Bank Committee, the blood bank project was in *status quo* in March of 1955,[99] and this project does not appear to have been the subject of active discussion in May when the commercial bank opened. Moreover, the Medical Society, through its reluctance to include the Red Cross in its plans for a central bank in any significant role and its grudging acceptance of the Hospital Association's participation had manifested an intention to exercise control over any central bank which might be established. In addition, Dr. Helwig, pathologist at St. Luke's Hospital, stated to a Federal Trade Commission attorney-investigator in 1956 that the Society of Pathologists at a meeting approximately two years earlier had stated in a resolution their preference for using replacement donors rather than obtaining blood from commercial blood banks. The reason assigned for this preference was disapproval of the purchase and sale of human blood, but the resolution indicated that commercial blood "should be used in emergencies."[100]

[98] CX 585.

[99] CX 171. Initial Decision, Findings of Fact, par. 48.

[100] The attorney-investigator's report, which was admitted in evidence without objection, as CX 598, contained the following paragraph:

"Informant stated that he belongs to both the Kansas City and the Missouri Pathological Societies. About two years ago at a meeting of the Kansas City Pathological Society he said there was drawn up a resolution stating the Association's preference for using

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The impending opening of the first commercial blood bank was brought to the attention of the Kansas City pathologists when Dr. Victor Buhler, the Missouri representative to the American Association of Blood Banks (AABB)[101] received a copy of a letter dated April 20, 1955, written by Marjorie Saunders, secretary of AABB, to Mrs. Bass, the administrator of the commercial bank, suggesting that Mrs. Bass contact Dr. Buhler with respect to her request for institutional membership.[102] Mrs. Bass invited Dr. Buhler in a letter dated May 10, 1955, to visit and inspect the bank's facilities.[103] Dr. Buhler also received a phone call from Dr. J. W. Graham, medical director of the commercial bank, concerning its opening. In his conversation with Graham, Buhler expressed vehement opposition to the commercial bank, apparently predicated primarily upon his belief that buying and selling blood was morally wrong [104] and secondarily upon the fact that Graham was not a specialist in blood banking.[105] Subsequently, Mrs. Bass personally requested Buhler to inspect the bank.[106] Shortly thereafter, Dr. Buhler and Dr. Kerr, a pathologist at St. Joseph's Hospital, visited the commercial bank and were given a guided tour of its facilities by Mr. and Mrs. Bass.[107] Although Dr. Buhler denies it,[108] Mr. Bass testified that one of the two pathologists stated

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replacement donors rather than getting blood from commercial blood banks because the Association was not in accord with traffic in human blood. The resolution stated, however, that commercial blood should be used in emergencies. He said that he knows of no one who has tried to 'do in' the local commercial blood bank and that he knows of no conspiracy against it and no concerted action to restrain its trade in any way."

[101] The American Association of Blood Banks, a national nonprofit association, provides technical information for and regularly conducts inspections of blood banks in an effort to improve methods and quality. See CX 25, 26; Tr. 3222–27, 5676.

[102] Tr. 7984–85; CX 13. From 1955 until 1959, commercial blood banks were not admitted to institutional membership in AABB. Between 1959 and 1961, commercial blood banks could be admitted to membership if approved or endorsed by the local medical society. After 1961, commercial blood banks were again denied institutional membership. CX 25, 26; Tr. 4885, 5885. Neither of the commercial blood banks in Kansas City were admitted as institutional members. See CX 15–22, 28–32.

[103] CX 14; Tr. 7984.

[104] Tr. 7985–88. Buhler's testimony on this point is as follows:

" . . . I was called to the phone and Dr. Graham greeted me, announced who he was, and asked if I had heard that there was a new blood bank that had been established in Kansas City. I announced that I had. The best I can recall, he says, 'Isn't that just wonderful?' And I said, 'No, it is terrible.' He said, 'Oh, is that so?' and I said, 'Yes.' And the content of my conversation from there on, I don't recall exactly, but I do remember telling Dr. Graham that I felt that it was morally wrong to buy and sell living human tissue for profit and I didn't feel that a commercial blood bank would be one in which I would look upon with great favor . . . ." Tr. 7986. See also fn. 184, *infra*.

[105] Tr. 7986–87.

[106] Tr. 7991.

[107] Tr. 7992–98.

[108] Tr. 7998.

that "they had been able to keep commercial blood banks up to this time out of Kansas City."[109] Buhler reported his findings to Dr. Angelo Lapi, a pathologist at St. Mary's Hospital, and Dr. Hilliard Cohen, a pathologist at Menorah Medical Center.[110] On May 17, 1955, the commercial bank mailed letters to a number of physicians and hospital administrators announcing its opening.[111]

The meeting of the Kansas City Society of Pathologists on May 18, 1955, is characterized by complaint counsel and the examiner as the genesis of the combination charged in the complaint.[112] At this meeting, Dr. Kerr reported on the newly formed commercial bank, referred to as the Jackson County Blood Bank. Since Kerr made the report, it is probable that Buhler's and Kerr's inspection of its facilities had been conducted prior to this date. After discussing both the commercial bank and the proposed community bank, Kerr proposed that there be a meeting between the pathologists and the hospital administrators under the auspices of the Hospital Association to proceed with plans for the community bank. The motion, which Cohen seconded, was passed.[113] The fact that a formal motion was required to institute cooperation between the pathologists and the Association supports the examiner's finding that the central bank project was not being actively pursued when the commercial bank opened. Moreover, such action contrasts with the past positions of the pathologists, some of whom had not been in favor of a central bank [114] and most of whom had been reluctant to cooperate either with the Hospital Association or the Medical Society.[115] In addition, the pathologists established at this meeting a loose federation among the existing hospital blood banks which would become effective on May 23,

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[109] Tr. 6883.

[110] Tr. 7998–8000.

[111] Tr. 6756, 6761; RX 276.

[112] While there is no list of all who attended this meeting, the transcript shows that the following pathologists were present—Buhler, Kerr, Hill, Cohen, Lapi, and Firminger (Tr. 8074–76).

[113] Tr. 8075.

[114] Tr. 4533.

[115] The earlier refusal of the pathologists to cooperate with the remainder of the Medical Society is graphically illustrated by the following colloquy between respondents' counsel and Dr. Philip L. Byers, a witness for respondents:

Q. Did it subsequently develop in the discussions between members of the medical profession that the lack of having perhaps consulted with and planned in advance with members who were pathologists have any effect upon the community blood bank program?

A. Would you restate your question?

Q. Did that lack of perhaps prior consultation with pathologists have anything to do subsequently with the development of the community blood bank program in the Kansas City area?

A. Well, yes, I think it speaks for itself. There wasn't a pathologist who contributed

1955.[116] Under this plan, one hospital would serve as a "clearing house" each week and would keep a record of the various types of blood available at all other local hospital blood banks. When one bank required a particular type which it did not have in stock, it could call the hospital then serving as the "clearing house" and determine immediately where such blood could be obtained, instead of calling each hospital blood bank individually to obtain this information.[117] At the May 25, 1955,[118] meeting of the Administrative Council of the Hospital Association, Reid, the chairman of the Blood Bank Committee, reported that he had been approached by a private commercial blood bank about which little was known except that it was not yet approved by the National Institutes of Health.[119] As was the case at the meeting of the Society of Pathologists, the improved reciprocity system among the hospital blood banks was described in connection with the discussion of the commercial bank. The examiner found and we agree that the reciprocity plan reduced the possibility that one of the hospital banks would be unable to locate needed blood at another hospital bank and thus reduced the possibility that blood would be purchased from commercial sources.[120]

On June 8, 1955, a representative of the Society of Pathologists invited the Hospital Association to meet with them to discuss blood problems.[121] At the June 21, 1955, meeting of the Hospital Association's Board of Directors, Dr. Kerr announced the resumption of joint efforts to establish a central bank when he stated that the pathologists were meeting with the Administrative Council of the Association on the next day to discuss the issue.[122] Several pathologists attended the June 22, 1955, meeting of the Administrative Council.[123] Firminger summarized the past efforts and indicated that the program had come to a stalemate, primarily because the Medical Society had not included the pathologists and hospital administrators in all phases of the planning. In addi-

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one single dime to Jackson County Medical Society's efforts to get the Community Blood Bank going. I think that question is easily answered. There wasn't a pathologist, the record will show it, who contributed one single dime out of his own pocket to getting the Community Blood Bank on its feet. (Tr. 4295–96.)

[116] Tr. 8077.

[117] Tr. 8076.

[118] CX 172.

[119] None of the Kansas City hospital blood banks were licensed by NIH at this time. See Tr. 8004–07; RX 315.

[120] Initial Decision, Findings of Fact, par. 67.

[121] See RX 155.

[122] RX 157.

[123] Firminger, president of the Kansas City Society of Pathologists; Kerr; Cohen; Buhler; and Hill. (CX 173.)

tion, he stated that the pathologists would not want to surrender the full responsibility of blood banking to a central bank. Kerr made a statement deploring the national trend toward the purchase and sale of blood, and indicated that acceptance of a central bank by pathologists would depend on its personnel. Others reiterated past objections to the central bank, such as the probability of increased cost, duplication of effort, and the belief that the hospital banks were adequate. The Association agreed to cooperate with Community Studies, Inc., the independent survey and research group which had been engaged by the Medical Society in July of 1955 to conduct a study of the blood needs of the area.

The Society of Pathologists met on September 2, 1955, and considered a proposal by Dr. Lapi for an interhospital blood bank.[124] The plan, which was presented by Lapi to the Administrative Council of the Hospital Association at its September 28, 1955, meeting,[125] provided for a central clearing house or registry, with retention of the individual hospital's drawing and processing facilities.[126] The blood would become the joint property of all the hospitals so that individuals could donate blood at one hospital, but receive credit at others. To avoid the criticism of putting a price tag on blood, there were to be no replacement fees. The Administrative Council felt that it would be inappropriate to take action before the Community Studies Report had been completed. However, it was decided that Community Studies would be requested to complete the report in time for the November meeting.[127]

Francis H. Bass, business manager and one of the owners of the commercial bank, mailed a letter, dated October 7, 1955, to various labor unions describing a "Blood Deposit Program" designed, according to the letter, to create advance deposits, save participants money, and protect those who were unable to donate.[128] The commercial bank also sent a letter to a number of physicians, dated October 7, 1955, describing its various services.[129] On the same date, the Society of Pathologists again discussed Lapi's proposal for a cooperative community bank. Further action was delayed, pending receipt of the Community Studies Report.[130] While there is no indication that this meeting was a reaction to the com-

[124] Tr. 8079.
[125] CX 174.
[126] See CX 174(G), (H).
[127] CX 174(C).
[128] RX 289.
[129] CX 5.
[130] Tr. 8080.

mercial bank's letters, a meeting of the Administrative Council, announced through a letter dated October 20, 1955, was clearly such a reaction. The letter stated:

> Action will need to be taken on the position of our hospitals in relation to the Mid-West Blood Bank and Plasma Center [the commercial bank] now operating in Kansas City. Inquiries from industry and labor groups regarding this commercial bank's "blood deposit program" make it essential that our stand be well defined. Please come prepared to discuss it fully.[131]

The minutes reveal that commercial blood banks and the hospitals' position toward them was a topic of discussion at the October 26, 1955, meeting of the Council. Although it was agreed that the position of each hospital would have to be decided individually rather than by the Association, the minutes contain the following paragraph:

> It was brought out in discussion that there was a serious matter of public relations involved, since commercial banks were properly licensed by NIH, and a failure to accept blood from them would create a real problem. There was general discussion as to whether an investigation should be made of a specific bank, but since Dr. Bryant stated this would be covered in the report of his research study, such action would not be necessary. It was agreed that the Council could stand on the statement of awaiting the Community Studies report before taking any action in the matter of blood banking.[132]

The stenographic notes of Susan Jenkins, executive director of the Association, record some of the statements made at this meeting.[133] The letter written by the commercial bank to the labor unions [134] was read to the group. William B. Schaffrath, administrator of Menorah Medical Center, stated:

> Will put ourselves in an awkward position if we refuse to accept blood from them. Have not a leg to stand on. If no one else comes up with a better program.

Burns, Commissioner of Hospitals, suggested asking for the qualifications of the personnel of the commercial bank and, later in the discussion, raised the question of whether the National Institutes of Health could be asked to supply the qualitifactions of the banks. He prefaced this last suggestion by stating: "Laying aside prejudice . . . where do we stand legally on using this bank?" Reid indicated that they were awaiting the Community Studies Report and that the issue was "for each hospital to decide." Mol-

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[131] CX 175(a).
[132] CX 175(d), (e).
[133] See CX 190.
[134] RX 289.

gren, the administrator of the University of Kansas Medical Center, noted that they should state that they ". . . are making available a wider community effort." The stenographic transcript ends with the statement "no action." [135]

This evidence shows that a number of hospital representatives discussed the question of taking some action with respect to the commercial bank. The statement referring to "prejudice" as well as the general tenor of all of the remarks show a definite bias against the commercial bank, and there is a strong implication that those present felt that the only real question was how the use of its blood was to be avoided without being put in an "awkward position." Both Schaffrath's and Molgren's statements indicate that the possibility of establishing a community bank is to be used as an excuse to reject the commercial bank's blood. While no action was taken at this time in the name of the Administrative Council, it is clear that most of those present were opposed to using the commercial bank's blood and that they were waiting for the Community Studies Report, which would contain additional information on the instant commercial bank, before considering further action.

The record shows a consistent pattern of refusals to use blood from the local commercial bank during this period. At some time during the summer of 1955, Dr. Buhler, the pathologist at General Hospital, instructed the technologist there not to accept blood from the commercial bank as replacement,[136] even though this hospital sometimes had difficulty replenishing its stock and found it necessary to purchase blood from other sources.[137] In the fall of 1955, the blood bank at St. Mary's Hospital, supervised by Dr. Lapi, refused to accept blood from the commercial bank on several occasions when the type required was unavailable at other local hospital banks.[138] One incident occurred while a Mr. Goddard, a patient at St. Mary's Hospital was scheduled for an operation which was "elective" in the sense that it was not necessary to operate immediately. Another patient had depleted the supply of O negative blood, Goodard's type, and the hospital requested Goddard's relatives to acquire the blood needed in advance of his operation. A friend recruited by Mrs. Goddard inadvertently made a donation at the commercial bank rather than at the hospital. The hospital refused to accept this pint or others of the same

[135] CX 190.
[136] Tr. 8002–03.
[137] See CX 173(e).
[138] Tr. 7529–33; CX 587; RX 287.

type available at the commercial bank, even though blood of the same type was not currently available from other hospitals. The first paragraph and the last two paragraphs of a letter written by Susan Jenkins, executive director of the Hospital Association, describing this incident and addressed to Leslie Reid, chairman of the Hospital Association's Blood Banking Committee, state:

> We have run up against trouble again with the Mid-West Blood Bank and this time with the Better Business Bureau of Kansas City, Missouri. The Mid-West Blood Bank has now been advertising in the STAR, and I think we may expect a pickup of these trouble situations.
>
> * * * * * * *
>
> I have a feeling we are just beginning to hear from this blood bank situation, and incidentally, I omitted a pertinent point as to how the whole St. Mary's thing came up. The wife of the patient in question who needed the nine units for elective surgery was seeking donors. One of her donors that she got was instructed to go to St. Mary's blood bank but he apparently lived just down the street from this Mid-West bank and went there instead and said he wanted to give a pint of blood and gave the name of the patient and the hospital. This is what brought the situation to a head. If he had gone to St. Mary's as he was requested to do, it probably wouldn't have come up.
>
> *I can assure you that I await with a deep and sincere interest Doctor Bryant's report on the blood bank situation!* In the meantime, Mr. Husser of the Better Business Bureau is going to document what he says is a big number of instances where people have complained to them that hospitals withheld blood from patients or put a burden of getting blood on the patient's family because they themselves were completely unable to meet the need.[139] (Emphasis supplied.)

