2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

B. Setting forth on invoices pertaining to fur products any false and deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

C. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

D. Failing to set forth the term "Persian Lamb" in the manner required where an election is made to use that term instead of the word "Lamb".

E. Failing to set forth the term "Dyed Broadtail-processed Lamb" in the manner required where an election is made to use that term instead of the words "Dyed Lamb".

F. Failing to disclose that fur products contain or are composed of second-hand used fur.

G. Failing to set forth separately information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder with respect to each section of fur products composed of two or more sections containing different animal furs.

H. Failing to set forth on invoices the item number or mark assigned to fur products.

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

IN THE MATTER OF

ADELE FASHIONS, INC., ET AL.

CONSENT ORDERS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

*Docket C-639—C-671. Complaint, Dec. 27, 1963—Decision, Dec. 27, 1963**

Consent orders requiring 33 wearing apparel manufacturers to cease discriminating in price among their customers in violation of Sec. 2(d) of the

* These orders were made effective on Aug. 9, 1965, *see Abby Kent Co., Inc., et al.*, docket No. C-328, et al., Aug. 9, 1965.

Clayton Act by favoring certain retailers with promotional payments not made proportionally available to competing stores, and postponing the effective date of the orders until further order of the Commission.

COMPLAINTS

The Federal Trade Commission, having reason to believe that 33 wearing apparel manufacturers named in a listing of respondents on p. 2070 herein, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13), and it appearing to the Commission that a proceeding by it in respect thereto is in the interest of the public, the Commission hereby issues its complaints stating its charges as follows:

PARAGRAPH 1. The respondents are corporations engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes their wearing apparel products from one State to customers located in other States of the United States. The sales of respondents in commerce are substantial.

PAR. 2. The respondents in the course and conduct of their business in commerce paid or contracted for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondents, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondents wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondents have granted substantial promotional payments or allowances for the promoting and advertising of their wearing apparel products to certain department stores and others who purchase respondents said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondents who compete with said favored customers in the sale of respondents wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISIONS AND ORDERS

The Federal Trade Commission having initiated an investigation of certain acts and practices of the manufacturers named in a listing

of respondents on p. 2070 herein, and subsequently having determined that complaints should issue, and the respondents having entered into agreements containing orders to cease and desist from the practices being investigated and having been furnished copies of a draft of complaint to issue herein charging them with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

The respondents having executed the agreements containing consent orders which agreements contain an admission of all the jurisdictional facts set forth in the complaints to issue herein, and statements that the signing of the said agreements are for settlement purposes only and do not constitute admissions by the respondents that the law has been violated as set forth in such complaints, and also contains the waivers and provisions required by the Commission's rules; and

The Commission, having considered the agreements, hereby accepts the same, issues its complaints in the form contemplated by said agreements, makes the following jurisdictional findings, and enters the following orders:

1. Respondent manufacturers listed herein are corporations organized and existing under the laws of various States, with their offices and principal places of business located as indicated on appended list.

2. The Federal Trade Commission has jurisdiction of the subject matter of these proceedings and of the respondents.

ORDERS

It is ordered, That respondents named in a listing of respondents on p. 2070 herein, corporations, their officers, directors, agents, representatives and employees, directly or through any corporate or other device, in the course of their business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for payment of anything of value to, or for the benefit of, any customer of the respondents as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of these orders to cease and desist be and it hereby is postponed until further order of the Commission.

The following is a listing of the 33 respondents named in the complaints and cease and desist orders (New York City unless otherwise indicated):

(C-639) Adele Fashions, Inc., 1407 Broadway.

(C-640) Blume Knitwear, Inc., 30-02 48th Avenue, Long Island City, N.Y., and a subsidiary at the same address, Impromptu Casuals, Inc.

(C-641) Cluett, Peabody & Co., Inc., 530 Fifth Avenue.

(C-642) Country Tweeds, Inc., 250 West 39th Street.

(C-643) Litt-Gluck Co., 111 West 19th Street.

(C-644) Sy Frankl, Inc., 1350 Broadway.

(C-645) Glensder Corp., 417 Fifth Avenue.

(C-646) The Hadley Corp., Weaverville, N.C.

(C-647) Larry Levine, Inc., 252 West 37th Street.

(C-648) Lord Jeff Knitting Co., Inc., 58-30 64th Street, Maspeth, N.Y.

(C-649) Miss Maude, Inc., 1311 Park Avenue, Hoboken, N.J.

(C-650) Mayflower Dress Co., Inc., 1350 Broadway.

(C-651) Munsingwear, Inc., 718 Glenwood Avenue, Minneapolis, Minn.

(C-652) Puritan Skirt & Dress Co., Inc., 144 Moody Street, Waltham, Mass.

(C-653) The Puritan Sportswear Corp., 813 25th Street, Altoona, Pa.

(C-654) Rainfair, Inc., 1501 Albert Street, Racine, Wis.

(C-655) Sportswear Corporation of America, 6516 Page Boulevard, St. Louis, Mo.

(C-656) Serbin, Inc., 1280 Southwest First Street, Miami, Fla.

(C-657) Sir James, Inc., 910 South Los Angeles Street, Los Angeles, Calif.

(C-658) Kandahar Sportswear Co., Inc., 8 West 30th Street

(C-659) Bobbie Brooks, Inc., 3839 Kelley Avenue, Cleveland, Ohio.

(C-660) Gay Gibson, Inc., 2617 Grand Avenue, Kansas City, Mo.

(C-661) The Grove Co., 8300 Manchester Road, St. Louis, Mo.

(C-662) Irwill Knitwear Corp., 1407 Broadway.

(C-663) Kathi Originals, Inc., 1350 Broadway.

(C-664) Lofties Knitting Mills, Inc., 85 DeKalb Avenue, Brooklyn, N.Y.

(C-665) Mademoiselle Modes, Inc., 520 Eighth Avenue.

(C-666) Donkenny, Inc., 1407 Broadway, and a subsidiary at the same address, Melray Blouse Co., Inc.

(C-667) Albert Rosenblatt & Sons, Inc., 1400 Broadway.

(C-668) Economy Blouse Corp., 1407 Broadway.

(C-669) E. D. Winter & Co., Inc., 525 Seventh Avenue.

(C-670) Jack Winter, Inc., 233 East Chicago Street, Milwaukee, Wis.

(C-671) Young Timers, Inc., 520 Eighth Avenue.

IN THE MATTER OF

CONTINENTAL BAKING COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECS. 2(a) AND 2(d) OF THE CLAYTON ACT

Docket 7630. Complaint, Oct. 27, 1959—Decision, Dec. 31, 1963

Order dismissing—the Commission concluding that respondent sustained its meeting competition defense—complaint charging a manufacturer of bakery products operating some 67 bakeries and many more sales depots in 40 States and the District of Columbia, with discriminating in price between competing purchasers in violation of Secs. 2(a) and 2(d) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described has violated and is now violating the provisions of subsections (a) and (d), Section 2, of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT ONE

PARAGRAPH 1. Respondent, Continental Baking Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at Rye, New York.

PAR. 2. Respondent is now, and for many years last past has been, engaged in the production, sale, and distribution of bread and other bakery products for use, consumption or resale within the United States. Its total consolidated sales in 1957 were approximately $307 million and its sales of bread in the same year were approximately $187 million.

PAR. 3. Respondent markets its products under widely advertised brands, including Wonder bread and Hostess cake. Respondent sells its products to thousands of retailer customers located throughout most of the United States. These customers are regular accounts with whom respondent has entered into contracts or arrangements to supply them with their requirements of bakery products made by it. Respondent operates approximately 67 bakeries and many more sales depots or loading stations located in 40 states and the District of Columbia. For the purpose of supplying said customers and of making deliveries pursuant to such contracts or arrangements, respondent ships its products both from its bakeries directly to its customers, some of which are located in States other than that from which such shipments originate, and from said bakeries to said sales depots or loading stations and to other bakeries, some of which depots and other bakeries are located in States other than that from which such shipments originate, for regular reshipment to its customers, some of which are located in States other than that from which such reshipments are made. Respondent carries on negotiations across State lines with some of its customers for the sale of its products, and adjustments of accounts between respondent and some of its customers take place across such lines. Advertising, both national and local, is prepared and placed in media by respondent's headquarters in Rye, New York.

Respondent, from its headquarters, centrally purchases raw materials for the manufacture of its product, as well as supplies, equipment, and other needs, and ships or causes to be shipped such items from various points to its bakeries located in States other than those from which such shipments originate. Respondent at all times maintains control, directly from its headquarters or through various regional offices, over the activities of its bakeries, such control being exercised over, among other matters, the area in which and the price at which each bakery is permitted to sell, standards of production to be maintained by said bakeries, all but minor repairs to plants and equipment, personnel policies, and funds collected and disbursed by said bakeries. In the exercise of such controls, respondent's headquarters, regional offices, bakeries, and sales depots carry on a steady flow of correspondence and other contacts with one another across State lines.

Thus there is and has been at all times herein mentioned a continuous current of trade and commerce, as "commerce" is defined in the Clayton Act, in said products between respondent and its customers.

PAR. 4. In the course and conduct of its business, respondent is now and during the times mentioned herein has been in substantial com-

petition with other corporations, partnerships, individuals, and firms engaged in the production, sale and distribution of bakery products. Respondent's customers are competitively engaged with each other within the various trading areas in which they are engaged in business.

PAR. 5. Respondent, in the course and conduct of its business, as above described, has been for several years last past, and now is, discriminating in price, directly or indirectly, between different purchasers of bakery products, who are in competition with each other, by selling said products of like grade and quality to some of such purchasers at substantially higher prices than to other of such purchasers.

PAR. 6. Among the methods by which respondent discriminates between said purchasers is the granting of discounts up to 7% off its list or regular prices on all purchases of said products by certain customers, including large chain food retailers, and denying such discounts to other customers who compete with said favored customers. During the year 1958, for example, on purchases of approximately $330,000 by certain units of the Safeway Stores chain respondent granted a discount of approximately $16,500.

PAR. 7. The effect of such discriminations in price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its customers are respectively engaged; or to injure, destroy or prevent competition with respondent or with purchasers therefrom who receive the benefit of such discriminations.

PAR. 8. The aforesaid acts and practices of respondent constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

COUNT TWO

PAR. 9. The allegations of Paragraphs One through 4, inclusive, of Count One of this complaint are hereby adopted and are incorporated herein by reference and made a part of this Count Two as if they were repeated herein verbatim.

PAR. 10. In the course and conduct of its business in commerce, as alleged, respondent has paid, or contracted for the payment of, something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the distribution of respondent's products.

PAR. 11. For example, during the year 1958 and several years prior thereto respondent contracted to pay and did pay money at the rate of $10,000 per year to Best Markets, Inc., Philadelphia, Pennsylvania, as compensation or as an allowance for advertising or other service or facility furnished by or through such customer in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available by respondent on proportionally equal terms to all other customers competing with Best Markets, Inc., in the sale and distribution of respondent's products.

PAR. 12. The aforesaid acts and practices of respondent constitute violations of the provisions of subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Mr. Brockman Horne and *Mr. Paul J. Dubow* for the Commission.

Mr. Paul Warnke, Mr. John H. Schafer, Mr. James V. Siena, Mr. Peter Barton Hutt, Washington, D.C., for the respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

MARCH 8, 1963

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The complaint herein issued on October 27, 1959, charges violations of Sections 2(a) and (d) of the Clayton Act involving the granting of discounts and the granting of advertising allowances in the sale of respondent's bakery products. The Commission charges such differences in Metropolitan New York-New Jersey, Camden, New Jersey, Trenton, New Jersey, and Philadelphia, Pennsylvania, which are discriminatory and may have the effect of substantially lessening competition essentially at the customer level (*i.e.*, secondary line competition).[1] It does not appear from the record that counsel in support of the complaint has made a serious effort to establish competitive injury or a likelihood thereof at the seller level (*i.e.*, primary line competition).