The letter as a whole expresses the assumption that there are to be no dealings with the commercial bank and its author seems primarily concerned with the problem of avoiding such dealings without incurring public disfavor or legal liability.

The minutes of the November 18, 1955, meeting of the Board of Directors of the North Central District Blood Bank Clearing House [140] contain the following paragraph:

> *REPORT ON THE MID-WEST BLOOD BANK, KANSAS CITY, MISSOURI*
>
> A detailed report was presented to the Board by Dr. Angelo Lapi, on the

[139] CX 587.

[140] The North Central District Blood Bank Clearing House, located in Chicago, Illinois, is a regional clearing house which began operation on March 21, 1955 (Tr. 3188). The purpose of the clearing house system is to enable banks located in different cities or districts to exchange blood or blood credits among themselves with a minimum of difficulty (Tr. 498, 1061, 3854–55). The American Association of Blood Banks has operated the clearing house system since August of 1960 (Tr. 1086–87, 2948, 3189, 5702). Although commercial blood banks are not admitted as institutional members of AABB, such banks may join and utilize the facilities of the clearing house system (Tr. 1087).

activities of this blood bank. Action on withdrawing their membership in the clearing house was deferred.[141]

Dr. Lapi, the pathologist at St. Mary's Hospital in Kansas City, and, as previously shown, a pathologist who had refused to utilize blood from the commercial bank, was the Missouri representative to the clearing house. An excerpt of the minutes of the above meeting, prepared by Ardyth Cobb, secretary of the clearing house, contains the following:

REPORT BY DR. ANGELO LAPI RE MID-WEST BLOOD BANK KANSAS CITY, MISSOURI:

It is a blood bank established for profit and they (the owners) make no excuse about that. That is its avowed purpose—to make money.

They have a medical director who is a 78 year old practitioner in town. His only experience with blood banking is with this blood bank and they have made less than minimal effort to enlist the cooperation of the city hospitals but rather have resorted to methods which are short of coercion and they have used harassing techniques, telephone calls, threats. They are allied with the Better Business Bureau. A man in the division called the families of several of our patients and asked if they needed legal aid to sue our hospital and several of us have been threatened with suit and *the hospitals finally got together in the area and issued a statement that we would buy blood from them only in an emergency but we did not feel we were forced to go beyond that.* We have tried to stay within regular bounds and to respect public opinion and we do not want anyone to feel that they are being denied blood because we will not buy from them. (Emphasis supplied.)[142]

Lapi admits making all the statements attributed to him by Ardyth Cobb's excerpt except the italicized portion.[143] However, Dr. Van Pernis, president of the clearing house, testified that he had heard Lapi make such statements at some time.[144] Under later questioning by respondents' counsel, Van Pernis denied that he had ever heard Lapi make such a statement,[145] but we deem this denial unconvincing. As a result, we think that there is a sufficient basis for concluding that Lapi in fact made a statement at the November 18, 1955, meeting of the Clearing House to the effect that the hospitals in the Kansas City area had "gotten together" and indicated that they would buy blood from the commercial bank "only in an emergency." While this statement does not conclusively establish the existence of an agreement to use commercial blood only in emergencies, it may be considered in

[141] CX 160.
[142] CX 158.
[143] Tr. 7619.
[144] Tr. 554–557.
[145] Tr. 8862.

conjunction with the other evidence tending to establish that an agreement to hinder the development of the commercial bank existed among those most intimately connected with established blood banking in Kansas City.[146]

Moreover, where there is evidence of meetings participated in by alleged co-conspirators, such evidence is sufficient to provide a foundation for the introduction of evidence of other acts on the part of one conspirator in furtherance of the conspiracy which are binding on all. *Continental Baking Co.* v. *United States,* 281 F.2d 137 (6th Cir. 1960); *American Tobacco Co.* v. *United States,* 147 F.2d 93, 118 (6th Cir. 1944), *aff'd* 328 U.S. 781 (1946). Here, Lapi attended the May 18, 1955, meeting of the Society of Pathologists at which the commercial bank was specifically discussed, the informal reciprocity system among the local hospitals was established, and plans to reinstate negotiations in connection with a central bank were made.[147] He also attended the September 2, 1955, meeting of the Society of Pathologists and the September 28, 1955, meeting of the Administrative Council of the Hospital Association, at which he presented a plan for a central bank.[148] Although the record does not reveal whether he attended the October 26 meeting of the Administrative Council of the Hospital Association at which the question of the hospitals' position toward the commercial bank was discussed, St. Mary's Hospital, the hospital which he served as pathologist, was represented.[149] In addition, the opinion that the commercial bank should be excluded from participation in the Clearing House was not an isolated opinion held by Lapi and was not of short duration. According to Dr. Van Pernis' testimony, Dr. Lapi, at a meeting of the board of directors of the Clearing House, held on February 20, 1956, moved that legal counsel be obtained to interpret the Clearing House constitution and by-laws in regard to the "Kansas City and Beverly Blood Bank problems." [150] In clarifying what he meant, Van Pernis testified:

> As you realize by now we had been in this dilemma for a good many months because of the variations in opinions, *and some had violent opinions, to bar the Mid-West Blood Bank from participating at all in the clearing house.* The motion was made that we get legal advice to properly interpret our constitu-

[146] As previously noted, the Society of Pathologists had stated a preference at some time prior to the opening of the commercial bank in May of 1955 for using replacement donors rather than obtaining blood from commercial banks, but had indicated that commercial blood "should be used in emergencies." See CX 598.

[147] See fn. 112, *supra.*

[148] Tr. 8079; CX 174.

[149] CX 175.

[150] Tr. 417–418.

tion and by-laws to be sure that we were doing the proper thing.[151] (Emphasis supplied.)

Accordingly, although Lapi testified that he was not representing and could not bind any officially constituted group, such as the Medical Society, the Society of Pathologists, or the Hospital Association in his position as Missouri's representative to the Clearing House,[152] we think there is sufficient basis for concluding that he was generally representing all of those closely associated with established blood banking in Kansas City. In addition, for the reasons stated above, we think that Lapi's participation in the attempt to exclude the commercial bank from the Clearing House may be considered to be an act in furtherance of the conspiracy to hinder the commercial bank's development and is, therefore, binding on all who took part in the conspiracy.

At the November 23, 1955, meeting of the Administrative Council of the Hospital Association, Reid, the chairman of the committee, stated that the Community Studies Report dealing with the blood problems of Kansas City had been completed and would soon be released to the hospitals.[153] On November 28, 1955, the board of directors of Community Blood Bank, the corporate shell which later became the operating community bank, appointed a committee to cooperate with the hospitals in studying the report.[154] This report,[155] which was eagerly anticipated and carefully studied by all groups interested in the formation of the central bank, listed the advantages and disadvantages of several proposed blood bank plans, including the informal reciprocity system then being used by the hospital blood banks. The report stated that one of the major disadvantages of this plan was the fact that a vigorous commercial bank could offer serious competition to individual hospital banks by organizing blood donor clubs and other insurance plans.[156] In discussing the possibility of forming a central bank without Red Cross support, the report indicated that some, but apparently less, competition from commercial banks could be expected.[157] The report concluded that a central bank supported by all interested groups—the physicians, the hospitals, and the Red Cross—should be established. This report was the focal point for all subsequent discussions concerning the forma-

[151] Tr. 419.
[152] Tr. 1095, 7537–38.
[153] CX 176.
[154] CX 378.
[155] CX 244.
[156] CX 244, p. 31.
[157] CX 244, p. 33.

tion of a central bank and, according to Dr. Carroll Hungate, it ultimately caused the "crystallization of opinion among various groups." [158]

Bishop DeLapp, president of the Hospital Association, appointed a committee, referred to as the Spelman Committee, to study the above report and to report to the Hospital Association its conclusions.[159] The committee met on December 15 and December 29, 1955. Doctors Buhler and Firminger, not committee members, were invited to attend the first meeting. Dr. Buhler proposed that a central bank be established, but that its function be essentially supplemental to that of the individual hospital blood banks. He felt that the pathologists and hospital administrators should work out their own program rather than inviting outside participation. Dr. Firminger presented an alternative proposal for a federation of existing hospital banks with a central clearing house or registry, but without central drawing and processing facilities.[160] At the second meeting, Dr. Coffey, one of the committee members, suggested that there should be an evaluation of how much risk or harm, if any, would come from using a commercial bank.[161] Mr. Schuler indicated that the commercial bank should be given some consideration. DeLapp stated that he was opposed to the idea of a commercial bank and Spelman indicated that blood banking should not be a commercial operation. After further discussion, the committee approved the principle of the establishment of a federation of existing hospital banks through a central registry, rather than the establishment of central drawing and processing facilities as recommended by the Community Studies Report. At the annual meeting of the Hospital Association on

[158] Tr. 4533–34. Dr. Hungate's testimony is as follows:

A. There was a divergence of opinion among pathologists. Some wanted a community type blood bank, some did not want to give up their blood banks at the hospital. Then there was this discussion of a federation of hospital blood banks with the authority for operation vested in a separate corporation.

Q. But with hospital blood banks retaining their full operation from donor to transfusion?

A. Oh, yes, that's right.

Q. In the two-year period that you were president [of the Medical Society], were those differences resolved to the point where a single organization could be formed and go ahead?

A. Yes, sir, but this crystallization of opinion among various groups, and I am not speaking only of the medical profession, I am speaking of people of Kansas City, I think that crystallized only after we had requested Community Studies, nationally recognized ethical highly regarded research organization to make a study of the blood needs, both historical and present, in Kansas City, and to come up with a recommendation to the medical profession and the public and the hospitals on just what type of blood bank we should have in Kansas City.

[159] The committee was composed of three hospital trustees, three physicians, and three hospital administrators. Its chairman was Dr. Spelman. Tr. 8498–8501; CX 177, 178.

[160] CX 177.

[161] CX 178.

January 4, 1956, Spelman's motion that the federation plan be approved in principle, with details to be worked out later, was carried unanimously.[162]

The refusals of the hospitals to accept blood supplied by the commercial bank for replacement purposes was preventing the commercial bank from establishing donor clubs during late 1955 and early 1956. During this period, a Mr. Wilbur Harrison, chairman of the blood bank committee of the Central Labor Union in Kansas City, Missouri, considered the possibility of organizing a group blood banking service utilizing the facilities of the commercial bank. The inability of the commercial bank to guarantee that its blood would be accepted by local hospitals caused the labor union to abandon the project.[163] Mr. Gilbert C. Murphy of the Council of Churches of Greater Kansas City prepared a memorandum discussing the possibility of forming a blood supply program with the commercial bank, but noted that "[t]he basic hurdle seems to be the blood committee of the Jackson County Medical Society, which is made up largely of pathologists now employed in the local hospitals." [164] Pursuant to a group contract between Tabernacle Baptist Church and the commercial bank, the secretary of the church attempted to discharge the debt of a member at General Hospital by informing the hospital that the blood replacement for this patient was on deposit at the commercial bank. The blood was not requested.[165]

On January 9, 1956, Kenneth Monroe, the secretary-treasurer of the Kansas City, Missouri, Post Office Employees Hospital Association, wrote a letter to fourteen hospitals informing them that his group had been approached by the commercial bank with reference to a blood supply program. The letter specifically asked whether the hospitals would accept blood from the commercial bank as replacement blood.[166] Monroe testified that the letter was necessary because he had been informed that some hospitals would not accept blood from the commercial bank.[167] Monroe's letter came to the immediate attention of Susan Jenkins, the executive director of the Hospital Association.[168] On the same date, she prepared a letter on Hospital Association stationery which she

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[162] CX 179(E).
[163] Tr. 237–241.
[164] CX 293.
[165] Tr. 2122–2127.
[166] CX 181, 195; Tr. 726–27, 743.
[167] Tr. 728–29.
[168] Tr. 691, 736–39.

sent by special delivery to all Kansas City hospitals.[169] The letter, addressed to Administrators, Member Hospitals, and The Community Blood Bank Committee, and marked "urgent" contained the following paragraph:

> Bishop DeLapp, president of the Association, and Mr. Reid, chairman of the Administrative Council *urge you not to reply to this letter until we can get out to you a suggested statement* that will contain assurance that the Area Hospital Association is to announce very soon its own program for meeting the blood needs of the community. In the meantime, I have already talked with a representative of the postal employees' group and will be talking with Mr. Monroe when I can reach him later today. We believe the group will be very cooperative about waiting for a statement from the Hospital Association if it is not unduly delayed.[170]

Jenkins also talked to Monroe by telephone concerning the letter and told him that the Hospital Association was having a meeting within the near future with reference to establishing a blood program.[171] On January 18, 1956, Jenkins sent a follow-up letter to the hospitals, informing them that discussions were continuing on the establishment of a community bank and that each hospital should determine its own response to Monroe's letter after consultation with legal counsel.[172] Monroe received replies from only three hospitals, none of which gave a definitive answer on whether commercial blood would be accepted as replacement blood.[173] Bruce Dickenson, administrator of Bethany Hospital, indicated that Bethany would continue to operate its own blood bank and would accept commercial blood only in emergencies. William Schaffrath, administrator of Menorah Medical Center and A. Neal Deaver, administrator of The Independence Sanitarium and Hospital, encouraged Monroe to contact Susan Jenkins before entering into any agreement with the commercial bank. As a result, the commercial bank's attempt to establish a donor club with Monroe's group was effectively thwarted.

Although Miss Jenkins testified that she was not instructing the hospitals in her official capacity to take particular action,[174] the fact that both letters were sent out in the name of the Hospital Association and its officers to all of its members and concerned

[169] See CX 182.

[170] *Ibid.* As previously noted, Molgren, administrator of the University of Kansas Medical Center, had stated at the October 26, 1955, meeting of the Administrative Council of the Hospital Association, where the group was considering what action was to be taken with respect to the commercial bank, that the members of the group should indicate that they ". . . are making available a wider community effort." See CX 190.

[171] Tr. 737.

[172] CX 183.

[173] Tr. 732; CX 196–198.