Respondent's defense is essentially that (1) if there were discriminations, which it denies, they did not occur in the course of commerce, (2) the purchases involved in such discriminations, if any, are not in commerce, and (3) favorable prices granted by the respondent to some customers were for the purpose of meeting competition and that it met such competition in good faith pursuant to specific customer demands made upon it to meet competitor discounts. Proof adduced by respondent in support of its meeting competition in good faith defense was on a customer by customer basis.

The hearing examiner has carefully considered the proposed findings of fact and conclusions submitted by counsel in support of the complaint and counsel for the respondent, supplemented by extensive oral argument thereon, and such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following findings of fact and conclusions:

I. THE RESPONDENT

A. Identity, Total Sales, and Number of Bakeries—

Continental Baking Company is a corporation organized, existing and doing business under and by virtue of the laws of Delaware. Its principal office and place of business is located in Rye, New York. Its total sales for the year 1957 were $307 million, of which $187 million were sales of bread.[2] Its total sales for the year 1958 were $328 million, for 1959, $385 million and for 1960, $410 million.[3] In 1959, Con-

[1] Of 63 witnesses who testified, 30 were called as non-favored "injury" witneses and 27 to prove a meeting-competition defense.

[2] Complaint and answer.

[3] Tr. 700–06.

tinental operated numerous bakeries and distribution centers, or depots, throughout the United States.

B. Products Marketed—

Continental produces and markets bread products under the brands Wonder, Profile, Daffodil Farm, and Staff, and cake products under the brand Hostess. Under the Wonder brand it markets white, white made with buttermilk, wheat, and rye breads, brown'n serve products, hamburger buns, and frankfurter rolls. Under the Hostess brand it markets, among other varieties, cup cakes, Sno-balls, Twinkies, macaroons, fruit cakes and pastries. Continental makes restaurant bread varieties as well as grocery varieties. Sweet goods are made from yeast, and the line blends into the cake line.[4] All wonder white bread (except buttermilk) is made from the same formula, whether it is regular round-top, sandwich, or thin-sliced. White bread is made in different sizes of loaves. The one-pound round-top white loaf is the largest seller. All wonder wheat bread is made from the same formula, and the same is true for all rye bread and for all hamburger buns and frankfurter rolls.[5]

C. The Organization of Production and Marketing Facilities

For the purposes of conducting its production and marketing operations, Continental has divided the country into regions, two of which are the New York region and the Washington region. The Washington region, headquartered at Alexandria, Virginia, enters the case mainly to the extent that the Norristown, Pennsylvania, bakery (near Philadelphia) was formerly attached to that region. This case essentially concerns the activities of the New York region, headquartered at Bronxville, New York. Regional offices have the responsibility of operating the "business and the bakeries under [their] control." [6]

Regions are headed by regional managers who are responsible to the headquarters office. Under such managers is a staff of persons specialized in various phases of manufacturing and marketing processes who render aid and assistance to operating facilities attached to the region. These staff people include the Regional Sales Manager, the Regional Production Supervisor, the Regional Cost Analyst, the Regional Vehicular Supervisor, the Regional Engineer, and the Regional Personnel Director. Such operating facilities include bread and cake bakeries. Bakeries attached to the New York region are located in the following places: Buffalo, Rochester, Utica, Jamaica

[4] Tr. 337, 341, 372, 373, 389.
[5] Tr. 460, 506, 618, 743–44, 505–06, 511, 743, 529, 506.
[6] Tr. 1837.

(Long Island), Brooklyn, and the Bronx, New York, Paterson and Hoboken, New Jersey, and Norristown, Pennsylvania. The Norristown bakery was prior to 1958 attached to the Washington region. The Jamaica, Brooklyn, Bronx, Paterson and Norristown bakeries are bread bakeries, and the Hoboken Hostess bakery is a cake bakery. (This Hostess cake bakery not only has its own cake route and depot system, but supplies the bread bakeries with their cake requirements for deliveries in areas not served by a Hostess cake route.)[7]

Bakeries typically have attached to them depots (sometimes referred to as loading stations, sales agencies, distribution centers, and other names). Depots are located at varying distances from the bakery and are supplied from the bakery with products by transport trucks. The bakery and each of its depots then become route sources of delivery trucks which serve the outlets of customers, usually, but not always, on a daily basis (except Sunday). Bread is perishable, fragile, and bulky for its weight, and for this reason cannot be transported unlimited distances from a bakery. It is feasible and economical to transport bread up to 150 miles from a bakery to a depot for further distribution. It is then feasible and economical to deliver bread from a route source to customers within a radius of 40 to 60 miles from said source.[8] Thus, within a radius of about 200 miles is about as far as it is possible to transport bread from bakery to consumer.[9]

For example, the Paterson bakery has attached to it depots located at Highland and Middletown, New York, and at Carlstadt, Woodbridge, Asbury Park, Washington, and Trenton, New Jersey. Up until relatively recently the depot at Camden (Bellmawr), New Jersey, was attached to the paterson bakery, and the Norristown, Pennsylvania, bakery had no depots. Camden was, in 1959, transferred to Norristown. Thus, until this transfer, all of the State of New Jersey served by Continental with bread was served from its Paterson bakery and its depots.[10]

D. Inter-bakery Transfers

There are interstate inter-bakery transfers with respect to some varieties of products. When this occurs, usually, but not always, the

[7] Tr. 710, 777–78, 712–14, CX 189, Tr. 710–11, 335–36, CX 11A, CX 189, Tr. 507, 758–59.

[8] Tr. 388–89, 499–501, 745–46, 2123, 723–25.

[9] For an estimate of an even shorter radius, see Tr. 312 where 50 to 100 miles was thought to be the maximum distance.

[10] Tr. 496, See CX 188A for map showing the locations of these depots. CX219B, Tr. 621. See also CX 2D through K for a listing of, and the areas served by, bakeries and their attached depots located all the way from Massachusetts to North Carolina. Although some bakeries are located in states other than their depots, in many cases the areas served are almost entirely within the same State as the bakery.

transfer is from Bakery A directly to Bakery B for further distribution by Bakery B to its depots, rather than directly from Bakery A to Bakery B's depots.[11] These interstate transfers may amount to a major or minor share of a route source's sales, according to the specialization of bakeries, proximity of the producing bakery, popularity of the variety, etc.

For example, the following chart shows 1958 total sales to grocery stores, the amount of those sales accounted for by transfers from out-of-state bakeries, and the ratio of such interstate transfers to total sales to stores.[12]

	1958		
	(A) Sales to stores	(B) Interstate transfers	Ratio of (B) to (A)
			Percent
Trenton depot:			
Bread	$767,778	$268,328	34.9
Cake	88,501	13,547	15.3
Camden depot:			
Bread	551,326	269,669	48.9
Cake	50,295	7,090	14.1
Norristown bakery:			
Bread	1,795,139	256,831	14.3
Cake	169,826	169,826	100.0

In the case of Trenton, $182,937 of the $268,328 of interstate transfers was accounted for by white bread made with buttermilk, and in the case of Camden, $209,252 of the $269,669 of such transfers was likewise accounted for by buttermilk. Such bread was a new and popular product made by the Norristown bakery. Thus buttermilk bread accounted for about 2/3 of Trenton's interstate receipts of bread and about 4/5 of Camden's. However, during the latter part of 1958 the Paterson bakery began producing buttermilk bread and soon began supplying all its depots, including Trenton and Camden, with their requirements of this variety.[13]

With respect to Norristown, all interstate receipts were (except for a relatively minor item) of brown'n serve products, hamburger buns, and frankfurter rolls, all supplied by the Paterson bakery.[14]

So that, with the exception of interstate transfers of buttermilk bread, during 1958 such transfers accounted for a relatively minor part of the above route sources' sales, and the record indicates that the interstate transfers of this variety ceased or were sharply diminished. With the exception of buttermilk, it appears that not

[11] CX 219, Tr. 507-08, 594-95, 741-42.
[12] CX 12, 6C.
[13] Tr. 309, 464, 339, 596.
[14] CX 11A.

more than 10% to 15% of these route sources' sales are interstate transfers.[15]

With respect to cake, Trenton and Camden were receiving most of their supplies from the Hoboken Hostess cake bakery and only about 15% of their cake was received from out-of-state. Since, presumably, Continental did not have a cake bakery in Pennsylvania, of necessity all of Norristown's cake had to be transferred from out-of-state.[16]

There are no transfers of bread from the New York region to bakeries outside the region, although there is some transfer of cake.[17]

It can be concluded from the foregoing that ordinarily bread bakeries themselves produce by far the greatest amount of bread which is sold by them and their depots, with inter-bakery transfers, either intra- or interstate, accounting for a relatively minor share, and that since cake production is an entirely different manufacturing process, interstate inter-bakery transfers of cake may account for a somewhat greater share.[18]

Bread varieties are transferred by the Paterson, Bronx, Brooklyn and Jamaica bakeries to out-of-state bakeries.[19] The Bronx bakery appears to be the source of Daffodil Farm bread for the area and the Jamaica bakery the source of Profile.[20] Such transfers appear to be generally of items other than round-top and sandwich white pan bread.

E. Classification of Customers, Negotiations with Customers, and Method of Serving Customers

Continental classifies its customers into three general categories: retailers, restaurants, and government installations and institutions. This case concerns only sales to retailers, or grocery stores. As stated, deliveries are made daily (except Sundays) to outlets of customers, although bread has a shelf-life of 48 hours (and cake even longer). Presumably, this is done to insure that an outlet is well supplied every day. A grocery store outlet served by Continental is known as a stop, and one not served is known as a non-stop.[21]

Negotiations for the sale of bakery products are carried on by various levels of Continental's organization. In the case of large

[15] See also Tr. 497, 499 which indicates that inter-bakery transfers account for a "very little" or a "minor part" of a bakery's sales.
[16] CX 11A. See also Tr. 336–40.
[17] Tr. 740.
[18] Tr. 2647–49.
[19] CX 221.
[20] Tr. 595.
[21] CX 2C; Tr. 744, 312–14, 725.

chain stores, negotiations are carried on by personnel from Continental's regional office. On the part of the chain-store customers, negotiations are usually on behalf of divisions or branches of the chains (although at times negotiations are on behalf of more than one division). These divisions are comprised of a number of stores, more than 100 in some cases, and when negotiations have been completed the chain provides Continental with a list of outlets and their addresses which Continental is authorized to serve provided store managers feel that sufficient consumer demand exists in their neighborhoods for one or more Continental products, and at the same time provides store managers with a list of Continental products which they are authorized to accept delivery of. Thus, the main elements of the sale of products to the chain take place between the regional office of Continental and the division office of the chain. [22]

In the case of smaller local chain stores, negotiations are usually carried on by either depot or bakery managers or route supervisors, according to the importance of the customer. Again, determinations of which products will be handled by these chains are made at chain headquarters, with Continental being furnished a list of stores, and store managers a list of authorized Continental products. In the case of small single-store customers, the route supervisor may assist driver salesmen in negotiations for arrangements to serve with products.[23]

Once arrangements have been made to begin serving a customer the route salesman calls each day, picks up stale bread and cake from the bread rack (products bear code markings) rearranges the products he finds which are still fresh, and fills up the space alloted to him with products from his truck. He keeps what is known as a route book, broken down by days of the week, in which he enters the unit amounts of stales picked up, products he finds fresh, and new products he leaves. From that route book the salesman can determine what the customer's probable needs will be for any given day of the week. When finished serving the rack, the salesman presents a sales slip, showing the amount of new products left from which is deducted the amount of stales picked up, to a store clerk or other store personnel, and the clerk either signs the slip or pays it, according to whether the customer is on a credit or a cash basis.[24]

Space on the rack is allotted by the customer in units of "spaces" or "facings", a space or facing being the width of the end of a loaf of bread along the front edge of the shelf. Loaves are stacked one

[22] Tr. 772, 2025, 1934–35.
[23] Tr. 775, 317–18, 465, 482, 516–17.
[24] Tr. 725, 312–14, 319–22, 461, 625–27, 735–36, 318, 737–38, 467–69, 518.

on top of the other, usually not more than three high, and at times a stack of loaves will be placed behind the front stack, if the rack is deep enough, so that one space may accommodate six or more loaves. Also allotted by the customer is "position" on the rack. Judgment of what is first position on a given rack may vary between salesmen but in general, it is the location on the rack where a brand of product will usually attract the first attention of most of the store traffic. Once space and position have been allotted, the customer does not concern himself with how much products are left by the bakery salesman; rather the salesman himself determines how much to leave to fill his space. Thus, once arrangements are made to serve a customer, the amounts of daily deliveries are a matter of routine in which the customer does not interest himself.[25] The driver salesman continues to make routine daily deliveries until for some reason the customer decides to discontinue service. The grocery store customer may stock five or six brands of bread.[26]

A route varies in size geographically and could cover two square blocks, 10 square blocks, or more, according to the density of the stops served and population. Route areas do not overlap. The average route serves between 50 and 60 stops.[27]

The average dollar amount of Continental's weekly bread sales per grocery store stop is $12 in the metropolitan New York-New Jersey, the Camden, and the Trenton, New Jersey areas, and considerably less in the Philadelphia area.[28]

The customer may be on a cash basis or a credit basis; however, 90% of the sales of the Norristown bakery, for example, are for cash. Norristown invoices the credit customers and all of them remit payment to Norristown, except Food Fair stores which remit to the headquarters office. The Paterson bakery likewise bills all its customers and most of them remit payment to it.[29]

Two factors of considerable importance in the sale of bread to consumers are (1) out-of-store advertising (in mass media) and (2) in-store display of bread (which is itself advertising). Mass-media advertising creates acceptability of a brand and a mass of display of the product on a store's rack draws the final attention of the consumer at the point of sale. Thus, the quantity of rack space and

[25] Tr. 2420–21, 628, 629, 1861, 735–36, 738, 467–68, 489. All the non-favored customers testified to this effect. For example, see Tr. 814–15, 839, 867–8.
[26] Tr. 318, 471.
[27] Tr. 333, 465, 556, 317, 556, 630.
[28] Tr. 1871–72.
[29] Tr. 346–48, 599–600.

the prominence of the position on the rack is of vital importance to the baker in enhancing sales. Salesmen endeavor to increase their space and improve their position.[30]

F. The Demand for Bakery Products and the Method of Estimating It

The demand for bread is relatively steady.[31] It is observed that weekly sales of wheat bread by the Camden depot during the year varied from a low of $100 during the 22nd week to $158 during the 23rd and 49th weeks and that the weekly sales fell into the following brackets:

Bracket:	*Number of weeks*
$100–$109	7
$110–$119	11
$120–$129	18
$130–$139	8
$140–$149	6
$150–$159	2
Total	52

The only trend reflected is in buttermilk bread which started the year at $2,479 for the first week and ended it with $5,351 for the last week. Buttermilk was a new and popular seller.

Bread and cake are baked in anticipation of consumer demand. This demand must be closely estimated from day to day because of the practice of a baker's standing the loss on stale returns which vary from 2.5% to 4% in the Philadelphia area and are about 7% in the Camden area (which is considered high). Stale return for the entire New York region averages about 4% on bread and higher on cake, because, while the demand for bread is steady, the demand for cake is variable. Cake is not bought with the same frequency as bread.[32]

The salesman's route book is the source of estimations of how much bread should be baked for any given day to minimize the stale return.[33] Therefore, each day the salesman estimates from the history contained in his route book how much bread he will need for a future day and then fills out an order blank [34] listing numbers of units of each variety. Thus is demand easily estimated and a close control maintained on quantities baked. The amount of products

[30] **Tr. 585–86, 590–91, 1860, 590, 740.**
[31] *See CX 15* which shows sales by weeks of certain varieties for the year 1958.
[32] Tr. 316, 624, 728–30.
[33] **Tr. 313–16.**
[34] **See CX 16 thru 19.**

which the driver salesman loads on his truck each day is determined by how much he expects to sell to the customers he serves.[35]

G. Compensation of Driver Salesmen

The driver salesman is compensated on a base-pay plus commission basis, so that the more products he serves an outlet with, the more compensation he receives and the greater are Continental's dollar distribution costs. In keeping with this system of salesmen compensation whereby the salesman makes more money for selling more goods, the salesman's working hours are not set by Continental. The only factors which limit his working hours are the availability of products at the beginning of the day and a rule that he must turn in his order for products for future days by a certain time towards the end of the day. Collective bargaining is done on a group basis, that is, by Continental and its competitors acting together, so that Continental knows what its competitors' labor costs are.[36]

H. Internal, or Intramural, Contacts and Controls

1. *In general*

Bakeries and depots are operating units of the Continental corporation. Many controls are exercised over their production and marketing operations, which controls necessitate numerous contacts back and forth between the headquarters office, regional offices, and bakeries, for the most part being of an interstate nature. Usually the regional office is the conduit through which these contacts take place. For example, instructions to the Paterson, New Jersey, bakery are received by the bakery from the New York regional office in Bronxville, New York, which has received them from Continental's headquarters in Rye, New York. Again, the Norristown, Pennsylvania, bakery in making a request would transmit it to the Washington regional office in Alexandria, Virginia (when Norristown was attached to that region), which in turn would transmit it to headquarters in Rye, New York.[37]

2. *Production*

Among interstate controls are those over production of the bakeries. For example, in 1935 there was initiated a series of Bread

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[35] Tr. 464, 466–67, 469, 497–98, 502, 509–10, 623, 727–28, 315–16, 617.

[36] Tr. 482, 631, 317–18, 466, 490, 713–14, 2125.

[37] See CX 225: "Continental's general office in Rye, New York, includes divisions with responsibility for sales, accounting, engineering, production, and purchasing. Each of these divisions has many routine documents and forms which regularly pass between Rye, the Regional Offices and the bakeries. In addition, other documents regularly pass between the management and administrative personnel located in Rye and the Regional Offices and the bakeries. The total of the documents is in the hundreds, and is too large to attempt to list."

Production Bulletins distributed from headquarters to the bakeries. Bulletin No. 1 states: that the bulletins are to be kept in binders for future reference. They were in no way to replace, but were to supplement, the 16 Narratives which had previously been sent to bakeries and which dealt with Controllable Cost Factors. The Bulletins would be

written with primary consideration of the most important phase of the operations of Wonder Bakeries — bread Quality. It must be recognized that the finest ingredients and the best formulae will not bake bread good enough to bear the name WONDER unless manufacturing skill is exercised and basic fundamental principles observed. There is a right way to do anything and any deviation from the right way is the wrong way. These Bulletins will establish the right way in which manufacturing will be carried on.[38]

Bulletin No. 33, issued in 1954, deals with moisture content of bread, pointing out that bread containing a moisture content of 36% stales faster than bread with 38% (the legal limit), and directs that efforts be made to raise such content as close to the maximum as possible. Bulletin No. 34, issued in 1957, goes into fine detail on how sanitation procedures shall be used in making brown'N serve products.[39]

Thus, strict production controls are exercised from headquarters to insure a national rigid standard of quality for Continental's products, with discretion to be exercised by bakery personnel only over such matters as are affected by local water and climatic conditions and local preferences. The regional offices have staff members who as specialists can be dispatched to bakeries to aid with production problems. A research laboratory is maintained at headquarters for the purpose of maintaining quality of products and developing new products. Such new products are then produced by the bakeries according to demand in a bakery's area.[40]

3. *Engineering*

The same is true with respect to the engineering connected with a bakery. Engineering Bulletins were initiated even before the Production Bulletins. For example, Engineering Bulletin No. 54–D relates to maintenance and testing of scales and points out that: "The accuracy of our scales is a most important part of our 'PRECISION BAKING'." No. 2–B is a 5-page document relating to operation and maintenance of cabinet bread coolers and containing detailed drawings for construction of a cooler. No. 87–C is a 7-page document relating to plant utility services and goes into detail as to how to save

[38] CX 22 and 22A.
[39] CX 22B & C.
[40] Tr. 717, 773, 369, 528, 463–64, 473, 527–29, 715, 773, 714–15, 718.

money on gas and electricity, directing the bakery manager to make friends with the local utility representative for the purpose of ferreting out the cheapest rates. It further provides that after the manager has visited the representative he is to fill out and return to headquarters an attached form report, giving full instructions on the use and operation of equipment consuming gas and electricity to the end that ultimate efficiency will be achieved.[41]

Regional offices have engineering experts to help on problems. The Regional Engineer solves the engineering problems that occur at the bakeries and acts as liaison between bakeries in the exchange of new methods and ideas. The Regional Vehicular Supervisor performs the same function with respect to the route trucks and other vehicles. Thus, the construction and operation of the mechanical parts of bakeries and their distribution systems is closely controlled and supervised by the headquarters and regional offices through interstate channels.[42]

4. *Accounting*

The bakeries perform their accounting functions according to a system of numbered accounts prescribed by the headquarters office and periodically render profit-and-loss statements of their operations. Upon occasion bakeries will receive detailed instructions from the regional office as to how to set up and keep accounts relating to specific customers. An inter-bakery clearing account is maintained by headquarters for the purpose of charging and crediting bakeries for their inter-bakery transfers and other transactions. Periodically a travelling auditor calls upon a bakery to audit its accounts. Should a bakery desire a change in the form of the route books used by a driver salesman, approval must be secured from headquarters.[43]

5. *Fiscal matters*

Bakeries retain no control over the moneys collected from sales of products and are allowed to disburse funds only for bakery payroll and "other miscellaneous local disbursements." This is accomplished by a system of local and interstate bank accounts. Each bakery maintains at its local bank both a "general" account and a "local" account. All daily bakery receipts are deposited in the "general" account and periodically are, upon appropriate directions, transferred to one of several "concentration" banks located at central points (in the present case New York City) and then transferred from "concentration" accounts to checking accounts for use by the headquarters office.

[41] CX 22A, CX 222–224.
[42] Tr. 715–716.
[43] Tr. 519–22, 383, 421, 519–24, 800, 802–03, CX 227, CX 97, Tr. 441, CX 6B, Tr. 360–64, 434–35, 719–20, 364–65, 328, 461–62.

Bakeries are not authorized to draw funds for their own use from their "general" accounts. The bakery then receives funds for its "local" account from the "concentration" bank on an "imprest" basis, that is, as an advance, by each week requesting such an imprest in an amount sufficient to bring its "local" account up to the level required for payroll and miscellaneous disbursements, including the payment of discounts to some customers.

The operation of the system is described as follows:[44]

> Continental Baking Company maintains for each bakery two bank accounts; a *General Account* and a *Local Account*, both of which are maintained in the same local bank in the town where the bakery is located.
>
> All cash receipts of the bakery are deposited in the *General Account*. No local bakery personnel is authorized to sign checks on the General Account, but the local bakery is authorized to issue Depository Transfer Checks on the General Account. These are forms bearing a printed signature which the bank is authorized to honor, and payable to the Concentration Bank for credit of Continental Baking Company only. These Depository Transfer Checks are used to transfer to the Concentration Account the funds deposited daily in the General Account. Funds are transferred periodically from the various Concentration Accounts throughout the country to Continental's checking accounts for general corporate disbursement purposes.
>
> The Local Account is used by the bakery for payroll and other miscellaneous local disbursements. This account is established in an amount sufficient to meet the bakery's normal weekly requirements, and is operated on an imprest basis, being reimbursed every week. Each week, after the bakery has determined the total amount of its disbursements from the Local Account for the week, a letter is sent by the bakery to the Concentration Bank, requesting that its Local Account be reimbursed by that amount. The Concentration Bank transfers the requested amount to the bakery's local bank for credit to the Local Account, and charges the Concentration Account for the amount so transferred.[45]

Thus, the bakeries are merely collection agents for the Continental corporation, the collected funds being continuously channeled into the corporate treasury for use in any one of the approximately 42 states where the corporation does business. Since labor contracts possibly call for expedition in preparation of and the payment in cash of weekly payrolls, that job is left to the bakeries, but payroll disbursements and the administration of what amounts to a petty cash fund are the only elements of discretion left to the bakeries in handling the money of the corporation.