[174] Tr. 693–94.

a matter which had been discussed at scheduled meetings compels the conclusion that the letters constituted official acts of the Association and were intended to be so regarded by the recipients. In any event, Miss Jenkins had attended the October 26, 1955, meeting of the Administrative Council of the Hospital Association when the question of the hospitals' stand with respect to the commercial bank was discussed and at which it was suggested that an excuse such as the one here offered be used by the hospitals.[175] As a result, we think that her letters to the hospitals, obviously designed to provide the hospitals with a plausible excuse for refraining from answering Monroe's questions, can be considered to be acts in furtherance of the conspiracy binding on all conspirators. *Continental Baking Co.* v. *United States, supra; American Tobacco Co.* v. *United States, supra.*

As previously noted, the Hospital Association at its annual meeting on January 4, 1956, had endorsed the federation plan, which provided for the retention of individual hospital blood banks united by a central "clearing house," as the preferable plan for a communtiy blood bank. The Community Studies Report had indicated that a plan of this nature subjected hospital blood banks to severe competition from commercial blood banks through the organization of commercial blood donor clubs.[176] On January 28, 1956, shortly after the Jenkins-Monroe incident, which was the commercial bank's strongest bid to establish a large donor club, Miss Jenkins called an informal meeting of the hospital administrators and pathologists.[177] In an introductory statement,[178] she reviewed past negotiations, mentioned the fact that the Federal Trade Commission attorney was investigating the situation, and echoed his statement that the complaints ". . . were in no sense trivial nor promoted by one carping critic." [179] Those present then weighed the advantages and disadvantages of the federation plan against those of the central bank plan, which would entail replacement of the individual hospital banks by a large central bank. At the conclusion of the discussion, sixteen of

[175] See fn. 170, *supra.*

[176] Two of the four disadvantages of the "Hospital Integration Plan" listed by the Community Studies Report are as follows:

(1) The development and use of insurance schemes, such as blood donor groups, appear to be difficult, if not impossible, under this arrangement.

(2) A vigorous commercial blood bank could offer serious competition to individual hospital blood banks by organizing blood-donor and other insurance-type groups. (CX 244, p. 31.)

[177] RX 162.

[178] RX 163.

[179] RX 163(H).

the eighteen who voted favored the formation of a central bank.[180] By March 12, 1956, all interested groups in Kansas City had concurred in this conclusion.[181] While there is nothing in the record to indicate that the Jenkins-Monroe incident was discussed at any of the meetings between January 28 and March 12, it is significant that the Hospital Association completely reversed the stand it had taken prior to this incident favoring the federation plan, a plan which the Community Studies Report characterized as subject to competition from commercial banks' donor clubs, and approved instead the central bank plan, a plan which the Community Studies Report described as less subject to such competition.

Subsequent meetings of the Hospital Association, its Administrative Council, and the corporate meetings of the Medical Society's nonoperating Community Blood Bank are devoid of specific reference to the commercial banks.[182] Although there was still some disagreement over details, negotiations continued on a regular basis. In August of 1957, before all areas of disagreement had been eliminated, Bass, the business manager of the commercial bank, and his attorney, a Mr. Howell, paid a visit to St. Joseph's Hospital and conferred with Doctors Buhler, Kerr, and Mantz, all of whom are pathologists.[183] Bass stated that his bank had not been accepted by the medical community, perhaps because of its medical direction, and inquired what could be done to make it "acceptable." He also asked whether one of these pathologists would consider acting as medical director. Buhler replied that he would not act as director of a commercial bank which purchased blood from donors and resold it at a profit. However, he indicated that if Bass established a nonprofit blood bank which relied on voluntary donors, he would consider acting as medical director.[184] According to Buhler, such a bank would have to derive its operating income from processing fees. While Buhler did not guarantee that the other hospitals would accept blood from such a bank, he advised Bass to discuss the matter with other pathologists. Howell testified that the three pathologists indicated that

[180] RX 162(E).

[181] Initial Decision, Findings of Fact, par. 130.

[182] See Initial Decision, Findings of Fact, pars. 131–150 for a detailed discussion of these meetings.

[183] Tr. 870–74, 8018–23; RX 6.

[184] Buhler's testimony on this point is as follows:

"Yes, he indicated that this would not be difficult to do, that he felt that he could establish a not-for-profit corporation, and I told him that if he did establish such a corporation with the intent that he would use voluntary donations, would discard and abandon the idea of buying and selling human living tissue for profit, that I would consider being the medical director." (Tr. 8020.)

there was nothing wrong with the blood from the commercial bank.[185] Later in the fall of 1957, Bass approached Dr. Bridgens at Independence Sanitarium and asked whether he would patronize such a nonprofit blood bank. Bridgens stated that he would give it "serious consideration." [186]

During late 1957 and early 1958, the groups working on the establishment of Community concluded their negotiations. The result was a central bank designed to take over all drawing and processing operations then performed by the hospital blood banks. The bank's corporate membership of thirty-nine was comprised of thirteen members of the Medical Society, thirteen representatives of the Hospital Association, and thirteen individuals representing the general public. Each of these groups elected four individuals to serve on the twelve-man board of directors. A technical advisory committee, composed of all of the pathologists who headed hospital blood banks, exercised complete control over the technical operation of the bank.[187] There is considerable indication that had the pathologists not been granted such authority, they would not have extended approval to the new bank.[188]

Both Community and a proposed nonprofit blood bank to be operated by Mr. and Mrs. Bass, using the name Community Blood Bank and Donor Service, sought membership in the regional Clearing House during March of 1958. The similarity in names caused the president of the Clearing House to request Dr. Lapi, the Missouri representative, for clarification and a recommendation.[189] Although membership in the American Association of Blood Banks was not a prerequisite to membership in the Clearing House,[190] Dr. Lapi replied as follows:

> The question of whether Mrs. Bass' application should be approved or not seems to me to depend upon whether or not her bank qualifies for membership in the A.A.B.B.
>
> * * * * * * *
>
> It is my opinion that this proposed new nonprofit blood bank operated by Mrs. Bass is nothing more than a dummy corporation to confuse the public just as you were by the similar names. It was probably designed to rate prior listing in the telephone directory and by use of the word "Community" to divert unsuspecting donors from the other bank. The simultaneous appearance of two community blood banks was probably not fortuitous.

[185] Tr. 916–18.

[186] Tr. 7703–04.

[187] See CX 383, 384, 397; RX 190, 196.

[188] Tr. 8718–19.

[189] RX 326–327.

[190] Mid-West, the first commercial blood bank, had been granted membership in the Clearing House, even though not admitted to institutional membership in A.A.B.B. See also Tr. 1081; RX 326.

I do not hesitate to recommend that the Community Blood Bank and Donor Service, Inc. of 1113 Grand Avenue be refused membership in the clearing house until they can show membership in the A.A.B.B.[191]

C

Shortly after the Community Blood Bank began operation on April 3, 1958, the majority of the large local hospitals entered into blood supply contracts with it and thereupon ceased operating their own blood banks.[192] The contract does not purport to require that the participating hospitals obtain all of the blood needed for transfusions from Community,[193] but the contracting hospitals consider it to be their exclusive source and apparently make no effort to utilize other sources.[194] As will subsequently be demonstrated, the interpretation given to this contract by Community and the hospitals, and Community's interpretation of the rules of the North Central Blood Bank Clearing House have been used effectively as excuses to reject blood supplied by the commercial banks.

Pursuant to the hospitals' contract with Community, title to blood ordered by the hospitals remains in Community until such time as the blood is used in a transfusion. At that point, the hospital becomes liable for a replacement fee of $25 and bills the patient for this amount. The patient is also charged two processing fees—one of $9 which is paid to Community and another which varies in amount and compensates the hospital for the final cross-matching and any other tests performed. The responsibility fee of $25 is designed to encourage the patient to replace blood and thus can be eliminated. Community's $9 processing fee can also be eliminated by the donation of a second pint of blood. However, the hospital's contract with Community states that the only blood which can be used as replacement blood for the purpose of discharging either the responsibility fee or the processing fee is blood drawn under Community's supervision.[195] Thus, the patient can eliminate these charges only by donations at Community or at one of its approved drawing stations. Credit may also be obtained if the patient is a member of one of Community's own blood savings or blood insurance clubs.

Patients who have entered into blood replacement contracts

[191] RX 328.
[192] Initial Decision, Findings of Fact, par. 1(f).
[193] CX 233.
[194] See Initial Decision, Findings of Fact, par. 158.
[195] CX 233(b).

with the commercial banks are not permitted to satisfy Community's responsibility fee or its processing fee by having one of the commercial banks supply pints of blood to the hospital which has billed them for the fee. When the commercial banks attempt to make deliveries of blood to the local hospitals in discharge of a patient's fees, the hospitals usually invoke their contract with Community, stating that its terms require replacement at Community. Community consistently refuses to accept direct blood deliveries from the commercial banks in discharge of its responsibility fees and, in so refusing, takes the position that the commercial banks must send credits through the Clearing House in Community's favor.[196]

The purpose of the Clearing House is to facilitate the transfer of blood and credits among member banks located in different cities. It is contemplated that banks needing blood will order it through the Clearing House machinery and those forwarding credits to other banks will do so in the same manner. Banks are never indebted to each other, but instead are indebted to the Clearing House. At the end of each month, the Clearing House determines each bank's balance and requires settlement. Banks with credits are usually permitted to receive at their election either direct shipments of blood from banks indebted to the Clearing House or payment for the blood by the Clearing House. Banks indebted to the Clearing House are also permitted, whenever possible, to elect to settle their accounts either by a direct shipment of blood to a creditor bank or by payment to the Clearing House.[197] To keep this machinery in operation, the rules provide that all transactions shall be channeled through the Clearing House.[198] Although member banks are discouraged from dealing directly with each other, those which have mutual exchange agreements antedating their membership in the Clearing House may transfer blood and blood credits directly instead of utilizing the Clearing House machinery.[199]

Community did not enter into a direct exchange agreement with either commercial bank prior to joining the Clearing House,[200] and, as a result, a literal application of the rules required that any exchanges of blood or credits between them be

[196] Initial Decision, Findings of Fact, pars. 159–160.

[197] Tr. 5769; RX 88.

[198] CX 529; RX 60, 61.

[199] Tr. 433; RX 85.

[200] Prior to its opening, Community signed mutual exchange agreements with the Red Cross and accepts direct deliveries of blood from the Red Cross. (Tr. 2573, 2578, 2643, 2734–35.)

channeled through the Clearing House. An employee of the commercial banks testified that they were reluctant to send credits through the Clearing House, because they usually were requested to make a monetary settlement rather than to supply blood in settlement of their account. For example, a patient having a blood assurance or a blood provider contract with one of the commercial banks would receive a bill from the hospital of $25 for Community's responsibility fee and $9 for its processing fee. If friends or relatives of the patient donated two pints of blood at one of Community's drawing stations, both charges were removed. However, when the patient requested one of the commercial banks to supply two pints to Community to remove the charges, Community would not accept direct delivery. Instead, it insisted that credits be transferred through the Clearing House in its favor. At the end of the month, the commercial banks were not asked to supply blood to Community to settle the indebtedness, but were requested to pay the required Clearing House fees —$14 plus a 35-cent service charge for each pint. When it sent two credits in order to discharge the patient's entire obligation to Community, it was required to pay two $14 fees and two 35-cent fees [201]—a total of $28.70. Since the commercial banks' contracts with the patients provided that blood would be supplied when requested, the commercial banks were effectively prevented from performing their function as suppliers of blood.

If all banks in the Clearing House system were strictly required to adhere to its rules, Community's refusals to accept direct shipments from the local commercial banks after it joined the Clearing House might, as respondents argue, be the result of this rule rather than indicative of the existence of an agreement to hamper the commercial banks' development. However, the record shows a number of instances of direct transfers of blood between member banks which, under a literal interpretation of the rules, would not have been permitted. There was testimony by the former executive secretary of the North Central District Blood Bank Clearing House that a number of blood banks "by-passed" the Clearing House in their dealings with each other even though they had not entered into mutual exchange agreements prior to becoming members.[202] On several occasions, Community itself ordered blood directly from other blood banks even though it had

[201] Tr. 3241–47, 3450–51, 3975–76, 6199–6204, 6506.

[202] Tr. 3214–15.

no prior mutual exchange agreements.[203] Moreover, the Clearing House, through its executive secretary, requested the commercial banks not to use the Clearing House machinery when shipping large orders to the Mayo Clinic, since the commercial banks always desired payment rather than a return shipment of blood in satisfaction of Mayo's indebtedness.[204]

Despite these general deviations from the rule that all transactions between member banks should be channeled through the Clearing House unless the banks had entered into mutual exchange agreements prior to becoming members, Community strictly construed this rule against the instant commercial blood banks on all occasions and consistently refused to accept direct shipments from them. Community's insistence that all transactions involving the commercial banks be sent through the Clearing House machinery and its refusals to accept direct deliveries from them continued from April of 1958 through the time of the hearings in this case. This policy has effectively prevented the commercial banks from supplying the major hospitals in Kansas City, most of which have contracts with Community and are members of the Hospital Association, and has hampered efforts to form donor clubs and sell blood assurance or blood provider contracts.[205]

IV

Respondents, while recognizing the validity of the legal principle that a combination in restraint of trade need not be established by direct proof, take the position that the evidence of record establishes at most parallel action by each respondent explainable by reference to individual beliefs and personal preferences. Some of the respondent pathologists and hospital administrators testified that they possessed a general belief that the buy-

[203] Initial Decision, Findings of Fact, pars. 164–169.

[204] Tr. 5792; CX 214; RX 233–236.

[205] The commercial banks have supplied the Kansas City Veterans Administration Hospital and a few of the smaller hospitals located in and near Kansas City, most of which are not members of the Hospital Association or do not have contracts with Community. Tr. 904–05, 5542, 5548. In addition, World Blood Bank, the second of the two commercial blood banks, constituted a source of supply for all transfusion blood required by the University of Kansas Medical Center, except that provided by the Red Cross or by other donor clubs, from October 1, 1958, until the expiration of the contract on October 1, 1962. Between October 1, 1958, and June 30, 1963, World supplied approximately 21,600 pints of blood to the Medical Center. On October 1, 1963, the Center entered into a contract with Community, but has continued to receive some of its needed supply of blood from World. Although officials of the Medical Center have expressed no dissatisfaction with the quality of the blood supplied by World, the Medical Center's orders from World have declined since the contract with Community was consummated. See Tr. 3978–95, 4199–4201; CX 458; RX 46, 47.

ing and selling of human blood was morally wrong, or that they were opposed to the national trend toward commercialization of the blood banking field. Others felt that increased commercialization would reduce the amount or quality of blood available, since individuals financially able to do so would tend to purchase insurance policies which would pay responsibility fees, or purchase blood from commercial banks rather than donating their own blood or requesting friends to donate.

Some stated that blood produced by many commercial banks is of inferior quality. This belief is predicated upon the fact that commercial blood banks tend to pay their donors as little as possible in order to maximize their profits on ultimate resale of the blood. Such small payments attract only low income donors, some of whom may be alcoholics or drug addicts. There was extensive testimony that such individuals are more likely to be carriers of serum hepatitis than are voluntary donors and, therefore, that voluntary donors were preferred.[206] Since there is no accurate, scientific test which will detect serum hepatitis in blood, reliance must be placed on the questions asked when the donors are being screened. Respondents take the position that such paid donors will falsify their answers in order to insure that their blood will be accepted and payment will be forthcoming. Thus, they assert that blood from commercial banks is far more likely to carry serum hepatitis than is blood from a nonprofit bank which does not pay its donors.