6. *Purchasing*

The headquarters office centrally purchases for practically all of the needs of the bakeries. Product ingredients and wrapping and labeling materials are so purchased and shipped directly to the bakeries

[44] CX 226.

[45] See also CX 43 & 44, Tr. 348–56.

from sources of supply located in various states throughout the United States. Such purchasing is done automatically by the headquarters office from periodic inventories submitted by the bakeries.[46]

Other bakery needs are purchased by the headquarters office as a result of purchase requisitions submitted by the bakeries.[47] For example[48], there is a New Jersey bakery requisition to the New York headquarters office for the purchase of 100,000 brown'n serve roll trays from a Pennsylvania supplier[49]; there is also a District of Columbia requisition for the purchase of a carton-forming machine from a North Carolina supplier and[50] a purchase order issued by the headquarters office to the supplier.[51]

In fact, bakeries themselves do relatively little independent purchasing. Such purchasing is limited to expenditures of $50 or less ($300 for engineering services), and is usually confined to items such as spark plugs and tire chains for the trucks and soap and toilet paper for the washrooms. Naturally, these limits do not apply in cases where emergencies develop when to keep the plant operating purchases of goods and services by bakeries may exceed these amounts.[52]

All group life and health as well as property and liability insurance is placed with carriers by the headquarters office. Thus, in case of a collision involving a truck, the matter becomes one for the headquarters or regional office to handle.[53]

7. Personnel

With respect to personnel, the bakery managers' capacity to hire and fire independently is confined to such employees as driver salesmen and housekeeping personnel. The manager can recommend the hiring and firing of upper level bakery personnel but the decision to do so is not his but the regional or headquarters office's. The bakery manager himself is hired and transferred by these offices. Colletcive bargaining, although it may be carried on locally, is nevertheless, out of the hands of the bakery manager and in the hands of the regional

[46] Tr. 358, 557; CX 2C, 6B, 25 through 33; Tr. 374–77, 462.
[47] Tr. 527, 600.
[48] CX 34A.
[49] CX 35A.
[50] CX 35B.
[51] Tr. 376–78.
[52] Tr. 357–58, 462, 526–27, 717. The Norristown manager claimed he purchased yeast locally, but the reason given for that was to insure freshness. Tr. 358. He was contradicted on this point by the Regional Manager. Tr. 715.
[53] Tr. 457–58, 718–19.

or headquarters office, there being a special labor relations man, specialized in labor relations, who functions for the New York region, as well as other regions, on negotiating labor contracts. To insure uniformity among jobs from one bakery to another, detailed job descriptions specifying duties are issued to the bakeries by the regional or headquarters office. The headquarters office distributes film strips to be used in training new employees. The Regional Personnel Director supervises safety procedures at the bakery and engages in recruiting college graduates for employment at the bakery. He also acts as liaison in the distribution and exchange of ideas on hiring, training, etc., between bakeries.[54]

8. *Advertising*

Continental's advertising, in its various forms, is almost entirely a function of the headquarters office. Some national mass-media advertising is done to a limited extent using television networks, but most of it is done on a local or regional basis through newspapers, radio and TV spots, and billboards. Magazines are not used because of waste circulation. Continental maintains an advertising department at its headquarters in Rye, New York, but most of the advertising is placed by its advertising agency located in New York City for local and interstate dissemenation.

At times bakery managers will recommend an idea of a strictly local nature which might tie in with some local activity as distinguished from an over-all campaign. Continental's advertising manager will frequently approve such an idea, pursuant to which the headquarters advertising department will get together with the advertising agency to prepare copy or a script, to make the decision to place the advertising with the local medium, and to contract with the medium. Upon occasion a bakery manager does place advertising locally, but that is an exception to the rule. Normally all advertising is placed and paid for by the headquarters office. [55]

At times a bakery manager will call for advertising support in certain phases of his business. For example,[56] the evidence indicates a series of interoffice correspondence concerning advertising support for Wonder Old Fashioned loaf in eastern North Carolina. The manager of the Washington region (Alexandria, Virginia) first wrote the advertising manager in Rye, New York, asking for such support. The

[54] Tr. 365–68, 564, 309, 713–14; CX 23, 24; Tr. 369–72, 473, 371, 525–26, 712–13.
[55] Tr. 785–88, 456–57.
[56] CX 38A through H.

advertising manager replied that headquarters did not have anything prepared on this variety, that it was doing well on the West Coast and in other markets without support, but that something was being prepared on a similar loaf, Wonder Country Style, for use in the Kansas City and St. Joseph markets which might be of interest. The regional manager replied that Old Fashioned would be sold at the same price as "our standard loaf of Wonder Bread" since it was the same formula, and he thought it could be advertised profitably. He suggested the Country Style advertising be altered to fit Old Fashioned.

The advertising manager answered that he would prepare some advertising for Old Fashioned but wanted to know the exact area where it should be advertised so he could line up his plans. He planned to use only radio because the bakery's reports of sales [57] showed that Old Fashioned was "definitely an Agency item," *i.e.*, sold best in "country areas." As soon as a recording was made of the script, a copy would be sent to the regional manager. The manager of the Raleigh bakery then wrote directly to the advertising manager listing the towns where advertising should be concentrated and suggesting a TV station. The advertising manager replied that headquarters was "buying local radio" in five named towns for three weeks at 10 spots per week. He turned down the TV suggestion because TV would not do an adequate job.

In advertising Profile and Daffodil Farm breads an entirely separate and different campaign is used from that used for Wonder bread. In the words of Continental's advertising manager, Profile "is a different type of product. We have a different advertising story. It is a different type of bread from Wonder Bread and requires individual treatment." The same is true of Daffodil Farm. Most of Continental's bread products are advertised as Wonder bread.[58] This concept of dissimilarity from an advertising viewpoint however does not exclude their competitiveness with other breads on the market.

Most of the designs for packaging are prepared by the headquarters art department. When a new one is prepared, it is sent to the bakery to inspect, and if the bakery manager suggests a change which sounds reasonable, it will be made. If he simply does not like the design, it will not be forced upon him. The same is true with point-

[57] Form 430, regularly submitted by bakeries to the headquarters office. Tr. 361, 378–81.

[58] Tr. 788–89.

of-purchase material, most of it being prepared at headquarters and bakery managers at times making recommendations.[59]

Continental spent about 6.5% of bread sales in advertising bread in 1961.[60] Bread sales in 1957 were $187 million.

9. *Areas of distribution, transfers of bakeries and depots, inter-bakery transfers, new products*

The areas of distribution of Continental's bakeries of course do not overlap. A bakery can recommend that its area be changed but the decision to do so is made by the regional or headquarters office. Decisions to transfer a bakery from one region to another are made by headquarters, and to transfer a depot from one bakery to another are made by the regional office. In addition, decisions to allow inter-bakery transfers are made by the headquarters or regional office. Although the bakery can recommend the production and marketing of a new product in its area, the decision to do so is made by the headquarters or regional office. The Regional Sales Manager's job includes making certain that various selling and promotional activities are carried on and generally supervising selling by the bakeries. As stated, he negotiates with large chain customers for the sale of Continental's products and he also negotiates the granting of discounts to such large customers.[61]

10. *Pricing*

Pricing of products is under the control of the regional and headquarters offices. List prices are usually the same for the area served by a route source but may vary, as in the case of the Trenton depot area which depot sells at one price in its northern area and at another in its southern area. Upon occasion, prices may be changed on a given variety of product on a given route, in which case approval is requested by the bakery of the regional and headquarters office.[62]

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[59] Tr. 790, 432–33. See CX 39A through D which is correspondence concerning a promotion beginning in Little Rock, Arkansas, involving a character named Cactus Vick. Cactus Vick was a TV personality and leader of a children's organization called the Square Shooters Club. The sales manager of the Little Rock bakery wrote the promotion supervisor at the headquarters office suggesting how membership cards should be made up, attaching a proposed bread rack "hanger" displaying a picture of Cactus Vick and asking for several thousand of these, and further asking for 1000 photos suitable for autographing. The promotion supervisor replied making counted suggestions for the membership cards and hangers and pointing out the expensive nature of photos. The sales manager than agreed in every respect with the promotion supervisor and cancelled the photos.

[60] Tr. 789, 794.

[61] Tr. 719–22, 723, 514–15, 339, 341–42, 714.

[62] Tr. 570, 459, 529–30; CX 17, 18; Tr. 391–92, 529, 1866–69; CX 51 through 53; Tr. 380.

Approval for off-list pricing is requested by filling out and submitting a Form 487, and for granting an advertising allowance by submitting a Form 486A. A 487 is used for any list price variant, termed a "production adjustment", be it a bid on government installation business, a territorial change as described above, or a discount granted a favored customer.[63]

The Forms 487, when prepared by the bakery, are transmitted to the regional office for approval, and after they are personally approved by the regional manager they are transmitted to the headquarters office for personal approval by the directors of bread sales and cake sales as appropriate. Approximately in 1956 it appears that depots began filling out and submitting to their bakeries a form entitled "Request for Production Adjustment Allowance" (herein referred to as a Depot Request) whenever the depot recommended a discount be granted to a customer.[64]

A bakery's practice is to report a lost account to the headquarter's office.[65]

When a discount is granted on bread it applies to all varieties of bread purchased by a customer, and the same is true of cake. When a discount is granted on bread, it may or may not be granted on cake also.[66]

II. PRICE DIFFERENCES

The record is abundantly clear that Continental grants a 5% discount (7% in the case of National Grocery Stores) to certain customers and grants no discount to certain competing customers. These price differences are not reflected in customers' resale prices, Continental's products being generally sold by all competing customers at the same price. In fact, Continental follows the practice of affixing the "suggested" retail prices to such products in the form of end labels. The custom in the industry is for resellers to realize about an 18% margin (18% of the retail price) on bakery products.[67] There is thus no retail price competition in the sale of advertised-brand bakery products since the retail price of the bake goods of Continental's com-

[63] CX 151; Tr. 382, 391, 799, 801, 1851–52.

[64] Tr. 416–17, 1837, 2121, 627–28, 633–34. CX 84B. After approval of the Request, the bakery manager prepares a Form 487 for transmittal through channels to the headquarters office. Tr. 604.

[65] Tr. 405.

[66] Tr. 458, 552, 757, 759–60.

[67] Tr. 470, 777, 782, 731, 453, 454–55, 553–55, 558–62.

petitors is not affected by any discount they may also grant. However, such discounts on bread permit discounts on other products in the grocery and meat line, which have a low margin of profit and are highly competitive.

The non-favored customers classified according to route, source, number of route emanating from that source, and city and town in which each customer is located are as follows:

Paterson Bakery Area [68] [69] [70] [71]

Nonfavored customers	Competitors of nonfavored customers
Paterson bakery routes:	
Edsall & Bargmann, Pearl River, N.Y.	Grand Union, 7 North William St.—1 block. Food Fair, Middletown Rd. Safeway, Middletown Rd. Grandway, Route 59, Nanuet. Acme, Montvale. Valley Fair, Hillsdale.
William Timmerman, Pearl River, N.Y.	Grand Union, 7 North William St. Food Fair, Middletown Rd. Safeway, Middletown Rd.
Kemmer's Delicatessen, Nanuet, N.Y.	Grandway, Route 59, Nanuet (next door). Safeway, Middletown Rd. Food Fair, Middletown Rd.
Quadrel's Market, Upper Montclair, N.J.	King's Supermarket, 75 feet away (from Quadrel's Market). Acme, Valley Rd.
Broadway Quality Market, Passaic, N.J.	Guarantee Market—3 blocks away.
Carlstadt depot routes:	
Lillian Blum, Irvington, N.J.	Good Deal Supermarket—1 mile.
Woodbridge depot routes:	
Harris Food Market, Perth Amboy, N.J.	Two Guys From Harrison, U.S. 9. Mayfair, Conveny Blvd. and Fayette St. Mayfair Markets, Smith St. Steve's Dairy, 277 Smith St., 1 block.
Steve's Dairy, Perth Amboy, N.J.	(No competitors indicated.)
Clark's Delicatessen, Great Kills, Staten Island, N.Y.	Trunz Market, 3986 Amboy Rd.—1 mile away.
Homestead Market, Tottenville, Staten Island, N.Y.	Food-O-Rama, 7300 Amboy Rd.—1 block away.
Sam's Country Store, Roselle, N.J.	Pied Piper—2 miles.
Elm Delicatessen, Westfield, N.J.	Mutual Stores, 138 Central Ave. Safeway, 206 North Ave. (3-4 blocks). Acme, South Ave.
Hoffman's Delicatessen, Scotch Plains, N.J.	Scotch Plains Shop-Rite—next door.
Mickey's Market, South Plainfield, N.J.	Food Fair, 140 South Plainfield Ave.—1 block away. Capitol Shop-Rite, 118 Hamilton Ave.—½ block away Grand Union, South Plainfield—½ mile away.
Asbury Park depot routes:	
Henry's Delicatessen, Red Bank, N.J.	Acme. Safeway. Mayfair. Davidson's.
Ridustelli's Market, Red Bank, N.J.	Acme. Mayfair. Safeway, within ½ mile.
Trenton depot routes:	
Applegate Delicatessen, Bordentown, N.J.	Two Guys From Harrison, Route 206. Acme.
George's Market, Bordentown, N.J.	Acme. Two Guys From Harrison.
Granada's Grocery, Bordentown, N.J.	Acme. Two Guys From Harrison.
Fran's Delicatessen, Trenton, N.J.	Penn Fruit, next store. Food Fair, up the street. Valley Fair (National Grocery Store concession), 1 mile away.
Public Meat Market, Trenton, N.J.	Food Fair, Brunswick and Pine. Valley Fair (National Grocery Store concession), North Olden St.

See footnotes at end of table.

Paterson Bakery Area [68] [69] [70] [71]—Continued

Nonfavored customers	Competitors of nonfavored customers
Camden (Bellmawr) depot routes:	
Barron's, Camden, N.J.	Heritage, 615 North 6th St. Acme, 6th and State. Food Fair.
Fritz Food Market, Camden, N.J.	Weiss, 6th and Grant. Weiss, 4th and York.
Lennie's Delicatessen, Camden, N.J.	Best Markets, Federal St.
Melvin's Market, Camden, N.J.	Weiss Bros., 4th and Grand. Acme, 5 blocks away.
Miserendino's Walt Whitman Store, Westfield Grove, N.J.	Food Fair. Acme.
Dunn's Market, Woodbury, N.J.	Heritage, Delsea Dr. Sickel's. Penn Fruit. Food Fair. Acme.
Evergreen Cold Cuts, Woodbury, N.J.	Evergreen Cold Cuts. Sickel's, 1000 yards away. Acme. Food Fair.

[68] CX 182 C, D, I, J, O-Q, 183R, T; Tr. 860, 1038, 1041, 979, 953, 932.
[69] CX 184 C, D, E, F, G, I, O, P, U, V; Tr. 1110, 1135, 807, 941, 906, 907, 876, 1060, 1062.
[70] CX 185 C, D; Tr. 1081, 1008, 1171, 1449, 1485, 1503, 1361, 1557, 1248.
[71] Tr. 1325, 1226, 1228, 1192-93, 1304, 1283.

Norristown Bakery Area [72]

Nonfavored customers	Competitors of nonfavored customers
Norristown bakery routes:	
Melillo's Food Market, Philadelphia, Pa.	Food Fair (Best Markets), 22d and Cambria. Penn Fruit, 22d at Lehigh.
Powellton Food Market, Philadelphia, Pa.	Acme. Best Markets, Lancaster Ave.

[72] Tr. 1382, 1440.

The favored customers whose discounts are challenged under Count I of the complaint include the following:

American Stores (Acme Markets)
Capitol Shop-Rite
Davidson's Foodtown
Food Fair
Food-O-Rama
Good Deal Markets
Grand Union
Guarantee Meat Markets of Paterson, Inc.
Heritage's Dairy
King's Supermarkets
Mayfair Supermarkets
Mutual Super Markets
National Grocery Stores
Pied Piper Supermarkets
Safeway Stores
Scotch Plains Shop-Rite
Sickel's Food Center
Trunz, Inc.
Two Guys From Harrison
Weiss Brothers [73]

[73] See CX 190.

III. PAYMENTS FOR SERVICES

In the case of two large customers, Best Markets and Food Fair Stores, Continental made payments of money as compensation or in consideration for the furnishing of services and facilities of an advertising and promotional nature by said customers. These payments were made pursuant to agreements in lieu of discounts to meet competition or as arrangements similar to those of Continental's competitors to meet competition. Continental neither made nor did it offer to make payments aforesaid to other of its customers competing with the above two.[74] (See findings hereinafter set forth re the meeting of competition defense.) To have done so either as to discounts or payments for services would have extended competitive inequities at random beyond the scope of meeting competition in good faith.

IV. USE, CONSUMPTION, OR RESALE OF THE PRODUCTS

The products involved in this case in the sale of which discriminations occurred were sold by Continental for resale by grocery stores all located in the United States and for consumption within the United States.

V. THE COMMERCE REQUIREMENT

In the case of many products, such as, for example, table salt (the product involved in *F.T.C.* v. *Morton Salt Co.*, 1948, 334 U. S. 37), the commerce requirement of the Robinson-Patman Act presents no particular problem. The manufacture of the product seeks proximity to the source of raw materials and the finished product then is shipped to customers located generally over the country. There is thus interstate product movement, and the orthodox indicium of a sale in commerce is present, even though the act itself makes no requirement that goods move across state lines for commerce to attach.

In the case of other products, for example, bread, the nature of the product is such that its manufacture must seek proximity to consumers, the raw materials being gathered from over the country and processed or assembled at the manufacturing plant. Although it could be said that such businesses were "local" in nature, that is true only because of the peculiarities of the product. Otherwise, Continental would hardly require approximately 69 bakeries to serve its customers in 42 states.

Obviously, bread is perishable, fragile, and bulky in relation to weight (the same is true to a great extent of cake) and the product

[74] Tr. 443, 2557, 746.

can be shipped only limited distances from manufacturer to consumer. Therefore, although to some extent bread is shipped across state lines from bakeries to bakeries, from bakeries to their depots, and even from bakeries to customers, a substantial amount of it never crosses state lines. Thus, in this industry commerce problems are presented which are not presented in the table salt and other industries.

Section 2(a) requires not only that a seller who discriminates in price be "engaged in commerce" and discriminate "in the course of such commerce", but that "either or any of the purchases involved in such discrimination" be "in commerce". Section 2(d) requires not only that a seller who discriminates in payments be "engaged in commerce" but that the payments be made "in the course of such commerce". The language of Sec. 2(d) does not contain the third commerce requirement of Sec. 2(a), but the Section has been interpreted as containing it. *Shreveport Macaroni Manufacturing Co., Inc.*, D. 7719, January 24, 1962, Comm. Dec., 60 F.T.C. 196.

It has been held that a seller's merely being engaged in commerce will not suffice for a Robinson-Patman violation but that the violation must itself occur in the course of commerce. See, for example, Sec. 2(a): *Myers* v. *Shell Oil Co.* 1951, S.D. Calif., 96 F. Supp. 670: *Danko* v. *Shell Oil Co.*, 1953, E.D.N.Y., 115 F. Supp. 886; *Sears, Roebuck & Co.* v. *Blade*, 1953, S.D. Calif., 110 F. Supp. 96; *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 1961, 7 Cir., 287 F. (2) 265; Sec. 2(d); *Sun Cosmetic Shoppe, Inc.* v. *Elizabeth Arden Sales Corp.*, 1949, 2 Cir., 178 F. (2) 150; *American News Co.*, v. *F.T.C.*, 1962, 2 Cir., 300 F. (2) 104. Thus, only one leg of the discrimination, either the favoring or the non-favoring leg, must be in the course of commerce. *Moore* v. *Mead's Fine Bread Co.*, 1954, 348 U. S. 115; *Shreveport Macaroni, supra.* Although Sec. 2(d) is subject to the interpretation that factors other than the sale of "products or commodities" in commerce will satisfy its commerce requirements (see *Corn Products Refining Co.* v. *F.T.C.*, 1945, 324 U.S. 726, 744-45), the hearing examiner finds for the reasons hereinafter set forth that sales of products, with respect to which payments were made in this case, were in the course of commerce.

Important questions here are: What is a sale under the Robinson-Patman Act and what facts are required to make a sale one in the course of commerce?

The hearing examiner substantially concurs with the commendable analysis of counsel in support of the complaint that there are four general factual situations to be considered which lead one to the con-

clusion that the commerce requirements have been met under the facts of this case.

A. Interstate Intermural Product Movement (From Seller to Customer)

As stated, the shipment of bread both in tractor-trailers to depots and in route trucks to stores, must necessarily be confined to a limited area. For example,[75] the territory penetrated by the Paterson, New Jersey, bakery and its depots reflects that this territory closely hugs New Jersey State lines except that the Paterson bakery's route coverage spills over into New York. It has depots in Middletown and Highland, New York, the routes of which penetrate three or four southern New York counties. Woodbridge, New Jersey, depot's routes go into Staten Island, New York. Thus, the bakery which produces the goods itself delivers a comparatively small quantity interstate to customers. It ships a larger quantity of products in bulk to its distribution points interstate for interstate delivery, and it ships other goods to its distribution point interstate for interstate delivery.

Therefore, with respect to these New York areas, there are sales accompanied by interstate product movements. The sales to both the Pearl River and Nanuet, New York, favored and non-favored customers (deliveries being made by Paterson bakery routes) are all clearly sales in commerce. Similar commerce is present in sales when deliveries are made from the Woodbridge, New Jersey, depot to the Staten Island, New York, favored and non-favored customers.

The Section 5 case of *Ward Baking Co.* v. *FTC*, 1920, 2 Cir., 264 F. 330, had held that when a baker transported bread from one state to another and its drivers there sold such bread "to such storekeepers as wanted to buy" no interstate commerce was involved, that sales in the second state were purely local. However, the Section 2(a) cases of *Standard Oil Co.* v. *F.T.C.*, 1951, 340 U.S. 231, and particularly *Moore* v. *Mead's Fine Bread Co.*, *supra*, have clearly superseded the reasoning of the *Ward* case which in any event does not appear to be factually comparable to the instant case.

Prior to *Standard Oil* and subsequent to the passage of the Robinson-Patman Act there had been many treble-damage gasoline cases, and the commerce question was prominent in each because of the practice in that industry of refining in one state and shipping in bulk to terminals in another, after which the gasoline was sold and delivered to retailers in the second state. Courts held both ways

[75] CX 188A and B.

on the flow of commerce question.[76] *Standard Oil* settled the question by holding that a Robinson-Patman "sale" may have been completed at a service station's gasoline tank but that the sale actually extended back through the local bulk station clear to the refinery located in another state, since the gasoline moved interstate in anticipation of a regular demand which could be accurately estimated.

In the case of *Moore* v. *Mead* it appears to be held that bread transported from New Mexico to Texas for sale, in the words of *Ward*, "to such storekeepers as wanted to buy" were not local sales.

Here the record is replete with evidence that bread is baked and delivered in anticipation of a regular demand easily estimated by Continental. Thus, the shipments by Paterson to the New York depots are similar to the *Standard Oil* factual situation and the route deliveries into New York by the Paterson bakery and the Woodbridge depot appear to be within the purview of *Moore* v. *Mead*. These interstate shipments, however, are not of major consequence when compared with a bakery's total sales.