Respondents also assert that their individual contacts with the instant commercial banks and their employees were unpleasant and that their refusals to deal are attributable to these incidents. Several pathologists testified that the commercial bank's early newspaper advertisements and circulars implied that the local hospitals were charging too much for blood, were unduly profiting from such charges, and that there was significant wastage of outdated blood. These respondents stated that such facts were not true and that their resulting irritation over these advertisements was the basis for their subsequent rejections of the commercial bank's blood.[207] Several testified that they were acquainted with the first medical director of the commercial bank and were aware that he was not a pathologist and had no special training in the blood banking field.[208] Thus, respondents argue that there were

[206] Tr. 3719–20, 3798–99, 4122–23, 7496, 7907, 7937; RX 319.
[207] Tr. 7215–18, 7251–52, 7316–18, 7351–54, 7690–94, 7882–84, 8033–35, 8379.
[208] Tr. 7216–17, 7254–55, 7309–10, 7689, 7768, 7882–83.

numerous reasons for individual opposition to commercial banks generally and to the commercial banks involved in this case in particular, and that these reasons negate any inference of conspiracy.

At the outset, it should be noted that commercial blood banks are used as a source of supply for nonprofit banks [209] and that not all commercial banks are considered to be producers of blood of inferior quality.[210] Moreover, there is no indication that the respondents were aware that the instant commercial banks were failing to screen their donors properly or that the personnel who performed this function or the processing were not qualified. Only a few pathologists inspected the first commercial bank prior to the meetings in the fall of 1955 which constitute the core of complaint counsel's evidence. Doctors Buhler and Kerr inspected the facilities in May or June of 1955.[211] At a later date, Dr. Cohen visited the bank.[212] Dr. Spelman embarked upon an inspection tour sometime during 1955, but did not actually enter the building because he did not approve of the appearance of persons whom he assumed to be prospective donors waiting outside.[213] There is no indication that these or later visits resulted in reports that improper procedures were being utilized or unqualified personnel were being employed. Although respondents offered testimony that the commercial banks were not, on some occasions, as careful in their procedures as might be desired, much of this testimony was contradicted by witnesses called by complaint counsel. In any event, there was absolutely no showing that any of these alleged instances were called to the attention of any of the respondents.[214] Thus, the statements of opposition to the commercial banks and the steps taken to limit their growth were not based upon specific knowledge that the personnel operating the banks on a daily basis were not qualified or that improper procedures in screening prospective donors or in processing blood were being used.

In any event, the evidence offered by complaint counsel was not limited to instances of nonuse of blood produced or supplied by the commercial banks. Had it been so limited, respondents' asser-

[209] Tr. 1105–06, 3949–50.

[210] In response to a letter from Dr. Lapi, Dr. Coye C. Mason, pathologist at Uihlein Memorial Laboratory in Chicago, stated:

"Relative to private blood banks, I can only say that they are much like the private physician. I presume that there are good and bad ones." RX 318(b); see also Tr. 1105–06.

[211] Tr. 7993 *et seq.*

[212] Tr. 3884–86.

[213] Tr. 4915.

[214] See Initial Decision, Findings of Fact, par. 208(d), (e), (f), (g).

tions that their individual beliefs accounted for their nonuse of such blood might be more convincing. However, complaint counsel's evidence showed that prior to the opening of the first commercial bank, the Society of Pathologists had taken a position favoring voluntary donors, but had agreed to use commercial blood in emergencies. At the May 1955 meeting of the Society of Pathologists, the commercial bank was discussed, the improved reciprocity system among the hospitals was initiated, and attempts to establish a central bank were intensified. The commercial banks were also discussed at subsequent meetings of the Hospital Association's Administrative Council. At the October 26, 1955, meeting of this group, the question of adopting a position with respect to the commercial bank was discussed. Dr. Lapi addressed the November 18, 1955, meeting of the North Central District Blood Bank Clearing House and is quoted as saying that at some earlier date the hospitals had "finally got together" and indicated that they would buy the commercial bank's blood "only in an emergency." His efforts as Missouri representative to this meeting to persuade the Clearing House to revoke the first commercial bank's membership in 1955 and his later recommendation that a proposed nonprofit affiliate of the commercial bank be denied membership constitute positive attempts to hinder the commercial banks' development. The consistent reaction of the Hospital Association through its officials to efforts of the commercial banks to organize large donor clubs are similar actions taken to hinder the development of these banks. Moreover, the Community Studies Report indicated that a federation of hospital blood banks would be extremely vulnerable to competition from commercial banks, but that a central community bank could expect less competition. After this report was studied by many of the respondents, the central bank plan was adopted.

In addition to the nonuse of commercial blood, therefore, the evidence showed discussions of the first commercial bank at meetings attended by many of the respondents and subsequent affirmative actions which are consistent with the conclusion that respondents knowingly joined in a course of action which had as its inevitable result the hindrance of the commercial banks' development. Where there is evidence tending to show an illegal combination or agreement, the fact that individual acts committed in furtherance of the combination could be explained by reference to valid business and personal reasons is not excusatory of liability and does not erase the findings of combination. *Standard Oil Co.*

of California v. *Moore,* 251 F. 2d 188 (9th Cir. 1957), *cert. denied,* 356 U.S. 975 (1958). We do not think that the various reasons given by the individual respondents in this case for preferring noncommercial blood instead of blood supplied by commercial blood banks, or for being opposed to commercial blood banks in general or the instant ones in particular are sufficient to destroy the inference of joint action arising from the aforementioned discussions of the commercial banks and the affirmative efforts to limit their growth. The fact that some of these efforts might have been lawful if pursued outside the context of a combination or conspiracy does not prevent them from being counted as integral steps in the conspiracy. See *Milk and Ice Cream Can Institute* v. *Federal Trade Commission,* 152 F. 2d 478 (7th Cir. 1946). Moreover, we think that the individual beliefs and preferences of the various respondents, rather than negating the inference of joint action, provide a motive therefor, and we so hold.

After examining all of the evidence of record, the Commission is convinced that the only logical conclusion which can be drawn from the entire series of events, beginning shortly after the first commercial bank began operation and continuing through the hearings, is the conclusion that the respondents knowingly joined in efforts to inhibit the development of the named commercial blood banks. The Commission has carefully considered respondents' professed reasons for engaging in the combination and has assessed the effects of the combination upon the instant commercial blood banks. The combination has obviously had the effect of imposing undue restrictions upon the operation of properly licensed commercial ventures. Accordingly, the Commission concludes that the evidence of record as a whole establishes the combination charged in the complaint and that this combination constitutes an unreasonable restraint of trade.

V

Respondents argue that this proceeding is not in the public interest. Although the combination charged in the complaint affected only two commercial blood banks under common ownership, the dispute cannot be considered to be "private." *Cf. Federal Trade Commission* v. *Klesner,* 280 U.S. 19 (1929). As the evidence demonstrated, the acts and practices of respondents were executed with scant knowledge of the operating procedures of these banks. This fact compels the conclusion that the respon-

dents would have reacted similarly with respect to any commercial bank which might have attempted to supply the Kansas City hospitals during the relevant period of time.[215]

Nor is the Commission, by issuing an order in this matter, expressly approving or passing upon the technical proficiency or competence of either commercial blood banks in general or those affected by the instant combination. All blood banks supplying blood "in commerce" are subject to regulation by the National Institutes of Health and must meet on a continuing basis the standards promulgated by this administrative body.[216] Moreover, blood banks which satisfy their Clearing House indebtedness with shipments of blood are inspected on a regular basis by the American Association of Blood Banks, an organization not friendly to commercial banks.[217] There is no indication that the commercial banks in the present case were found deficient by any inspecting organization.[218]

If the current standards of these inspecting organizations are not sufficient, or if additional regulation is required, there are various administrative and legislative remedies which may be pursued. A group of private citizens, no matter how public spirited or altruistically motivated, may not relegate to themselves the essentially governmental function of determining the standards which will be applied in the interstate operation of blood banks and band together to inhibit the development of licensed commercial banks which meet governmental but not their own self-imposed standards. Nor may they take such action because

[215] This conclusion is supported by the experience of Municipal Blood Bank, a commercial blood bank owned by two registered pharmacists and not affiliated in any manner with Mid-West or World. This bank, which began business in March of 1960, did not attempt to deliver blood directly to Community or Kansas City hospitals having contracts with Community and thus did not compete with Community. Instead, it concentrated on serving small, rural hospitals. The University of Kansas Medical Center and the Veterans Administration Hospital were also customers. The hospitals having contracts with Community indicated that if Community could not supply them, they would order from Municipal. Shortly after it began business, it requested a meeting with Community to discuss blood standards, but this request was rejected on July 25, 1960, by Community's board of directors. Municipal went out of business in March of 1962 because of an inability to collect accounts or to get blood replacement from the rural hospitals. See Tr. 8385–8408; CX 432(c).

[216] Tr. 493–94, 1178–79; CX 312, 313.

[217] Tr. 494, 3222–27, 4845.

[218] Respondents offered evidence of various improper procedures employed by the commercial blood banks. See Initial Decision, Findings of Fact, par. 208. However, there is no indication that these practices, if true, continued over long periods or caused disqualification in any inspection. Moreover, we note that Community itself did not always maintain the highest standards. The record shows that in November of 1959, one of Community's drawing stations was temporarily closed after an inspection by the National Institutes of Health because of failure to meet its requirements. Tr. 2582–83. Accordingly, we do not think that a showing that the commercial banks were not always as careful in their procedures as might be desired negates the conclusion that this proceeding is in the public interest.

they hold the opinion that the buying and selling of human blood is morally wrong. *Cf. Associated Press* v. *United States,* 326 U.S. 1 (1945); *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission,* 312 U.S. 457 (1941); *Northern California Pharmaceutical Ass'n* v. *United States,* 306 F. 2d 379 (9th Cir.), *cert. denied,* 371 U.S. 862 (1962); *American Medical Ass'n* v. *United States,* 130 F. 2d 233 (D.C. Cir. 1942), *aff'd* 317 U.S. 519 (1943); *United States* v. *Utah Pharmaceutical Ass'n,* 201 F. Supp. 29 (D. Utah), *appeal dismissed,* 306 F. 2d 493 (10th Cir. 1962), *aff'd,* 371 U.S. 24 (1962). While the Commission applauds public-sponsored projects, such as Community, and encourages public participation in such projects, it cannot ignore a combination having the effect of limiting the growth of legitimate private competitors to such organizations. As long as commercial blood banks are authorized by law, they are entitled to protection from such a combination or conspiracy, whether inspired by a good faith, but overzealous, effort to insure the success of a community-sponsored bank, a desire to impose more rigid standards upon blood banks than those now existing, or a belief that human blood should not be bought and sold. Accordingly, the Commission holds that the instant proceeding is in the public interest.

Finally, respondents aver that they were denied due process of law in three respects. First, they argue that the hearing examiner was biased. The transcript as a whole demonstrates beyond cavil that the examiner conducted the trial of the case in a fair and impartial manner. As a result, respondents' assertions of bias and prejudice are without foundation. Secondly, respondents argue that they were improperly denied the opportunity to take certain pretrial depositions. The examiner's and the Commission's denials of respondents' original application for subpoenas ad testificandum and duces tecum prior to the trial of the case were correctly denied at that time because unreasonably broad.[219] During trial, the examiner granted respondents' revised application for requested subpoenas duces tecum subject to certain conditions.[220] Numerous documents were produced pursuant to the examiner's ruling and respondents were accorded ample opportunity to cross-examine with respect to these documents. As a result, we do not think that respondents were denied due process of law in this respect. Thirdly, respondents argue that the examiner was in

[219] See Order Denying Appeal, May 3, 1963.

[220] See Order Granting Application For Issuance of Subpoenas Duces Tecum on Conditions Set Forth, June 21, 1963.

error in excluding evidence of improper practices on the part of the commercial banks. Since there is no indication that this information was brought to the attention of any of the respondents before this proceeding was instituted, we agree with the examiner that it is not relevant on the question of the existence of a conspiracy. However, as requested by respondents, we have considered this evidence with respect to the question of public interest. Accordingly, we reject respondents' assertions of denial of due process.

VI

The order issued by the examiner includes the three hospitals named in the complaint in their individual capacities and as representative of the entire membership of the Hospital Association. However, the record does not show that all of the hospitals which are members of the Hospital Association committed acts in furtherance of the combination or otherwise participated in it. We think that those hospitals which declined to accept blood from the commercial banks after these banks had been discussed at meetings of the Society of Pathologists and the Hospital Association's Administrative Council may be considered to have joined the combination. In addition, Community's contracts with the various hospitals, consummated after Community opened in 1958, provide that blood accepted as replacement for blood originally supplied by Community must be drawn at Community or at one of its approved drawing stations.[221] Hospitals having such agreements are thus prevented by the agreements from accepting blood from the commercial banks in discharge of the responsibility and processing fees included in the bill which the hospital sends the patient. We think that these contracts, which were drafted and signed during the heat of the combination, constitute acts in furtherance thereof, and that all hospitals having entered into such contracts may be considered to have joined the combination.[222]

[221] See CX 233.

[222] In addition to the hospitals listed in the complaint, those hospitals which are members of the Hospital Association and which either refused to accept blood from the commercial banks or have entered into a blood supply contract with Community are as follows:

Bethany Hospital, Excelsior Springs Hospital, Independence Sanitarium and Hospital, Lakeside Hospital, North Kansas City Memorial Hospital, Olathe Community Hospital, Osteopathic Hospital, Queen of the World Hospital, Research Hospital, Pleasant View Health and Vocational Institute, Inc., Community Hospital Association, St. Joseph Hospital, St. Joseph's Hospital, St. Luke's Hospital of Kansas City, St. Mary's Hospital (Sisters of St. Mary), Sweet Springs Community Hospital, St. Margaret Hospital, Trinity Lutheran Hospital, Wheatley-Provident Hospital, Warrensburg Medical Center, Inc., Kansas City General Hospital and Medical Center. (Initial Decision, Findings of Fact, par. 1(f); Appendix A.)

Hospitals which did not decline to accept blood from the commercial banks or which did not sign contracts with Community were not otherwise shown to have joined the combination and, therefore, will not be subject to the terms of the order.

The examiner's order also dismissed the complaint as it applied to a number of respondents in their individual capacities, but not in their representative capacities as officers, directors, members, or employees of the corporate respondents. Since the order is applicable to these corporations and to their current officers, directors, members, or employees, we do not think it necessary to name those individuals who held these positions just prior to the filing of the complaint and who would be included in the order only in their representative capacities. Those respondents held subject to the order in their individual capacities by the examiner were found to have engaged in the furtherance of a plan which had as its necessary consequence a restraint of trade.[223] Most of these respondents were pathologists or administrators at hospitals which refused to accept blood from the commercial banks. Others were key employees or leaders of Community or the Hospital Association, and in their particular capacities were active in establishing the policies followed by these two corporations. All participated significantly as individuals in furthering the objectives of the common plan to impede the development of the commercial banks. As a result, we agree with the examiner that these respondents should be included in the order in their individual capacities.