B. Interstate Intramual Product Movement (From Bakery to Bakery)

In the area at issue, Bakery A produces most of the products it sells and assembles the rest from the seller's other bakeries, B, C, and D. The total product line is then distributed from Bakery A to its depots for delivery to customers. Some of such imported products come from out-of-state and they are then distributed to some customers out-of-state but mostly to customers located in the same state as Bakery A. For instance, the Jamaica, New York, bakery ships Profile bread to the Paterson, New Jersey, bakery, which bakery in turn commingles that bread with the bread that it produces and then serves both New York and New Jersey customers with the full line. Actually as to such imported bread, the facts merely add an additional stopping point to the Standard Oil situation, and that case it seems would control as to the sales of that bread to the bakery's intrastate customers. Furthermore, such interstate imported bread, when commingled with that locally produced, taints the entire line with commerce, so that sales of the locally produced bread to intrastate customers would also be sales in the course of commerce.

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[76] Commerce was present: *Alabama Ind. Service Station Assn.* v. *Shell Pet. Corp.*, 1939, S.D. Ala., 28 F. Supp. 386; *Midland Oil Co.* v. *Sinclair Ref. Co.*, 1941, N.D. Ill., 41 F. Supp. 436; commerce was not present: *Lipson* v. *Socony Vacuum Corp.*, 1937, 1 Cir., 87 F. (2) 265; *Lewis* v. *Shell Oil Co.*, 1943, N.D. Ill., 50 F. Supp. 547; *Spencer* v. *Sun Oil Co.*, 1950, Conn., 94 F. Supp. 408.

However, resolving the commerce question entirely upon inter-bakery transfers seem questionable, since even in the area where bakeries are the most densely located the indications are that not more than 10% to 15% of a bakery's sales are accounted for by such transfers. The probability exists that in some other areas bakeries are too far apart to make any transfers feasible.

C. Interstate Intermural Contacts (Between Seller and Customer)

The question of what is a sale under the Robinson-Patman Act goes to the heart of this commerce issue. Concepts enunciated in the Law of Sales, such as passage of title, shifting of risk of loss, etc., are inapplicable here. See for example, *American News*, *supra*, which reaffirms the indirect-purchaser doctrine that there do not have to be direct sales to establish a seller-customer relationship; *Standard Oil*, *supra*, which in effect holds that a sale in commerce is more than delivery of goods and passage of title to a customer; and *Nachman* v. *Shell Oil Co.*, 1945, Md., 1944–45 CCH Trade Cases, par. 57,361, which considered the important point to have been interstate customer contacts in a case where the court felt there was no interstate delivery of the product. Thus, a sale under Robinson-Patman goes far beyond common law concepts.

What the Act contemplates as a sale is the total *transaction* that takes place (which includes in addition to seller-customer contacts, interstate activities of the seller, and interstate activities of the customer as discussed in *J. H. Filbert, Inc.*, 1957, Comm. Dec., 54 F.T.C. 359, 370–72, *Shreveport Macaroni*, *supra*, and *Corn Products*, *supra*.) Such construction is consistent with the Court of Appeals statement in *Standard Oil*, 1949, 7 Cir., 173 F. (2) 210, 214, that:

> We decline, as the Supreme Court did in *Stafford* v. *Wallace*, supra, p. 519 " * * * to defeat this purpose in respect to such a stream [of commerce] and take it out of complete national regulation by a nice and technical inquiry into the noninterstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they are an essential but subordinate part." After all, as Justice Holmes said in *Swift and Company* v. *United States*, * * * " * * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." The modern concept of commerce is one which gives full sweep to the commerce clause of the Constitution within the limits of the implementing statute, a liberal view of the congressional purpose as expressed in the statute, and a realistic view of what business is doing as it moves across state lines to accomplish its purpose. * * *

The record shows that the transactions here involved begin by a contact, usually originated by Continental, between seller and customer for the purpose of making arrangements to serve the cus-

tomer's store or stores with Continental's products. Negotiations then take place and if successful the customer agrees to handle either Continental's full line or a certain part of it and assigns to Continental a certain position and a certain amount of space on the store's bread rack, after which Continental begins daily service to the store. What the negotiations end up with, then, is an arrangement whereby Continental is to fill the store's daily requirements of Continental's products. Once the arrangements have been completed and space assigned, the customer no longer concerns himself with deliveries except to pay or sign a charge slip for whatever products the driver salesman leaves. Thus, a major element of the sales transaction takes place during the negotiation and authorization across state lines as to terms and discounts to be granted pursuant to company policy centrally controlled.

If a customer is on a credit basis, Continental periodically invoices for products delivered and the customer remits. The discount may be deducted from the invoice by Continental or by the customer, or else Continental sends a check therefor. Payments are also made by check upon Continental's being invoiced by the customer. These seller-customer contacts are themselves integral and important parts of the sales transactions.

It is the hearing examiner's view that respondent's interstate advertising [77] and negotiations for reaching agreements for service to stores of products and for customer price or payment and discounts, as well as invoicing and remission of moneys, which involve and make use of interstate means of communications are sufficient under the act to cause the total transaction to be in the course of commerce. These means include interstate traveling, telephone calls, telegrams, and use of the mails pursuant to which local salesmen are finally authorized to consummate daily sales of bread at a price. Under the facts of this case the ultimate sale is merely a step in an interstate chain of events required to consummate it as an executed contract, the authority for which must express itself across state lines.

The foregoing theory of sales transactions is not premised upon the interstate product movement concept but upon the requirement of the act that sales transactions be in the course of commerce even though product movement from Continental facilities to customer facilities takes place entirely intrastate.

As another facet of interstate customer contacts, it should be pointed out that such take place also between Continental and the purchasers of its products in whom it is the most interested, *viz*,

[77] See *Ford Motor Co.* v. *F.T.C.*, 1941, 120 F. (2) 175.

consumers, by means of mass-media advertising. Not only are media with an interstate coverage, such as television, radio, and large daily newspapers, employed by Continental, but arrangements and contracts with media over the country are the result of interstate contacts between the media and Continental's headquarters and its advertising agency, both located in the state of New York, with invoicing and remission of moneys for time and space employing interstate communication.

That advertising is an important part of the total sales transaction is shown by the opinion of the Sixth Circuit in *Ford Motor Co.* v. *F.T.C.*, 1941, 120 F. (2) 175. This was a Section 5 case, involving deceptive consumer advertising by Ford. Ford contended that sales to the consumer by the car dealer were purely intrastate and thus the deceptive practice was not in commerce. In rejecting this contention and holding advertising to be an integral part of a total interstate transaction the court said, at pp. 183:

> Advertising goes hand in hand with volume of production and retail distribution. It operates to increase the demand for and availability of goods and to develop quickly consumers' acceptance of the manufactured products. Expressed another way, it breaks down consumers' resistance, creates consumers' acceptance, and develops consumers' demand.
>
> * * * * * * *
>
> The use of advertising as an aid to the production and distribution of goods has been recognized so long as to require only passing notice. The economy of mass production is just as well known and the effects of advertising may be described as mass selling without which distribution would be lessened and a fortiori production correspondingly decreased. The present advertisement of the method for financing the purchase of petitioner's cars on credit was an integral part of their production and distribution.

It seems reasonable to assume that the direct customers of Continental, the retailers, probably read Continental's mass-media advertising, and the amount of it and consumer acceptance created thereby enter prominently into a retailer's decision to handle Continental's products. Thus, being an integral part of the sales transactions, its interstate nature in inducing sales nationally must be given weight in resolving the commerce issue in this case.[78]

D. Interstate Intramural Contacts and Controls (Within the Seller's Organization)

A considerable portion of Continental's discount business is done with substantial customers operating stores located entirely or largely

[78] Tr. 482, 517, 585–86.

within the same state as the bakery and its depots, with which customers all negotiations are carried on at the depot and bakery levels, never requiring the intervention of the regional office. These negotiations are entirely intrastate. Billing is done by the bakery and payments are all made intrastate. Except for some products which have moved interstate from bakery-to-bakery, the products with which these customers are served never cross state lines. Thus, the foregoing theories of commerce under these facts may be questionable.[79]

It has been established that bread must of necessity be produced near to its consumption and that bakeries, far from being autonomous operations, are closely controlled in every important phase of their business in which discretion might otherwise be used by bakery personnel. The bakery does not purchase its raw materials or wrapping supplies, those being automatically purchased by the headquarters office upon inventories routinely submitted by the bakery. Those materials and supplies are procured and shipped to the bakery from out-of-state. The method of manufacture by the bakery is directed in detail by headquarters to the end that Continental's national brands will have a national standard of quality. Likewise, the bakery is told in detail how equipment shall be constructed and operated to the end that uniform national efficiency will be achieved. Headquarters makes certain that accouting procedures will be uniform throughout the country, and of course all insurance is purchased by and adjusted with headquarters. So dependent is the bakery upon headquarters that no more than minor purchases can be made by the bakery, all others requiring a request for issuance by headquarters of a purchase order. The bakery has no control over the moneys collected from sales, these being automatically transferred to the corporation's interstate treasury for completely independent use by headquarters. The bakery cannot even price its products, and, in fact, cannot even grant a discount to a single-store customer, without seeking and obtaining approval and authority therefor by headquarters. Selling areas are determined by headquarters, and the hiring and firing of all but low-echelon personnel is out of the hands of the

[79] For example, CX 191 through 211 show with respect to all the favored customers listed in those exhibits with the exception of American Stores, Food Fair, Grand Union, and Safeway, that all negotiations for the sale of products and the granting of favoritism, as well as all invoicing and remission of moneys occur between Continental and customer without any interstate contracts. (The Norristown, Pennsylvania, bakery manager testified that such was also the case with all of Continental's Philadelphia area customers except Food Fair) Tr. 346–48. However, Best Markets, a large Philadelphia chain, received payment of its advertising allowance from Continental's headquarters office. CX 161 B.

bakery. Advertising, although much of it is accomplished by local campaigns through local media, and although the bakery may make requests and suggestions, is for all intents and purposes entirely a headquarters' function. The bakery's role is largely ministerial. It merely goes about the day-to-day procedures of baking and delivering products and endeavoring to acquire new customers for those products subject to respondent's policy and controls which require interstate contacts in formulation and dissemination. The actions of the bakery are those of a puppet whose strings are kept taut by an interstate organization. All these controls over the bakery form an intricate web of interstate contacts. Literally hundreds of different forms flow back and forth in making these contacts. Thus, any sale transaction in which the bakery plays a part, either in negotiations, invoicing, making or receiving payment, or making deliveries is a transaction or contract in the course of commerce which although not executory becomes an executed contract upon performance by respondent's salesmen acting under authority of a central office which operates interstate.

In *U.S.* v. *South-Eastern Underwriters Assn.*, 1944, 322 U.S. 533, a rather similar situation was presented. This case involved an attempt to bring the activities of fire insurance companies within the terms of the Sherman Act. The commerce question was perhaps the most important to be resolved. Appellees contended that the business of insurance was local in nature, that its regulation had always been left to the States, it being purely intrastate in nature, and that it was not subject to federal jurisidiction because the fire insurance business was not commerce. The District Court had agreed with this contention. In reversing, the Supreme Court remarked, at page 537:

> * * * As recognized by the District Court, the insurance business described in the indictment included not only the execution of insurance contracts but also negotiations and events prior to execution of the contracts and the innumerable transactions necessary to performance of the contracts. All of these alleged transactions, we shall hereafter point out, constituted a single continuous chain of events, many of which were multistate in character, and none of which, if we accept the allegations of the indictment could possibly have been continued but for that part of them which moved back and forth across state lines. True, many of the activities described in the indictment which constituted this chain of events might, if conceptually separated from that from which they are inseparable, be regarded as wholly local. But the District Court in construing the indictment did not attempt such a metaphysical separation. * * *

Thus, the District Court did not attempt to fragmentize the insurance business so as to segregate the making of local contracts from the rest of the insurance business and the Supreme Court appears to concur in this respect.

The Supreme Court continuing its remarks at pages 541–42 states:

> This business is not separated into 48 distinct territorial compartments which function in isolation from each other. Interrelationship, interdependence, and integration of activities in all the states in which they operate are practical aspects of the insurance companies' methods of doing business. A large share of the insurance business is concentrated in a comparatively few companies located, for the most part, in the financial centers of the East. Premiums collected from policyholders in every part of the United States flow into these companies for investment. As policies become payable, checks and drafts flow back to the many states where the policyholders reside. The result is a continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts. Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office — the risks it insures, the premiums it charges, the investments it makes, the losses it pays — concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state.
>
> That the fire insurance transactions alleged to have been restrained and monopolized by appellees fit the above described pattern of the national insurance trade is shown by the indictment before us. Of the nearly 200 combining companies, chartered in various states and foreign countries, only 18 maintained their home offices in one of the six states in which the S.E.U.A. operated; and 127 had headquarters in either New York, Pennsylvania, or Connecticut. During the period 1931–1941 a total of $488,000,000 in premiums was collected by local agents in the six states, most of which was transmitted to home offices in other states; while during the same period $215,000,000 in losses was paid by checks or drafts sent from the home offices to the companies' local agents for delivery to the policyholders. Local agents solicited prospects, utilized policy forms sent from home offices, and made regular reports to their companies by mail, telephone or telegraph. Special travelling agents supervised local operations. * * *

The Court then points out that other cases seemingly inconsistent with its holding were handed down when no attempt had been made to assert federal jurisdiction, when the only regulation of insurance was by the states. "But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause." p. 545.

The appellees attempted to have the Court scrutinize the local sale and issuance of policies of insurance as being the only activity to be examined. To this the Court replied, at pages 546–47:

> * * * Another reason much stressed has been that insurance policies are mere personal contracts subject to the laws of the state where executed. But this reason rests upon a distinction between what has been called "local" and what "interstate", a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power. Cf. *Wickard* v. *Filburn*, 317 U.S. 111, 119–120; *Parker* v. *Brown*, 317 U.S. 341, 360. We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce. Cf. *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539, 557–558. But it does not follow from this that the Court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events *which becomes interstate commerce.* Only by treating the Congressional power over commerce among the states as a "technical legal conception" rather than as a "practical one, drawn from the course of business" could such a conclusion be reached. *Swift & Co.* v. *United States*, 196 U.S. 375, 398. In short, a nationwide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce.

Thus, the Court concerns itself almost entirely, not with interstate contacts between the insurance company and its policyholders, but with the interstate contacts and controls which occur between and among the insurance company's headquarters and its agents. Contacts with policyholders seem to have been purely intrastate in nature. The important point was the existence of an interstate web of activities which went on before and after the occurrence of these local contacts, which included local issuance of policies, local premium payments, and local transfers of damage-claim checks. Under this concept the web of interstate activities in effect turned the local transactions into interstate transactions which were in the course of interstate commerce.[80] It also seems reasonable to conclude from this holding that the same concept may be applied in evaluating whether or not in a Clayton Act Section 2(a) case the discriminations are in the course of commerce and the purchases in commerce, or in a 2(d) case the payments are made in the course of commerce since the projection controls over such transactions brings them into commerce

[80] That the majority held that the local transactions were in the course of interstate commerce is carefully pointed out by the Chief Justice Stone's dissent. 322 U.S. at 562 *et seq.* The portion of the indictment at issue did not allege that restraints affected interstate commerce. Mr. Justice Jackson, in dissenting, was actually in agreement with the majority on the commerce issue but was not in favor of upsetting long-established state regulation of insurance. *Ibid.*, at 584 *et seq.*

aside from the issue of engagement in interstate commerce or its effect.[81]

In 1959 the Seventh Circuit decided a jurisdictional issue in *Holland Furnace Co.* v. *F.T.C.*, 269 F. (2) 203, *cert. den.*, 1960, 361, U. S. 932. That was a Sec. 5 case, but the decision was based largely upon *Standard Oil*, a Sec. 2(a) case, the Court remarking, at p. 211:

* * * That [*Standard Oil*] involved price discriminations under and in violation of Sec. 2(a) of the Clayton Act * * * does not affect the question of interstate commerce within the meaning of the Federal Trade Commission Act.

The *Holland Furnace* case involved deceptive practices of Holland's salesmen in their door-to-door selling activities. Holland claimed these practices were local and so not in commerce. The Court found they were in commerce, being a part of a larger interstate transaction.

There, Holland manufactured furnace components and shipped them from State A to a warehouse in State B for assembly. The salesmen's activities complained of took place in the sale of furnaces in State B. The Court quoted from the Commission's opinion as follows, at p. 209:

* * * The heating equipment is manufactured in Holland, Michigan, and shipped from there and sold by respondent's authorized representatives on a nationwide basis in some 45 states through respondent's own retail outlets. A realistic view of respondent's activities in moving its products from Michigan across state lines to accomplish its stated purpose of direct sales to ultimate consumers through "500 Direct Factory Branches serving Over 15,000,000 Customers" admits of no other conclusion than that respondent is engaged "in commerce."

Contracts between respondent and branch managers and salesmen; correspondence between the home office in Michigan and field personnel; those contracts between respondent's salesmen and the purchasing public on respond-

[81] See *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 in which the Court states:

"We think that the practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry [*sic*] increasing its domain through outlawed competitive practices. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. If this method of competition were approved, the pattern for growth of monopoly would be simple. As long as the price warfare was strictly intrastate, interstate business could grow and expand with impunity at the expense of local merchants. The competitive advantage would then be with the interstate combines, not by reason of their skills or efficiency but because of their strength and ability to wage price wars. The profits made in interstate activities would underwrite the losses of local price-cutting campaigns. No instrumentality of interstate commerce would be used to destroy the local merchant and expand the domain of the combine. But the opportunities afforded by interstate commerce would be employed to injure local trade. Congress, as guardian of the Commerce Clause, certainly has power to say that those advantages shall not attach to the privilege of doing an interstate business." p. 119.

ent's behalf which must be accepted by the home office; and representations made by salesmen in selling respondent's products—all are part and indicate a pattern of conduct in commerce within the meaning of the Federal Trade Commission Act.

The Court could find no point, from shipment of components to a salesman's front-door sales, where the stream of commerce logically ceased. It said, at p. 210:

Under the policy and practice found by the Commission there seems to be no logical point between shipments from the State of Michigan and the sale and delivery of Holland's products through its employees to the ultimate consumer in another state when, in view of the provisions and purposes of the Federal Trade Commission Act, they cease to be in interstate commerce until they rest finally in the possession of the purchaser or ultimate consumer. Without the sales, deliveries and installations made by Holland's salesmen and servicemen from its own warehouses its interstate business would cease. With those sales, deliveries and installations, and measured by them Holland has a continuous interstate business reaching into forty-four states. Under such facts the temporary warehousing of the products in each separate state in Holland's own warehouses is but an incident in the interstate business. The work of Holland's salesmen and servicemen create and are an essential part of Holland's vast interstate business and therefore is in commerce and subject to the regulative powers of the Commission.

Holland argued that the cases of *F.T.C.* v. *Bunte Bros., Inc.*, 1941, 312 U.S. 349, and *Ward Baking Co.* v. *F.T.C.*, *supra*, were controlling but the Court cast both of those aside because in *Bunte* the respondent was engaged in purely intrastate business and because *Ward* was decided upon the authority of a tax case and so was "entitled to little weight here." The court, in reaching its conclusion, relied heavily upon *Standard Oil* v. *F.T.C.*, *supra*. It felt that in both *Standard Oil* and in *Holland* "the interstate commerce was wholly dependent on the sales made subsequent to storage in connection with which unfair and deceptive practices were used and kept moving through estimates of future needs created by said sales." p. 212.

Thus the Court reasoned that the local sales by Holland's salesmen were but a part of larger interstate transactions which included many interstate intramural contacts and controls such as we have here as well as interstate movement of components for local mechanical assembly or chemical processing.

Nowhere in the Clayton Act is there a requirement that goods must move across state lines in order for there to be a sale in commerce. Section 2(a) merely requires that a sale be in commerce, and Sec. 1 defines "commerce" simply as "trade or commerce among the several states", etc. The touchstone of interstate product movement has grown over the decades to be one reliable guide, but that guide grew

up before the influx of interstate chains of business establishments which of necessity must be relatively localized in their activities.

Nor is there any inflexible rule of construction requiring that interstate contacts between seller and customer—whether interstate product shipments, interstate negotiations, interstate contracts, or interstate billing and paying—occur for a sale to be one in commerce. "In commerce" must be construed in the light of the evidence in each individual case. The broad interpretation of this phraseology enunciated by the courts is a clear indication of this.

Accordingly, the hearing examiner finds all of Continental's sales, including those made in New York, its headquarters state, are sales in commerce. The New York sales, as well as other sales, are all an integral part of the respondent's interstate system of sales control and promotion. The Supreme Court has made it clear that inflexible mechanical criteria are not controlling in the measurement of Federal power over commerce.[82]

VI. LIKE GRADE AND QUALITY

Continental markets its bakery products by delivering them all on one truck (except in densely populated areas such as the metropolitan New York City-northern New Jersey area where it is feasible, because cake has a longer shelf-life than bread and so does not require delivery as often, for cake to be delivered by separate trucks). It offers to sell any or all items to any given customer. These bakery products are classified and branded as Hostess cake products (which include cup cakes, Sno-balls, Twinkies, macaroons, fruit cakes, and pastries), as Wonder bread products (which include white, white made with buttermilk, wheat, and rye breads, brown'n serve rolls, hamburger buns, and frankfurter rolls), as Profile bread, and as Daffodil Farm bread.[83] There is only a single grade and quality of Hostess cake products, of Wonder bread products, of Profile bread, and of Daffodil Farm bread.[84]

Although marketed together as Continental's bakery products, the lines of products are classed separately in making prices to customers, in that discounts on Hostess cake products do not necessarily accompany discounts on Wonder, Profile, and Daffodil Farm bread products. Discounts on all products at the same rate were usual however, dependent upon the competition to be met. The discount on bread

[82] See *U.S.* v. *South Eastern Underwriters Assn.*, 1944, 322 U.S. 533 and *Moore* v. *Mead's Fine Bread Co.*, 1954, 348 U.S. 115.

[83] CX 259B.

[84] Tr. 506.

applied not only to Wonder bread but also to Profile and Daffodil Farm; in other words, to all bread the customer chose to handle.[85]

The Court in the *Moog* case [86] said in effect that when Moog made no attempt to govern or to determine whether or not certain customers bought certain items of a line, the Commission did not have the burden of becoming immersed in the small details of matching items bought by competing customers to prove a fact, the disproof of which by Moog would have been sheer happenstance. That situation seems parallel to the one here.

Thus, when competing customers handle any part of the Hostess cake line a discrimination in price is on goods of like grade and quality. The same can be said for Continental's bread line. If a favored customer handles Wonder white bread and a competing non-favored customer handles Profile a discrimination in price is on goods of like grade and quality for one reason, because both are priced as a line of bread, and for another, because both varieties are used for the same purpose, namely, as bread. The evidence is clear that the competing favored and un-favored customers of Continental were buying and selling Continental bake products of like grade and quality in the market areas hereinbefore identified specific proof of like grade and quality is not, however, an essential statutory requirement in establishing a defense of meeting competition in good faith. It seems reasonable to assume, nevertheless, that *de minimis*, the statute contemplates the reduced price or allowance in each individual situation must be in a competitive line, otherwise it could hardly be considered a bona fide method of meeting competition. This can only be de-

[85] Tr. 2140–41. CX 190 consists of tabulations showing varieties of products sold to favored customers (CX 190A is the key sheet and the rest of the tabulations are broken down by route sources and then by routes). CX 190B through F cover favored customers served by the Paterson bakery and the Carlstadt and Woodbridge depots and do not show any deliveries of cake products. Presumably the areas served by these route sources are served by separate cake routes and Continental, in preparing these exhibits, merely overlooked including the cake items. CX 190G and H, however, cover the favored customers served by the Asbury Park and Middletown depots and do show cake deliveries, thereby indicating that in those areas the same route truck delivers both bread and cake. The record shows that two non-favored customers (Henry's Delicatessen and Ridustelli's Market) were served by Asbury Park Route #4 who were served with cake and were in competition with Safeway, Acme, and Mayfair outlets, all of which are shown on CX 190G as being served by the same Route #4 and all of which are also served cake. These two non-favored customers are served with Wonder white and "cracked" wheat bread and hamburger buns and frankfurter rolls, as well as Profile bread. CX 190G shows that the Safeway and Mayfair outlets are served with all of these products and the Acme (American Stores) outlet is served with Profile. With respect to Daffodil Farm bread, CX 190 shows that Edsall & Bargmann (served by Paterson Route #14) handles it and is in competition with Grand Union and Food Fair outlets, which also handle it; that Clark's Delicatessen (served by Woodbridge Route #30) handles it and is in competition with a Trunz Market outlet, which also handles it; and that Hoffman's Delicatessen (served by Woodbridge Route #45) handles it and is in competition with Scotch Plains Shop-Rite, which also handles it.