Paragraphs 1 and 2 of the order prohibit all respondents from engaging in any concerted action which would hinder any blood bank licensed by the National Institutes of Health from selling or furnishing blood to any hospital or which would hinder anyone from purchasing, acquiring, or using such blood. In our opinion, these paragraphs require the cancellation of the contracts between Community and the hospitals,[224] since these contracts are generally construed by the hospitals as preventing them from ordering blood from any source other than Community and from accepting blood from any other source in replacement for blood already used. The examiner indicated that the order is not intended to prevent any physician from exercising his individual medical judgment in determining whether a transfusion is necessary, and, if so, the source of the blood to be used in the transfusion. This limitation is, we think, entirely appropriate.

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[223] Initial Decision, Findings of Fact, par. 225.

[224] CX 233.

It has been established that in appropriate circumstances, the Commission may order individual respondents in a conspiracy case to cease doing particular acts which are lawful in themselves in order to prevent a continuation of the effects of a conspiracy. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 509–510 (1957). We see no necessity for requiring Community to cancel its agreements with the Clearing House. However, the evidence showed that one of the clearinghouse rules provided that all transactions between member banks should be channeled through the clearinghouse system unless the banks in question had mutual exchange agreements which antedated their membership in the Clearing House. The Commission is of the opinion that Community must not continue, as it has in the past, to construe this rule of the Clearing House strictly with respect to the instant commercial banks and to use this rule as an excuse to reject direct deliveries from these banks—that is, deliveries of blood which have not been sent through the clearinghouse system —if Community accepts such direct deliveries from other blood banks which, as is the case with the instant commercial blood banks, are licensed by the National Institutes of Health. The fact that the Clearing House permits such direct transfers if the blood banks have mutual exchange agreements antedating their membership in the Clearing House is not, we think, controlling. As previously shown, Community, prior to joining the Clearing House in 1958, entered into such agreements with other banks, but did not do so with the commercial banks. Moreover, there was evidence that there was direct dealing between member blood banks when there were no such agreements, indicating that the presence or absence of such agreements is not of any real importance. As a result, we think that Community may not use the absence of a mutual exchange agreement with the commercial banks coupled with the clearinghouse rule as a reason for refusing to accept direct deliveries of blood from the commercial banks, while simultaneously accepting such shipments from other federally licensed banks. Therefore, the order will specifically prohibit this practice.

For the aforementioned reasons, the findings and conclusions of the examiner, as supplemented by the findings and conclusions of the Commission as expressed herein, are adopted as the decision of the Commission. An appropriate order will be issued.

Commissioners Elman and Reilly dissented. Commissioner Elman has filed a dissenting opinion, and Commissioner Reilly has filed a dissenting statement.

Commissioner Jones concurred and has filed a concurring statement.

DISSENTING OPINION

SEPTEMBER 28, 1966

BY ELMAN, *Commissioner*:

In my opinion, dismissal of the complaint in this case is required on several independent grounds. First, the Commission has no jurisdiction, Community Blood Bank and the other corporate respondents all being *bona fide* nonprofit corporations.[1] Second, the record does not establish a *concerted* refusal to deal. Third, in any event, this is not a commercial boycott case, and a *per se* test of illegality is inapplicable. Respondents' conduct was entirely the product of professional judgment devoid of any economic or commercial basis or motive.

I

Section 5(a)(6) of the Federal Trade Commission Act limits the jurisdiction of the Commission to "persons, partnerships, or corporations," the last defined in Section 4 of the Act to include any company or association (except a partnership) "which is organized to carry on business for its own profit or that of its members." This language is very different from that found in other antitrust statutes. The Sherman Act, for example, applies by its terms to every "person," which Section 8 of the Act defines "to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." The same language was carried over in Section 1 of the Clayton Act to define the jurisdictional scope of that Act, enacted contemporaneously with the Federal Trade Commission Act.

I do not see how we can refuse to give effect to the words "organized to carry on business for . . . profit" in Section 4. The words are plain and unambiguous. Unless we may completely ignore express language used by Congress, it is inescapable to me that the jurisdiction of the Commission under the Federal Trade Commission Act with respect to corporations is different from,

[1] The corporate respondents, besides Community Blood Bank, are the Kansas City Area Hospital Association (the Association) and three of its member hospitals.

and significantly narrower than, the jurisdiction created by the Clayton and Sherman Acts, and does not include genuine nonprofit corporations.

In a number of cases, it is true, the Commission and the courts have refused to recognize any exemption from the Federal Trade Commission Act for nonprofit corporations employed by commercial enterprises as a medium or instrumentality to commit unfair practices. *E.G., Chamber of Commerce* v. *F.T.C.*, 13 F. 2d 673, 684 (8th Cir. 1926). But, so far as I know, the only such corporations have been trade associations. Trade associations, which bring together firms having common business concerns, have often played a central role in boycotts, price-fixing conspiracies, and other unlawful conduct involving concert of action. See, *e.g., Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457. In such a case, piercing the nonprofit corporate veil and recognizing the trade association for what it is—a device by which individual profit-making concerns, for private gain, seek to restrain competition—does no violence to the Congressional design embodied in Sections 5(a)(6) and 4 of the Federal Trade Commission Act; failure to pierce the veil, indeed, would elevate form over substance to an unreasonable degree, and lay the path to evasion of the Act wide open.[2]

But it is one thing for the Commission, in order to prevent frustration of the objectives of the Federal Trade Commission Act by transparent evasive devices, to hold liable a nonprofit corporation found to be the tool of corporations organized for profit which these corporations manipulate for evil ends, and quite another to read Section 4 out of the Act altogether and hold, as the Commission does today, that its jurisdiction under the Act embraces *all* corporations, profit and nonprofit alike, whatever the circumstances. Such is clearly the import of the Commission's holding. It is conceded that the corporate respondents are corporations validly organized and existing under nonprofit-corporation statutes; that they have been granted tax-exempt status by the Internal Revenue Service; and that they do not distribute any part of their funds to, and are not organized for the profit of, members or shareholders. Any profit realized in their operations

[2] As stated in *National Harness Mfrs' Assn.* v. *F.T.C.*, 268 Fed. 705, 708–09 (6th Cir. 1920):

"The language of the Act affords no support for the thought that individuals, partnerships, and corporations can escape restrictions, under the Act, from combining in the use of unfair methods of competition, merely because they employ as a medium therefor an unincorporated voluntary association, without capital and not itself engaged in commercial business."

is devoted exclusively to the charitable purposes of the corporation. They have a paid staff, of course, but none of the officers or directors is paid. There is no contention that any of the corporate respondents is a device or instrumentality of individuals or firms who seek monetary gain through the nonprofit corporation. The majority opinion (pp. 909–910) points out that Community Blood Bank conducts its affairs in a businesslike fashion and makes profits on the sale of blood, but that is certainly of no relevance here. A religious association might sell cookies at a church bazaar, or receive income from securities it holds, but so long as its income is devoted exclusively to the purposes of the corporation, and not distributed to members or shareholders, it surely does not cease to be a nonprofit corporation merely because it has income, or keeps its books and records (as indeed the law might require it to) in much the same manner as commercial enterprises.

Therefore, the Commission is in effect saying that any corporation charged with a violation of Section 5 is fully subject to the Commission's jurisdiction. This would presumably include churches, labor unions, fraternal organizations, and charities of all kinds, as well as nonprofit blood banks and sectarian and nonsectarian hospitals. Neither the language nor the legislative history of the Federal Trade Commission Act leaves room for such a broad interpretation.

Besides the nonprofit corporations, the complaint names as respondents a number of individuals, consisting of officers and directors of the corporate respondents and pathologists employed by hospitals in the Kansas City area. (Pathologists are medical doctors who are responsible, among other things, for selecting the blood used in the hospital.) Section 5(a)(6) of the Federal Trade Commission Act applies to all persons. There is no exemption provided for persons not acting for profit. But obviously the distinction made in the Act between corporations acting for profit and nonprofit corporations would be erased if all the Commission had to do, in order to obtain jurisdiction, was to name the officers, directors, and other personnel of a nonprofit corporation as the respondents. Since a corporation can act only through individuals, enjoining its key people can have the same effect as enjoining the corporation itself. I do not think the Commission may bring within its power a corporation over which it has no jurisdiction by the simple expedient of joining its officers, directors and personnel as respondents, and arguing that they, as individuals, are fully subject to the Commission's jurisdiction. Such a result flouts

the expressed policy of Congress of exempting nonprofit corporations from the Commission's jurisdiction.

Thus, I do not see how the Commission can lawfully enter an order against any person who is simply doing the business of the nonprofit corporate respondents, and this includes not only the officers and directors of the corporate respondents but also, I think, the respondent pathologists. They were doing the business of the nonprofit hospitals which employed them. There is no indication that these pathologists, in participating in the alleged boycott of the commercial blood banks, were actuated by desire for personal enrichment, or were using Community Blood Bank, the Association, or the member hospitals as a tool for the furtherance of selfish ends. In the circumstances, entry of a cease and desist order against the pathologists would improperly extend the Commission's jurisdiction over the activities of the corporate respondents, which are plainly not subject to the Commission's statutory jurisdiction. An order against the pathologists would be in practical effect an order against the corporate respondents, since in the critical area of blood procurement and selection—the area of respondents' activities affected by the order—it is the pathologists who are the responsible personnel of the corporate respondents.

II

The theory of the complaint and of the Commission's decision is that the pathologists and hospital officials in the Kansas City area desired to impair the development of the commercial blood banks in the area, and to accomplish this end, formed their own blood bank (Community) and agreed not to accept any blood from the commercial banks. Under this theory, it is plainly not enough to show that the hospitals and pathologists in the Kansas City area in fact refused to deal with the commercial blood banks; *the element of agreement, tacit or expressed, is central to the Commission's case.* Nor is it enough to show that respondents exchanged with one another opinions and recommendations on the ethical and medical issues involved in the procurement of blood by the methods used by the commercial banks. Such an exchange would not constitute, or even evidence, a boycott; and grave constitutional problems would be raised if the Commission tried to enjoin communications among medical personnel on professional questions of this kind. Finally, while the formation of Community Blood Bank could be considered a combination by and among

the respondents, I do not understand the Commission to suggest that this in itself was unlawful concerted activity. It is not the formation of Community Blood Bank that the Commission finds unfair and unlawful but the alleged efforts by respondents to prevent the commercial blood banks from competing with Community.

In my opinion, the record does not show the existence of an agreement among respondents to boycott or otherwise restrain the operations of the commercial blood banks. Since there was no such agreement, the complaint must be dismissed.

The hearing examiner noted—as if there were something sinister in the fact—that pathologists in the Kansas City area met together in professional groups "which held frequent meetings" (Initial Decision, p. 871). He also found, and this I think is significant, that at these meetings "there was substantial unanimity among them [the pathologists] that commercial blood banking was immoral and destructive to the sense of community responsibility to share in providing the blood needs of the sick." *Id.*, p. 871. They felt that the principal commercial blood bank in the Kansas City area (Midwest) "was offensive in its advertising, aggressive in its attempts to foist its services on the hospitals in the area, and that its management and direction were such that the doctors did not have confidence in its operation." *Ibid.* The picture that emerges is not one of conspiracy. The pathologists, for reasons sufficient unto themselves—it is immaterial, from the standpoint of whether there was an agreement, what their reasons were—, abhorred commercial blood banks and shrank from doing business with them. As the Commission's opinion says (p. 913), respondents thought that commercial blood banking was "morally wrong" and "did not supply blood of equal quality with nonprofit banks." They organized Community Blood Bank so as to be able to satisfy the need of their hospitals for blood without turning to commercial blood banks. Once Community Blood Bank was in operation, it was natural that the pathologists—whose opposition to commercial blood banking was, as the examiner pointed out, unanimous—should refuse to deal with the commercial banks. As I read the record, that refusal to deal, which is the crux of the Commission's case, was not collusive, and not the product of agreement or conspiracy, but stemmed from the unanimously and strongly held views of individual pathologists about the medical and ethical propriety of selling human blood for profit and their concern with the safety of the blood banked by the commercial blood banks.

An example may help show how far-fetched it is to infer conspiracy from the circumstances of record here. Suppose that a group of farmers got together and bought a grain elevator, and having bought the grain elevator they thereafter ceased doing business with commercial grain elevators in the area. These circumstances, without more, would surely not justify an inference of conspiracy, since the refusal of the individual farmers to do business with the commercial grain elevators could readily be explained in terms of their individual self-interest. *Cf. Milgram* v. *Loew's Inc.*, 192 F. 2d 579, 583 (3d Cir. 1961). So it is here. With their deep ethical hostility toward the commercial blood banks, it is hardly surprising that, having formed a noncommercial blood bank to satisfy their needs, the pathologists, and the hospitals for which they worked, should have declined to do business with any commercial blood bank. There is no need to posit a conspiracy.

To be sure, even where individual self-interest dictates a uniform response by members of a group, the members may enter into an agreement or combination to effectuate their common purpose. If the pathologists in the Kansas City area entered into a solemn pact to have no truck with commercial blood banking, there would obviously be an element of agreement or conspiracy, as well as of individual decision, in their refusal to deal with such banks. But they testified unequivocally to the contrary; there is no direct evidence of any agreement or conspiracy; and the circumstantial evidence on which the Commission is forced to rely is singularly unpersuasive. As already explained, this evidence consists of facts whose significance (whether considered singly or in combination) is wholly indeterminate. The first is that respondents had frequent communications among themselves with regard to the blood-banking problem. This was inevitable, of course, and hardly sinister, since all of the individual respondents are pathologists or hospital officials directly concerned with blood banking and participants in the Community Blood Bank project. The second is the fact that Community Blood Bank was apparently organized in order to enable respondents to do without the services of commercial bood banks. But if a group of persons are not satisfied with the services rendered them by existing firms, they are surely free—without being stigmatized as conspirators against the outside firms—to organize their own enterprise to provide these services. The third is the fact that the hospitals and pathologists in the Kansas City area did refuse (though not without exception) to deal with the commercial blood banks after

Community Blood Bank was organized. But their refusal to deal, as I have indicated, was the natural outgrowth of respondents' feelings toward commercial blood banking and of the formation of Community. The rest of the Commission's case seems to me mere bits and scraps of completely inconclusive, wholly speculative, circumstantial evidence.

III

The hardest question raised by this case is whether, assuming it could be proved that respondents agreed among themselves not to do business with commercial blood banks, a finding of illegality would be proper. Boycotts are considered to fall within the category of practices that are *per se* illegal under the antitrust laws. See, *e.g.*, *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 347–48; *Klor's Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 212. This means that to establish a violation it need be proved only that respondent in fact engaged in the practice; and, indeed, evidence that in the particular circumstances the practice did not have adverse competitive effects, or was reasonable and justified, will not even be admitted. See *Fashion Originators' Guild* v. *F.T.C.,* 312 U.S. 457. The harsh treatment accorded boycotts under the antitrust laws stems in part from recognition that in the hands of businessmen they are typically a potent and completely unjustifiable method for stifling competition, but even more, perhaps, from a conviction that to allow private groups to wield coercive powers is inconsistent with a free, democratic society. See *Fashion Originators' Guild* v. *F.T.C., supra,* at 465.

Suppose that the members of an industry got together and agreed to blacklist any member who deviated from certain standards established by the industry. The agreement would be illegal even if violations of the standards would be unlawful, even if the only competition suppressed by the boycott would be unfair competition. For, it is felt, the application of sanctions to unethical and even unlawful business conduct should be left to the orderly processes of the law, not to vigilante action—however justifiable such action may seem in the circumstances—by private individuals or firms who, acting concertedly, enjoy great power.

The principle that boycotts are forbidden without inquiry into either competitive effects or possible justifications is sound. But, like all principles, there are limits beyond which it should not be pushed. The antitrust laws are concerned with the regulation of

business behavior (*cf. Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 *et seq.*; *Eastern R. Conference* v. *Noerr Motors*, 365 U.S. 127, 136); and most boycott cases have involved such behavior. In the typical case, what is challenged is the conduct of some businessmen in refusing, for business reasons, to deal with other businessmen. This was essentially the situation in the famous group-health case, which involved the efforts of medical societies to frustrate a plan to provide low-cost medical services to government employees. *American Medical Assn.* v. *United States*, 130 F. 2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519. Doctors are not businessmen, strictly speaking, and the boycott was not a typical restraint of trade; but the motives and purposes of the medical societies were commercial and pecuniary: to discourage a method of price competition in the furnishing of medical services. The issues in the case were basically economic.

Much can be said for confining the reach of the antitrust laws to boycotts that are economic in origin, as in the group-health case. I recognize, however, that courts have occasionally enjoined under the antitrust laws boycotts whose origin was ideological rather than economic.[3] An example is the case of the "Hollywood Ten," who were blacklisted by the motion picture industry because they were allegedly Communists. *Young* v. *Motion Picture Assn., Inc.*, 299 F. 2d 119 (D.C. Cir. 1962). But though there is precedent for applying the antitrust laws to boycotts growing out of other than commercial or competitive problems or conflicts, we should be cautious in assuming that the same *per se* rule of illegality that is applied to the more usual business boycott is applicable here. Suppose that a group of Negroes, in protest against segregated busses, boycotted the bus system. Assuming that the jurisdictional obstacles to bringing a federal antitrust suit could be overcome, I still would not be prepared to say that such conduct was illegal *per se*. Or suppose that the doctors in a medical society agreed among themselves not to prescribe thalidomide to pregnant women, or not to use a certain scalpel because it was made of inferior steel, or not to send their patients to a substandard private hospital or to one which excluded Negroes from its professional staff. In all these cases, too, I would have difficulty with invoking the *per se* rule of *Klor's* and *Fashion Orignators' Guild*.

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[3] See *Council of Defense* v. *International Magazine Co.*, 267 Fed. 390 (8th Cir. 1920); *I.P.C. Distributors* v. *Chicago Motion Picture Operators Union*, 132 F. Supp. 294 (N.D. Ill. 1955). But see *Ruddy Brook Clothes* v. *British Maritime Ins. Co.*, 195 F. 2d 86 (7th Cir. 1952).

While we are on safe ground in assuming that the public policy of this country is opposed to permitting purely economic or business judgments to be delegated to private groups armed with the sanction of a concerted refusal to deal, we are on more tenuous ground in assuming a like public policy where professional and other noncommercial judgments and issues are concerned. For purposes of the present case, it is the professional judgment that is relevant. Professional self-regulation is prevalent in our society. Bar associations and medical societies are permitted to regulate the professional conduct of lawyers and doctors in ways that society does not tolerate in the business sphere. Where challenged group conduct that in other contexts would be struck down out of hand as an illegal boycott is the product of a professional judgment, it should, in my opinion, be given a fuller analysis.

This brings me to the facts of the present case. It is undisputed that respondents' activities did not have a business motive or objective. The aims and purposes of all the respondents were professional rather than commercial or economic in character.

Two types of professional judgment are disclosed in this record. The first includes such reasons for opposing the commercial blood banks as respondents' strongly held view that it is immoral to make money from the sale of human blood. Such reasons are not purely "medical" judgments in the strict sense of a judgment based exclusively on concern for what is in the patient's best interest. However, in addition to these ethical or moral reasons involved in respondents' unwillingness to use the blood of commercial blood banks, there was clearly a professional medical basis for their conduct. Respondents believed, and I find no basis in this record for doubting their sincerity, that the blood supplied by the commercial blood banks in the Kansas City area was unsafe. They feared that because these blood banks paid for the blood they banked and, respondents thought, were none too careful about whom they bought it from, and because they lacked (in respondents' view) adequate qualified personnel, their blood was medically unsafe, and created an undue risk of causing hepatitis in users. Respondents—whose professional duty was to protect the health and safety of their patients—did not have confidence in the safety and soundness of the commercial blood banks' operations.

Much of complaint counsel's case was given over to attempting to refute the views of the respondents and prove that the blood of the commercial blood banks was perfectly good and safe—for ex-

ample, because they met the minimum standards promulgated by the National Institutes of Health. But it is not for us to decide whether the respondents were exercising sound medical judgment in insisting on higher standards for the blood to be used in treating *their* patients. If a group of doctors have concluded not to use certain blood because of genuine doubts as to its safety and reliability, they should not be compelled by order of the Federal Trade Commission to accept such blood. This Commission was not established to sit as a board of review over professional medical judgments made by doctors in the course of their practice. There is no question in my mind that the respondents believe, sincerely and honestly, that their professional responsibility as doctors requires that they not dispense to their patients blood bought from these commercial blood banks. Whether we agree or disagree with such a medical judgment is irrelevant here. The question is whether the doctors' refusal to accept blood from the commercial blood banks reflected their professional medical judgment, and not whether we think their judgment was wise or unwise. A doctor's judgment on medical and health matters is no less a professional judgment because the members of the Federal Trade Commission are not impressed by the grounds on which it is based or the manner in which it was reached. Unless we are prepared to say, as I am not, that the testimony given by the doctors in this proceeding was false and is not to be believed, their attitude towards the commercial blood banks was shaped by professional medical considerations and nothing else. This case ought to be decided by the Commission on that basis, and not on the basis that these doctors were lying to us or were acting irresponsibly and unprofessionally.

Under the Commission's order in this case the respondent doctors will *not* be free to exercise their own professional medical judgment, as they see fit, in accepting or rejecting blood from commercial blood banks. They will *not* be free to meet, discuss, and recommend the use or non-use of such blood. If there should be any such meetings or discussions and if any doctor should refuse to accept blood from a commercial blood bank, he will be subject to $5,000-a-day penalties for violation of the order. The right of the respondent doctors to practice medicine is thus seriously restricted by the order, which deprives them, individually and collectively, of the freedom to exercise a professional medical choice in accepting or rejecting blood to be used in treating their patients.

This case is atypical, to the point of freakishness, of the kind of proceedings this Commission is equipped to bring in the restraint of trade area. It does not involve monopoly or competition in the usual sense. It does not involve conduct having commercial motives or ends; the participants are not business concerns actuated by the profit motive. What this case really involves is an acrimonious private controversy, professional and personal in character and origin, between the pathologists and the commercial blood bankers in Kansas City. The Commission, whose mandate and function is to foster and protect the competitive process, should not intrude itself in such a controversy. If there is need for governmental intervention in this matter, the State of Missouri has ample authority to take such regulatory measures as protection of the public interest may require. We should stick to our own job: the elimination of unfair methods of competition in interstate commerce. Regulating the professional conduct of doctors is not our business.

DISSENTING STATEMENT

SEPTEMBER 28, 1966

BY REILLY, *Commissioner:*

The Commission by its opinion and order in this case would impose upon the medical community of the Kansas City area an obligation to conduct an important phase of its collective health responsibility according to the ethic of the marketplace. I disagree.

I find it particularly distressing that the opinion and order will operate to stigmatize a sizable portion of the Kansas City medical community in circumstances where I believe the Federal Trade Commission has neither jurisdiction in law nor warrant in public interest. The hearing examiner found that the respondents had agreed that the best means of meeting the blood needs of the Kansas City area was through a central blood bank operated by Community. I am sure it will come as a great shock to the doctors and hospitals here involved, who know little and care less about the finer points of legal exegesis, to find themselves in the toils of the law as a consequence of the joint community-wide efforts at resolving what was a jointly shared community problem peculiarly within their province as medical men.

In short, while it is clear that the commercial blood bank, Midwest, was hampered and trade was thereby restrained by the activity of at least some of the respondents, it does not follow that

the matter falls within the jurisdiction or competence of the Federal Trade Commission.

In addressing themselves to the problem of the blood needs of Kansas City, respondents brought with them certain preconceptions giving rise to a pronounced prejudice on putative moral and professional grounds against commercial blood banking. These preconceptions which are apparently shared by the medical community at large include:

Commercial blood banking, "the trafficking in human blood," is morally wrong or at least professionally unethical;

The likelihood of disease transmission through commercially obtained blood is greater because of reliance upon derelict "donors" who are less reliable in responding to questions designed to establish the presence of disease;

All blood banks, both commercial and voluntary, should be directed by persons experienced in blood banking and they should have available the services of a pathologist or hematologist;

The presence in a community program of commercial blood banks, because of advertising, blood deposit programs and other methods, render less likely the effective operation of a community program based upon a system of voluntary donations and replacement.

There is no question that the commercial bank here involved has been hampered by the mere establishment of Community with its machinery for cooperation among the hospitals, its insistence upon clearance through North Central District Clearing House and the refusal of the participating hospitals to accept direct deliveries from the commercial bank. Moreover, I have little doubt that the discussion of commercial blood banking in general and of Midwest in particular at various professional meetings of respondents served to reinforce individual convictions that Midwest should not be permitted to participate in the joint effort of the medical community.

Nevertheless, if I read the majority opinion correctly, it does not hold that the hindrance or frustration of Midwest was the central objective of the respondents in establishing Community but rather that their effort had "as its inevitable result" the hindrance of Midwest.

It is my position that the action of the respondents had as its intended purpose and result the establishment of an effective blood supply program for their community; that the two results, that is, the establishment of a program and hindrance of Mid-

west, flow from the same course of collaboration among respondents; that an effective blood supply program was respondents' sole concern; that the restraint of trade was incidental to this larger professional and public health preoccupation; that the restraint of trade was inevitable because of the conviction on the part of the community that Midwest should be excluded because participation by a commercial enterprise was incompatible with an effective blood supply program; that however valid or invalid these convictions might be they were arrived at in good faith on the basis of professional medical judgment not demonstrated on this record to be clearly wrong, and therefore beyond the competence of the Federal Trade Commission to examine.

The clear thrust of the Federal Trade Commission Act as well as the Sherman Act is toward the marketplace. They are concerned with the commercial, financial and economic life of the community, in essence, the manufacture, sale and distribution of goods and services. Their aim is the fostering of competition to preserve its benefits, including lower prices, for the economic well-being of the consumer. The expertise of the Federal Trade Commission is confined exclusively to the area of trade regulation. It knows nothing of medicine or of public health. And that is what is involved in this case. The entire context is beyond the commercial realm and thus beyond the jurisdiction of the Commission.

It is important, it seems to me, to recognize at the outset that the physicians and hospitals here involved were engaged as a group in the solution of a pressing problem of public health which they were especially competent as a group to deal with. They were not acting in a commercial context nor were they in any sense a vigilante organization seeking to impose its ideology, morals, beliefs or idiosyncratic notions of patriotism upon the public at large or individual members thereof. *Cf. Young, et al.* v. *Motion Picture Association of America, Inc., et al.,* 299 F. 2d 119 (C.A.D.C. 1962).

The question is not whether the medical profession has "a tonsure-like immunity" but whether in the first instance this is a matter falling within the ambit of the antitrust laws or of the Federal Trade Commission Act. There is here involved no question of exemption but one of initial application.

In a clearly business context obviously the Federal Trade Commission would have jurisdiction. In a clearly medical one it would not. The question is what to do in a hybrid situation such as here

where Midwest's interest is exclusively commercial and the respondents' exclusively medical. The Supreme Court has said ". . . there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." [1]

In the case to which the Court had reference, one which involved the constitutionality of legislation directed against advertising by dentists, the Court in distinguishing "traders in commodities" from dentists noted that in matters involving ". . . the vital interest of public health . . . a profession treating bodily ills [demands] different standards of conduct from those which are traditional in the competition of the marketplace." [2]

The majority relies upon *American Medical Association* v. *U.S.*, 317 U.S. 519. That case, wherein physicians and medical associations conspired to restrain trade by interfering with the medical practice of a group health organization, turned on the fact that it was entirely a business context within which the alleged conduct occurred. The defendants were fearful of the threat which Group Health represented to their businesses, the practice of medicine, and their "main purpose or aim was to obstruct the business of Group Health." The case thus holds that physicians acting in a *commercial context* enjoy no immunity from prosecution under the Sherman Act "if the *purpose and effect of their conspiracy* was obstruction and restraint of the *business* of Group Health." [3] (Emphasis supplied.)

In *U.S.* v. *American Medical Association,* 110 F. 2d 703, 710 (C.A.D.C. 1940), *cert. denied,* another, earlier appeal arising out of the same conspiracy, the court held that the Sherman Act was applicable to the practice of medicine because a "profession partakes on its *financial* side of a *commercial* business . . . ." (Emphasis supplied.)

The factual emphasis in these American Medical Association cases was clearly upon the *business* of practicing medicine, the livelihood of the physicians involved.

In the instant case Midwest represented no threat in a business sense to the respondents. Their sole purpose was one of insuring

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[1] *U.S.* v. *Oregon Medical Society, et al.,* 343 U.S. 326, 336.
[2] *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 612.
[3] 317 U.S. 519, 528.

an effective blood supply program for their community, a medical and public health matter which by its very nature required collective action by the physicians and hospitals concerned. The hospitals did not stand to profit in any business sense, broad or narrow. The program had nothing to do with the livelihoods of the respondents. It was separate and apart from their business concerns and was invested with a non-profit, non-political, community-wide public interest. Moreover, in the cases citied above the activity of the defendants was directly and explicitly aimed at frustrating other doctors in their businesses. Here the respondents acted in the public interest and their activities only incidentally operated to the detriment of Midwest.

The majority seeks to impose a commercial character upon the matter here involved and thereby would assert jurisdiction by citing some of the indicia of commerce which happen to be present such as the words "corporation," "profit" and "carry on business," and the question whether blood is a product or commercial commodity. I have no great quarrel with this approach as far as it goes but I feel it represents a fussy attention to trees when the forest is the major concern. If, as I insist, the central concern of the respondents was a medical one, it does not become commercial merely because some of the organizations involved are corporations or earn profits or carry on business. It seems to me the crucial fact here is that this conduct is not an unfair *method of competition* or an unfair or deceptive act or practice in *commerce*.

As to the readiness of respondents to accept Midwest blood in emergencies I do not believe such action places in question either the *bona fides* or the medical wisdom of the respondents' policy in opposition to commercial blood banking. An emergency by definition requires suspension of normal procedures and the employment of normally unacceptable alternatives.

One final point should be made: the National Institutes of Health in licensing the operation of commercial blood banks have established minimum standards for the selection of donors and the drawing, processing and distribution of blood in order to insure the safety of this process and the purity of the product.

Because the respondents set more stringent standards and in effect prevented the participation of Midwest, the majority holds that Community arrogated to itself: ". . . the essentially governmental function of determining the standards which will be applied to the interstate operation of blood banks and band[ed] together to inhibit the development of licensed commercial banks

which meet government but not their own self-imposed standards."

The answer to this is that NIH has merely set minimum standards as to safety and purity but has done nothing to assure Kansas City an effective area-wide program looking to an adequate supply of blood for its hospitals. In the absence of legislation or regulation directed to this need, the medical community not only has the right but indeed the professional obligation in the public interest to establish an effective program.

The order issued by the majority in this case will prevent the medical community from operating a central community blood bank in a way its professional judgment dictates without any corresponding assurance from the Federal Trade Commission that the kind of competition the order seeks will insure Kansas City of an adequate blood supply.

I would dismiss the complaint.

CONCURRING STATEMENT

SEPTEMBER 28, 1966

BY JONES, *Commissioner:*

The majority holds that respondents' concerted action over a sustained period of time to hinder and obstruct the operations in their community of Midwest, a commercial blood bank is a violation of Section 5 of the Federal Trade Commission Act. I agree.

Commissioner Reilly, writing in dissent, however, looks at these concerted activities of respondents as motivated solely by respondents' desire to establish an effective blood supply program in their community, as arising out of their professional and public health preoccupations and as based solely on their medical judgment exercised in good faith. He concludes that respondents' activities were "exclusively medical" and because they were acting "in the public interest" any commercial harm which resulted for Midwest—which he concedes occurred—was only "incidental" and not therefore encompassed by the antitrust laws. Commissioner Elman, also writing in dissent, views respondents' activities vis-a-vis the two commercial blood banks in the Kansas City area as based in part on their ethical and moral "professional" judgment which he concedes is not purely medical "in the strict sense of a judgment based exclusively on concern for what is in the patient's best interest." He also views respondents' conduct as

having had, in addition, clearly a medical basis grounded on respondents' belief that commercial blood was unsafe.[1]

I do not agree with either dissenter that respondents acted against these commercial blood banks because of their medical judgment that the blood denominated by these banks was medically unsafe, nor that their moral and ethical concerns about trafficking in blood represent their professional and public health preoccupations or in any event should operate to remove their activities from the jurisdiction of the antitrust laws. Finally, I cannot agree with Commissioner Reilly's further conclusion that since, as he viewed them, respondents acted in the public interest, any resulting restraints of trade are merely incidental and outside the antitrust laws.

I find no distinction in any of the strictures of the antitrust laws against restraining competition between restraints which are "incidentally" imposed and those which are not incidentally imposed. Nor do I find any differences in the application of the antitrust laws based on the good-faith motivations or professions of the persons imposing the forbidden restraints.

I agree—and find nothing in the majority opinion to the contrary—that every doctor must be free to exercise his own medical judgment as he sees fit, whether in bad faith or in good faith, and whether the way in which he individually elects to practice medicine restrains the trade of another incidentally or not so incidentally. Presumably every time a doctor prescribes a medicine, orders a piece of equipment, recommends a particular nurse or doctor to be consulted, or suggests a particular hospital or nursing home for his patients, he is restraining someone's trade. No one would ever suggest that such action on the part of a doctor is in any way subject to the antitrust laws. Similarly, if a group of doctors in a hospital, or in an association or simply practicing together, meet, discuss and recommend a particular course of treatment involving particular medication or the use of a certain type of medical equipment because in their judgment this is best for the treatment of the patient, no question would or should ever arise as to the applicability of the antitrust laws to such manifestations of the practice of medicine simply because it represents a concerted judgment of these doctors.

But as I read the record in this case, this is not what went on

[1] Commissioner Elman also dissents to other aspects of the majority opinion relative to the Commission's jurisdiction over non-profit corporations and the adequacy of the evidence of conspiracy. I will not discuss these here, as I believe the majority opinion adequately disposes of these issues.

in Kansas City, nor do I believe that there is anything in the majority opinion which could be regarded as even remotely suggesting that such unilateral or concerted activity would be subject to the Federal Trade Commission Act.

The gravamen of the offense with which these respondents are charged and which they have been found to have engaged in is the organization and exercise of their concerted power to hinder the operations of two commercial blood banks of which they did not approve. Respondents impeded the establishment of donor clubs by the two commercial blood banks by refusing to state that their blood would be acceptable at the various hospitals within the area with which respondents were associated; and after the establishment of their own central blood bank, they refused to accept blood offered for replacement purposes from these two commercial blood banks and they interpreted the rules and regulations of the central clearing house to exclude blood supplied by the commercial blood banks, but not necessarily blood from noncommercial blood bank sources.

I do not agree with either dissenter that in fact respondents acted on the basis of what could in any sense be termed their medical judgment. The record clearly establishes, in my judgment, that while what could be interpreted as medical concerns about the quality of the blood dealt in by commercial blood banks were voiced by some of the respondents from time to time, none of the respondents were in fact exercising their "medical" judgment in good faith when they concertedly acted together to hinder the operations of these two commercial blood banks in Kansas City. Nor by any stretch of the imagination can respondents' actions in hindering the operations of these two commercial blood banks be regarded as based on any professional or public health preoccupations or could in any sense be said to be in the public interest and deserving of exemption from the antitrust laws.

At most, the evidence that respondents were acting on the basis of their medical judgment respecting the quality of this blood consists of various statements made by some respondents in the course of their various discussions about a blood supply program about the lack of qualified personnel at the commercial blood bank, the low character types—presumably donors—who had been observed at the premises of the commercial blood banks and the likelihood or possibility that payment of donors might tend to encourage them to conceal any disqualifying information such as whether they had had hepatitis recently.

Yet aside from these generalized preconceptions about the operations of commercial blood banks, the record is totally silent respecting any attempt by any respondent to go beyond a mere assertion of these preconceptions and to evaluate their validity. Moreover, the record also demonstrates that there was no unanimity of belief among the doctors in Kansas City that blood supplied by commercial blood banks was unacceptable or of poor quality. Sometime around 1954 and prior to the organization of one of the commercial banks in Kansas City, the pathologists in Kansas City had gone on record and formally resolved that such blood could be used in an emergency (Op. p. 918). It is axiomatic that to a doctor not even emergency conditions could justify the use of inferior or medically unsafe blood. In 1955, two members of one of the committees established by the respondent Hospital Association to consider the question of establishing a blood supply program for Kansas City, indicated their interest in considering the use of commercially distributed blood and one of these committee members proposed that an evaluation be made of the risk or harm, if any, from using blood from commercial blood banks (Op. p. 929).[2] Clearly, the making of these suggestions indicates that in fact no one, at least at that time, knew anything about the quality of blood available from commercial blood banks, and this discussion by itself certainly conclusively disproves that respondents believed the blood was medically unsafe. At best, the evidence suggests that some of the respondents thought the question should be examined.

The evidence shows that the respondents who were most adamant in their opposition to the use of commercial blood banks for the supply of blood never once made any actual examination or conducted any tests of the blood available at these banks. No effort of any kind—scientific or otherwise—was made by these respondents to verify the accuracy of their preconceptions about the personnel and quality of blood available from commercial blood banks in general or from these two banks in particular. Indeed, when the business manager of the commercial blood bank inquired about what steps the bank should take to make its blood acceptable, he was told by some of the respondents to convert his bank into a nonprofit organization relying on voluntary donors

[2] A Dr. Coffey, attending as a member the December 29, 1955, meeting of the Spelman Committee (appointed by the Hospital Association to consider the report) suggested that there should be an evaluation of the risk or harm, if any, from using commercially furnished blood. A Mr. Schuler at the same meeting indicated that the commercial blood bank should be given some consideration. Op. p. 929.

(Op. p. 933). Not even passing mention was made in response to this inquiry as to acceptable standards of blood quality or of personnel as conditions prerequisite to approval. If respondents had been motivated in their reaction to these two commercial blood banks by their medical judgments, it would be reasonable to assume that they would have expressed their prerequisites to approval in precise terms of approved standards and procedures for blood collection and dissemination. For professional men who are scientifically trained and accustomed to act on the basis of carefully conducted tests and experiments, this is a glaring omission which in my judgment conclusively demonstrates that respondents were not opposing the commercial blood banks for medical reasons and that the allegedly unacceptable quality of the blood from these banks was not the basis for the actions which they took here to discourage and hinder the operation of these commercial blood banks.

Against this background of what appears to be at best respondents' generalized conviction or "preconceptions," or, at worst, blind prejudice about the quality of blood distributed by commercial blood banks, there is affirmative evidence in the record respecting the acceptable quality of this blood which further compels the conclusion that respondents' convictions could not have been based on their medical judgments.

The commercial blood banks in Kansas City which were the objects of respondents' boycott continued to supply the blood needs of the United States Veterans Administration Hospital in Kansas City, as well as the University of Kansas Medical Center throughout this period. It is inconceivable that the pathologists and administrators of these hospitals would have considered for an instant accepting blood which was in any way contaminated or which was produced under circumstances which might in any way reflect on its quality (Op. p. 938).

Moreover, the National Institutes of Health not only issues licenses to commercial blood banks using paid donors so long as they meet specified standards, but NIH issued such licenses to both the commercial banks which were the subject of respondents' boycott. Again, it is inconceivable that NIH would have so acted, or would not have immediately revoked such licenses if confronted with any facts suggesting that the blood of these two banks was medically unsafe.[3]

[3] While I am of the view that any medical group is wholly within its rights to establish higher medical standards than those used by the NIH, the fact that NIH certified these two banks, plus

Respondents' failure to make any attempt to evaluate the quality of blood actually produced by these two commercial blood banks or to establish general standards of acceptability for blood and the absence of any other evidence that the blood of these or of any other commercial blood banks was medically unsafe convinces me that the attempts by respondents now to justify their actions on the ground that they constituted an act of medical judgment or were grounded on medical reasons cannot stand up under scrutiny.

The dissenters seem to be of the view that because respondents' boycott of the two commercial blood banks was professionally motivated, and hence noncommercial in nature, the antitrust laws do not or should only in rare instances apply to it. The issue as to whether a noncommercial boycott, that is, a group boycott not engaged in for the economic profit of the participants, is or should be subject to the antitrust laws of the United States, has never before been raised under Section 5 of the Federal Trade Commission Act, although it has been raised under Section 1 of the Sherman Act. The underlying policy considerations are of course similar under the two statutes (*Fashion Originators Guild of America, Inc., et al.* v. *Federal Trade Commission,* 312 U.S. 457, 467–68 (1941)).

The antitrust laws were enacted in order to protect and promote competition in the marketplace and prevent the establishment of monopoly. Thus, acts which unreasonably restrained a person's trade or furthered a monopoly were early recognized to be within the compass of the antitrust laws. The activity prohibited by the antitrust laws is the restraint of someone's trade, or in the case of a boycott, the restriction of "the liberty of a trader to engage in business." *Loewe* v. *Lawlor,* 208 U.S. 274, 293 (1908); *Binderup* v. *Pathe Exchange Inc.,* 263 U.S. 291 (1923). It is obvious that the intent or design of the restrictive conduct does not constitute the gravamen of the offense. Moreover, the courts have never laid down as a precondition to liability under the antitrust laws that the defendants must receive some commercial benefit from the restrictive activity, although this has frequently been the situation.

Thus, in *Anderson* v. *Ship Owners Association,* 272 U.S. 359 (1926), the Supreme Court, in holding that the Sherman Act applied to an agreement among shipowners respecting the terms of

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the fact that respondents made no independent appraisal of these two banks, or indeed any study in general of the quality of blood produced by commercial blood banks, throws considerable doubt on the credibility and good faith of respondents' assertions of this ground as a basis for their concerted refusal to use the facilities of the commercial blood bank.

employment under which seamen would be hired, noted that the purpose of the Sherman Act was to prohibit "contracts or combinations which unduly interfere with the free exercise of their rights by those engaged or who wish to engage in trade and commerce—in a word to preserve the right of freedom to trade." Speaking directly to the question of the motives and objectives of the combination, the Supreme Court said that it is immaterial that:

> * * * the object of the combination was merely to regulate the employment of men and not to restrain commerce. A restraint of interstate commerce cannot be justified by the fact that the object of the participants in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of such restraint (p. 363).

More recently, in its opinion in *Klors, Inc.* v. *Broadway-Hale Stores Inc.*, 359 U.S. 207, 213 (1959) the Supreme Court recognized that while most combinations are engaged in for commercial purposes, this was not an absolute precondition of liability. Thus, the Court specifically stated in *Klors* that while the Sherman Act "is aimed primarily at combinations having commercial objectives," it nevertheless is applied albeit to "a very limited extent to organizations, like labor unions, which normally have other objectives" (Note 7 at p. 213).

Several lower federal court decisions have sustained the validity of antitrust complaints against motions to dismiss which charged as illegal combinations and boycotts engaged in for admittedly noncommercial purposes. These cases are of importance in this discussion because in all of them the Courts have assumed that the challenged boycott, though entered into for noncommercial purposes, could be subject to the antitrust laws if plaintiff's trade was unreasonably restrained.[4]

In other cases the courts have struck down boycotts having noncommercial objectives either because the objective sought was regarded as against public policy or simply because the court did

[4] *Council of Defense of State of New Mexico, et al.* v. *International Magazine Co.*, 267 Fed. 390 (8th Cir. 1920) (defendants ideological boycott of plaintiff's magazines held a violation of the antitrust laws even though defendants admittedly were not acting to advance their own commercial or economic interests); *IPC Distributors* v. *Chicago Moving Picture Machine Operators Union*, 132 F. Supp. 294 (N.D. Ill. 1955) (injunction under the Sherman Act sustained against union's refusal to project a movie because of its ideological content without discussion of application of antitrust laws to noncommercial boycotts); *Screen Writers' Guild* v. *Motion Picture Ass'n of America*, 8 FRD 487 (S.D. N.Y. 1948) (treble damage complaint under antitrust laws based on defendant's ideologically generated blackout of plaintiff dismissed with leave to amend, thus impliedly recognizing validity of basic cause of action pleaded); *Molinas* v. *National Basketball Association*, 190 F. Supp. 241 (S.D. N.Y. 1961) (treble damage suit based on defendants' blacklist of plaintiff dismissed on the merits because basis of blacklisting found to have been reasonable).

not agree that such concerted activity interfering with another's trade could be permitted.[5]

On the other hand, in several cases the courts have refused to hold concerted activity which restrained another's trade illegal under the antitrust laws. An analysis of the courts' decisions in these cases indicates that in every case the defendants were found to be engaged either in exercising some constitutionally protected right or were acting in furtherance of their legitimate purposes for which they were organized of which the challenged restriction was found to be a necessary and reasonable corollary. In the latter instance the defendants were already associated together and their concerted activity was not the result of a combination specially organized in order to take the action charged as restrictive. Rather, the concerted activity engaged in was merely the action of a pre-existing group acting to protect its own existence by a means which the court found reasonably necessary to accomplish the established purposes of the organization.

The leading case on this point is *Eastern Railroads Presidents Conference et al.* v. *Noerr Motor Freight, Inc., et al.*, 365 U.S. 127 (1961). In the *Noerr* case, the Supreme Court held that no violation of the Sherman Act could result from mere attempts by defendants to influence the enactment of laws and pointed out that any other construction of the antitrust laws might raise constitutional problems under the First Amendment protecting the right of petition. The Supreme Court pointed out that concerted activities of this nature

> bear little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedoms of others through the use of such devices as . . . boycotts. . . . (p. 136).

However, the Supreme Court was careful to note that its decision was grounded on its finding and conclusion that defendants' activities did not go beyond "the mere attempt" to influence the enactment of legislation. In discussing whether defendants had gone beyond this and thus brought themselves outside the application of this principle, the Supreme Court specifically noted that there

[5] *A. S. Beck Shoe Corp.* v. *Johnson*, 274 N.Y. Supp. 946 (N. Y. Sup. Ct. 1934); *Hughes* v. *Superior Court* (198 p.2d 885) (Cal. Sup. Ct. 1948) (injunction sustained against boycott to induce employment of Negroes); *American Mercury, Inc.* v. *Chase*, 13 F.2d 224 (D. Mass. 1926) (injunction sustained against Jehovah's Witnesses threatening criminal prosecution of sellers of magazines disapproved by Witnesses); but, *cf New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938), *rev'g* 92 F.2d 510 (D.C. Cir. 1937) (picketing by employees to induce hiring of Negroes held proper labor activity and not enjoinable).

was no evidence that defendants "attempted directly to persuade anyone not to deal with the truckers" (p. 142).

There have been several lower federal court decisions which have also sustained the validity of restrictive group action against charges that it violated the antitrust laws on the ground that the conduct was reasonably designed and necessary to protect the basic existence and function of the boycotting group.[6]

A series of state court decisions has involved challenges under a variety of statues of group boycotts engaged in for religious, political, social or other noncommercial reasons. In most of these cases, the courts have taken an essentially pragmatic approach, weighing in each case the basic purpose for which the boycott was entered into, its relationship to the fundamental nature and activity of the group in connection with the impact of the boycott on the plaintiff or the segment of the public most directly affected. None of these cases involved allegations of antitrust violations. All of them were brought under some type of tort theory of damage. Nevertheless, it is believed that the approach of the courts to determining the lawfulness of these boycotts is of relevance to the instant problem.

Two of these cases involved boycotts of communication media by religious leaders and both held the boycotts did not give rise to a cause of action for damages because the defendants' actions were designed to protect the faith of their members and were within the scope of the church's discipline. *Kuryer Publishing Co.* v. *Messmer*, 156 N.W. 948 (Wisc. Sup. Ct. 1916) (writing of a pastoral letter forbidding communicants to subscribe to plaintiff's newspaper); *Watch Tower Bible & Tract Soc.* v. *Dougherty*, 11 A.2d 147 (Pa. Sup. Ct. 1940) (solicitation by the church of letters of protest to be addressed to a radio station which was attacking the church).

Similarly, a college regulation prohibiting students from patronizing noncollege-owned restaurants,[7] picketing of a local

[6] *United States* v. *United States Trotting Association*, 1960 *Trade Cases* ¶69,761 (D. Ohio 1960) (association's rules and regulations adopted in order to advance and protect the sport of harness racing held reasonably necessary for this purpose and hence not illegal under the antitrust laws); *Molinas* v. *National Basketball Association*, 190 F. Supp. 241 (S.D. N.Y. 1961) (association's rule suspending players for betting held reasonable disciplinary measure necessary for the protection of the association's purposes); *Deesen* v. *The Professional Golfers Association of America*, 1966 *Trade Cases*, ¶71,706 (9th Cir. 1966) (association's rules requiring five years experience to compete sustained as reasonable operational rule); *cf. Washington State Bowling Proprietors Association, Inc.* v. *Pacific Lanes*, 356 F.2d 371 (9th Cir. 1966) (association's rule excluding bowlers from tournaments who bowled with any group which did not belong to defendant's association held violation of Section 1 of the Sherman Act).

[7] *Gott* v. *Berea College*, 161 S.W. 204 (Ky. Ct. of Apps. 1913).

bakery by a consumers group to protest its high prices,[8] and of a progressive Jewish butcher by a group of Orthodox Jewish butchers to protest its sale of some nonkosher meats[9] were all sustained by the courts either as within the reasonable scope and responsibility of the boycotting institution or as within the normal rights of the defendant citizens to express their views.

Several principles emerge from these cases respecting the application of the antitrust laws to group boycotts. In the first place, it is clear that as a general proposition group boycotts are subject to these laws. However, not all group boycotts will be regarded as violative of the law and their lawfulness will depend in part on the objective of the boycott and the reasonableness of the means used in the light of such objective.

Where the boycotters are engaged in commerce and are acting to further their own commercial and economic interests by restricting the trade of others, their actions are held to be illegal without consideration of the reasonableness of their conduct. *Fashion Originators Guild of America* v. *Federal Trade Commission,* 312 U.S. 457 (1941); *Klor's Inc.* v. *Broadway-Hale Stores, Inc., et al.,* 359 U.S. 207 (1959).

Where the boycotters are acting in order to prevent a legitimate and recognized interest, their action is subject to the antitrust laws, but its lawfulness will probably be determined on the basis of its reasonableness: *Molinas* v. *National Basketball Association,* 190 F. Supp. 241 (S.D. N.Y. 1961); *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). Where the group boycott is engaged in solely in furtherance of a constitutionally protected right and does not go beyond the exercise of that right, it will not be regarded as unlawful under the antitrust laws. *Eastern Railroads Presidents Conference, et al.* v. *Noerr Motor Freight Company, et al.,* 365 U.S. 127 (1961).[10]

In the instant case, none of the factors which have led the courts to exempt concerted boycotts or restrictive conduct from the reach of the antitrust laws exist. Respondents here are not taking an act of self-help designed to protect a Constitutional right to which they are entitled, nor is their act an exercise of a constitutionally protected right of petition, speech or religious ex-

[8] *Julie Baking Company* v. *Graymond,* 274 N.Y. Supp. 250 (N.Y. Sup. Ct. 1934).

[9] *Rosman* v. *United Strictly Kosher Butchers,* 298 N.Y. Supp. 343 (N.Y. Sup. Ct., 1937).

[10] Perhaps these, too, in time will become illegal as other alternative courses of action appear realistic and feasible, but at the present time there is little doubt that the use of self-help through the use of concerted action by racial minorities to defend their own Constitutional rights from encroachment and indeed annihilation is, under the doctrine of the *Noerr* case, a proper and lawful activity free from the prohibitions of the Sherman Act.

pression. Nor were respondent's acts designed to protect their own existence, nor could they be construed as reasonable measures of self-help taken in order to furnish or protect the basic overall corporate purposes of their association or organization. In no sense can respondents argue that the concerted action which they took here is the only means available to them to implement their own personal views as to the quality or efficacy of commercially disseminated blood. Nor was it the only efficient means available to them to implement their views in their own practice of medicine. Respondents are doctors and hospitals whose basic professional purpose is the care and treatment of their patients. They are the leaders in their community. Their rights to practice medicine or perform other actions are in no way imperilled. Their ability to practice their profession is in no way impaired. Their freedom to advise their patients or even to organize a publicity campaign to express their own personal views on the quality of blood disseminated by commercial blood banks or on any other aspect of commercial blood banks is not restricted. But they chose none of these courses of action. They attempted to secure a total elimination of commercial blood banks in Kansas City and succeeded in their aim insofar as their own hospitals and blood banks were concerned. Thus, their concerted activity, which forms the gravamen of their offense, was solely and exclusively directed towards this objective. It was not designed simply to exchange views, make studies or reach conclusions on the medical facts related to the collection and dissemination of blood, nor merely to establish their own bank. Respondents were eminently successful and their concerted activity seriously hindered the commercial trade of Midwest. Such private activity even by doctors was never designed to be left out of the protection of the antitrust laws. I agree with the majority decision that respondents' activities have violated Section 5 of the Federal Trade Commission Act.

FINAL ORDER

This matter having been heard by the Commission on the appeal of respondents from the initial decision of the hearing examiner, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that the appeal should be denied and that the findings of fact and con-

clusions of the hearing examiner, as supplemented by the accompanying opinion, should be adopted as the finding and conclusions of the Commission:

It is ordered, That the findings and conclusions of the initial decision, as supplemented by the accompanying opinion be, and they hereby are, adopted as the findings and conclusions of the Commission.

It is further ordered, That the following order be, and it hereby is, substituted for the order issued by the hearing examiner:

ORDER

It is ordered, That respondents Community Blood Bank of the Kansas City Area, Inc., a corporation, and its officers, directors, and members; Perry Morgan, Administrative Director, and W. W. Henderson, Business Manager, individually and as administrative director and business manager, respectively, of Community Blood Bank of the Kansas City Area, Inc.; Walter V. Coburn, John Murphy, and Marjorie S. Sirridge, individually and as directors and members of Community Blood Bank of the Kansas City Area, Inc.; Kansas City Area Hospital Association, a corporation, and its officers and directors; Arch E. Spelman, President, and Susan Jenkins, Executive Director, individually and as President and Executive Director, respectively, of Kansas City Area Hospital Association; Baptist Memorial Hospital, a corporation; Menorah Medical Center, a corporation; Sisters of Charity of Leavenworth, a corporation, d/b/a Providence Hospital; Bethany Hospital; Excelsior Springs Hospital; Independence Sanitarium and Hospital; Lakeside Hospital; North Kansas City Memorial Hospital; Olathe Community Hospital; Osteopathic Hospital; Queen of the World Hospital; Research Hospital; Pleasant View Health and Vocational Institute, Inc.; Community Hospital Association; St. Joseph Hospital; St. Joseph's Hospital; St. Luke's Hospital of Kansas City; St. Mary's Hospital (Sisters of St. Mary); Sweet Springs Community Hospital; St. Margaret Hospital; Trinity Lutheran Hospital; Wheatley-Provident Hospital; Warrensburg Medical Center, Inc.; Kansas City General Hospital and Medical Center; O. Dale Smith, individually and as pathologist of Baptist Memorial Hospital; Hilliard Cohen and Evelyn Peters, individually and as pathologists of Menorah

Medical Center; D. A. Hoskins, individually and as pathologist of Osteopathic Hospital; Victor B. Buhler, individually and as pathologist of Queen of the World Hospital and St. Joseph's Hospital; Frank A. Mantz, individually and as pathologist of St. Joseph's Hospital; Ferdinand C. Helwig and David M. Gibson, individually and as pathologists of St. Luke's Hospital; Angelo Lapi and Lauren R. Moriarity, individually and as pathologists of St. Mary's Hospital; Jack H. Hill, individually and as pathologist of Trinity Lutheran Hospital; James G. Bridgens, individually and as pathologist of Independence Sanitarium and Hospital; William McPhee, individually and as pathologist of North Kansas City Memorial Hospital; Ralph J. Rettenmaier, individually and as pathologist of Providence Hospital; Robert A. Molgren, individually and as Executive Director of St. Luke's Hospital; and A. Neal Deaver, individually and as Administrator of Independence Sanitarium and Hospital; their agents, representatives and employees, directly or through any corporate or other device, in, or in connection with, the procurement, use, offering for sale, sale, or distribution of whole blood (human), do forthwith cease and desist from entering into, cooperating in, carrying out or continuing any planned common course of action, understanding, agreement or combination between and among any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following acts and things:

1. To exclude, limit or restrict any blood bank operator licensed to engage in the sale and distribution of blood by the National Institutes of Health, United States Department of Health, Education and Welfare, from collecting or from selling or furnishing blood to any hospital, blood bank, or other user, distributor or purchaser of blood.

2. To foreclose or prevent any person, firm or corporation from using, or from purchasing, paying or contracting for, any blood furnished by or through any blood bank operator licensed to engage in the sale or distribution of blood by the National Institutes of Health, United States Department of Health, Education and Welfare.

3. To exclude or limit the access of any blood bank

licensed by the National Institutes of Health, United States Department of Health, Education and Welfare, from becoming members of the American Association of Blood Banks, the North Central District Blood Bank Clearing House or other clearinghouse sponsored by the American Association of Blood Banks, or from carrying on trade in blood through such clearinghouse system.

4. To hamper, hinder or prevent any blood bank operator licensed to engage in such business by the National Institutes of Health, United States Department of Health, Education and Welfare, from entering into, carrying out or enjoying the benefits of contracts for the furnishing of blood to any person entitled thereunder, either for use by the contracting patient directly or as replacement blood for blood already given to the patient, or that prevents, hampers, or hinders any person, firm or corporation from purchasing, obtaining or using blood supplied or furnished under such contracts.

It is further ordered, That each of the respondents forthwith cease and desist from rejecting or refusing to accept direct shipments or deliveries of whole blood (human), *i.e.,* shipments or deliveries of whole blood (human) which have not been sent pursuant to clearinghouse rules or which have not been sent through the clearinghouse system, from any blood bank licensed by the National Institutes of Health, United States Department of Health, Education and Welfare, in discharge of any obligation to the said respondent, if the said respondent accepts or receives such direct shipments or deliveries from other blood banks licensed by the National Institutes of Health, United States Department of Health, Education and Welfare, in discharge of any obligation to the said respondent.

Nothing contained in this order shall operate to prevent any respondent, either individually or in concert with each other or with others, from establishing or participating in the establishment of a blood bank or to prevent any respondent individually from expressing a professional scientific opinion as to the relative merits of various blood banks or from otherwise exercising individual medical judgment in determining whether whole blood (human) shall be utilized in the care of a patient, and, if so, the source from which such blood shall be obtained.

It is further ordered, That this proceeding be, and it hereby is, dismissed against David T. Beals and Russell W. Kerr, now deceased.

It is further ordered, That the proceeding be, and it hereby is, dismissed as to the following persons in their individual capacities:

Miller Bailey	Sister Michaella Marie
E. B. Berkowitz	Russell H. Miller
T. R. Butler	Dr. William C. Mixson
Dr. Ralph Coffey	Gilbert C. Murphy
Tom J. Daly	Adolph R. Pearson
Abraham Gelperin	Walter A. Reich
Meyer L. Goldman	James R. Rich
Mack Herron	Dr. William J. Sekola
Maurice Johnson	James T. Sparks
Thomas M. Johnson	Nathan J. Stark
Walter N. Johnson	Harry M. Walker
James D. Marshall	Robert F. Zimmer

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

Commissioners Elman and Reilly dissented. Commissioner Elman has filed a dissenting opinion, and Commissioner Reilly has filed a dissenting statement. Commissioner Jones concurred and has filed a concurring statement.

IN THE MATTER OF

THE CROWELL-COLLIER PUBLISHING COMPANY ET AL.*

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 7751. Complaint, Jan. 18, 1960—Decision, Sept. 30, 1966***

Order requiring a New York City publisher which sells its encyclopedias

*Now known as Crowell Collier and Macmillan, Inc.

**This order was made effective on Feb. 4, 1969, and applicable to the respondent parent corporation, its successor and the new subsidiary.