[86] *Moog Industries, Inc.* v. *F.T.C.*, 1956, 8 Cir., 238 F. (2) 43.

termined by the circumstances in each case as evidenced. The evidence in the instant case would seem to indicate, in view of the manner in which the bake goods business is conducted (as herein set forth), that one general line of bake goods is competitive with another, particularly in view of competition for the allocation of counter space and preferred counter position as an inducement to market demand.

VII. COMPETITIVE INJURY

Respondent argues that the supermarkets to which it allegedly grants favorable prices are not in competition with local grocery stores who now specialize in certain types of groceries and meats, because these local stores do not and cannot have many of the facilities which enable large volume buying at the supermarkets. Although there is some realistic merit to this argument, as an economic fact neither the courts nor the Federal Trade Commission have taken cognizance of it. In fact, the very purpose and intent of the Robinson-Patman Act is to protect small business.

It is true, as enunciated by counsel for the respondent, that if supermarkets were eliminated it would not make supermarkets of local grocery stores. On the other hand, the business of the local stores would be enhanced, it is believed, if supermarkets were eliminated even though the small local stores could not offer the public all the facilities and accommodations available at supermarkets. Therefore, to a substantial degree, it would appear the small grocer is a competitor of the supermarkets in the same geographic market area.

Respondent argues that the bakery products it sells are not competitive price-wise since these items retail at the same price in the supermarkets as in the local grocery stores. Therefore, respondent says allowances to favored customers (*i.e.*, the supermarkets) cannot substantially lessen competition. To the contrary, however, such allowances in a highly competitive market, more particularly the grocery business where the margin of profit is small, may substantially lessen competition or tend to create a monopoly if allowances on one product afford the opportunity of reducing prices on other items that are highly competitive and have a low margin of profit. Whether the products sold at a discriminatory price have the effect of substantially lessening competition in the retail sale of that particular product as distinguished from other products in the same market would not in and of itself appear to the hearing

examiner to be a controlling economic factor within the purview of Section 2(a) of the Clayton Act.[87]

Favored-customer price-cutting or loss-leadership on products not involved in the discrimination at issue (but on which price reductions are significant enough to cause a reasonable probability of consumer diversion on many products, including the one at issue) is merely another incident of the advantages gained indirectly over non-favored customers. Installation of motorized shopping carts in supermarkets, for instance, as well as loss-leadership on such a product as coffee, might very well cause consumer diversion.

In the *Auto Parts* cases [88] it was pointed out that with the amounts by which non-favored customers were discriminated against these customers could hire more salesmen, operate more trucks, expand their plants, and open branch houses. In this case non-favored customers, if they could have purchased at the same price as favored customers, would have been able to improve their plants to make them more comfortable, attractive, and convenient to consumers as well as engaged in price-cutting on highly competitive products such as coffee and sugar.

The evidence establishes that non-favored customers were in competition with favored customers located as much as a mile or more away. This was so because many consumers were equipped with automobiles. Although a non-favored customer may have drawn his trade from his immediate neighborhood, that same trade could drive to a relatively distant outlet of a favored customer to shop for the weekly supply of groceries. The nearer such an outlet was located, the more competition it provided for fill-in, or day-to-day shopping. And, of course, the fact that favored customers advertise in newspapers of wide circulation and distribute circulars by direct mail to 5,000 or more addresses is some proof that they draw their customers from relatively wide circles. [89]

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[87] See auto parts cases *e.g. Moog Industries, Inc.* v. *F.T.C.*, 1955, 51 F.T.C. 931; aff'd., 1956, 8 Cir., 238 F. 2d 43; 1958, 355 U.S. 411; *rehear. den.*, 356 U.S. 905; *Whittaker Cable Corp.* v. *F.T.C.*, 1955, 51 F.T.C. 958; *aff'd.*, 1956, 7 Cir., 239 F. 2d 253; *E. Edelman & Co.*, v. *F.T.C.*, 1955, 51 F.T.C. 978; *aff'd.*, 1956, 7 Cir., 239 F. 2d 152, which hold that, regardless of whether there was any price-cutting by customers on *any* products, probable injury was present as here where there was a highly competitive market, with low profit margins, and the discrimination was not insubstantial. Injury in the secondary line, according to those cases, does not require a diversion of trade caused by price-cutting, or what may be termed direct injury. [This is obviously so because otherwise the McGuire Act would provide an exemption not only to the Sherman and Federal Trade Commission Acts but to the Robinson-Patman Act as well, since by fair-trading his product a seller could eliminate any customer price-cutting.]

[88] *Id.*

[89] See *Carpel Frosted Foods, Inc.*, 1951, 48 F.T.C. 581, 596, to the effect that advertising in newspapers places grocery-store advertisers in competition with other grocery stores in the area of the newspaper's circulation.

There can be no doubt that the grocery business is a highly competitive one. Most of Continental's non-favored customers are usually small family enterprises, in some cases employing no outside help, remaining open for long hours, and offering such services as credit and deliveries in an attempt to compete with the larger supermarket stores.

Small profit margins in the grocery business are realized by both favored and non-favored customers. For example, the New York division of Safeway Stores made no profit in 1957, and, in 1958, profits were considerably less than 5%; and Davidson Bros., operating two supermarkets with annual sales of $2.2 million, has made no profits for "the last few years." [90]

Of further significance is the fact that bakery products account for a substantial share of a grocery store's business, usually averaging around 5% but in some cases accounting for considerably more.

With respect to the amount of the price difference in this case, the record establishes that in every case except one the amount of Continental's discount granted to favored customers was 5%. (That exception was National Grocery Stores which was first granted 5% and later an extra 2%.)

A recent order and supporting reasons of the Commission on the subject of injury in *United Biscuit Co. of America*, D. 7817, vacating an Initial Decision, June 28, 1962, where the examiner had dismissed the complaint because he felt a discount schedule ranging from 0% to 6%, in ½% increments, applying to the sale of crackers and cookies to grocery stores, did not produce the required effect, states:

> * * * Considering the highly competitive nature of the market and other factors mentioned, a volume discount of 6%, tantamount to a difference in price of 6%, was clearly substantial. Likewise substantial were the lesser discounts shown ranging up to 6% [60 F.T.C. 1893, 1898]. Clearly, the test for competitive injury set forth in *Morton Salt* [91] and applied in the automotive cases above mentioned should govern this proceeding.

Thus the Commission has unqualifiedly held that the grocery business is highly competitive and a discount of as much as 5% on such items creates a difference in price of such substantiality as to cause probable competitive injury [92] under circumstances similar to those herein, even though there is no customer price-cutting. The hearing examiner therefore makes the same finding in this case with regard to Continental's discounts or allowances on bake goods.

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[90] See also Appendix demonstrating the low margin of profit in the grocery lines including meats and delicatessen items.

[91] 334 U.S. 37 (1948).

[92] See *Corn Products Refining Co.* v. *F.T.C.*, 324 U.S. 738.

VIII. RESPONDENT'S DISCOUNTS TO MEET COMPETITION

Respondent has satisfied the requirements of Section 2(b) of the act, since the evidence demonstrates that the discounts in question were given in good faith to meet the equally low or lower prices of competitors.

A. History of Discounts in the Market Areas Involved

Before 1953, Continental Baking did not grant discounts to any of its retailer customers in the market areas involved in this proceeding. As a matter of business policy, Continental appears to have been opposed to granting discounts. The granting of discounts by competing wholesale bakers caused a revision of this policy in 1953 in particular individual situations where discounts or allowances were necessary to survive competition.[93] Not only is there no evidence of discounts granted by Continental before 1953, but the record reveals that Continental refused discounts prior to that time even though it meant the loss of customers or a drastic reduction in purchases by a customer. In contrast, there is abundant evidence of discounts granted to retail grocers by Continental's competitors well before 1953.

Continental's major competitors in the New York-New Jersey and Philadelphia market areas were General (bakers of Bond Bread), Ward (bakers of Tiptop Bread), American (bakers of Taystee Bread), Gordon (bakers of Silvercup Bread) and Fischer bakeries. All of these bakers sell a full line of baked goods comparable to the line of products sold by Continental in these markets. Numerous smaller bakers also sell in various localities throughout these markets.[94] In addition to the testimony of Continental's representatives, the record as to the individual discounts in issue in this case vividly demonstrates that Fischer, Ward, General, and Gordon were Continental's major competitors in the New York-New Jersey area during the time in question.

The first baker to grant discounts from list prices in the New York-New Jersey area was Fischer Baking Company, beginning as early as 1937 or 1938. These discounts originally were 2% and soon moved up to 5%. Through these discounts Fischer developed a strong position in the New Jersey market, to the detriment of other bakers serving that area.[95]

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[93] See Timberman, Tr. 1838–39, 2135.
[94] See Timberman, Tr. 1840–41, 2141–42; Lynch Tr. 1964.
[95] See Timberman, Tr. 1839–40; Lynch, Tr. 1961–62; Heim, Tr. 2147–48.

Ward Baking Company was giving discounts in the markets in question before 1942. By the late 1940's or early 1950's many of Continental's other competitors in the New Jersey market began to give discounts to retail food stores. Continental's employees heard persistent reports of discounts given by Ward, General, and American bakeries. The prevailing discount then being offered by these bakers was 5%. Customer witnesses testified also that it was common knowledge in the trade by 1953 that, with the exception of Continental and Gordon, all of the major bakers serving the New Jersey market were giving discounts.[96]

The history of Ward's discounts, which began before 1942, is of special interest. By 1955, Ward had so many discounts, in such a variety of forms and rates and negotiated by persons at all levels of management, that the central office of the company was unable to keep track of them. In March 1955, Ward's changed from the disorganized procedure to an "allowance" of 5% to each store which would indicate an intention to purchase more than $50 worth of bread and cake per week over an eight-week period. This program was announced to the trade by press release, and at its peak was extended to 4,000 Ward customers in the "metropolitan New York market." This region was defined by Mr. Sidders as that area below Poughkeepsie and Middletown, New York, and east of the Delaware River, extending as far south as and including Philadelphia. Upon the inception of this program those who had been receiving a Ward discount were, with[97A] one or two unnamed exceptions, made its beneficiaries. In December of 1957, after the legality of the program had been questioned, it was withdrawn and Ward went back to a straight 5% discount without reference to any required dollar amount of purchases.[97B]

Though characterized as payments under an "advertising allowance" contract, the 5% reduction given by Ward to some of its customers from 1955 through 1957 was in fact simply a discount. All that was ostensibly required was the participation by the retailer in six special Ward promotions during a 52-week period. Though Ward's offered six promotions timed to coincide with holidays when baked products sales were high, the retailer was not bound to participate in these, but could choose any time of year and any type of promotion. The display materials were supplied by Ward's and the

[96] See Sidders, Tr. 2642, 2681; Timberman, Tr. 1841–42; McKinnon, Tr. 1922–23, 1941, 1956–57; Lynch, Tr. 1965; Kaufelt, Tr. 1785–88.

[97A] See Sidders, Tr. 2681, 2638–39, 2675–76, 2640, 2677; CX 258; Tr. 2642, 2678.

[97B] See Sidders, Tr. 2675, 2680.

display erected by the Ward's salesman. There was never any attempt to correlate the 5% reduction with the retailers' expenditures. Ward made no check on the retailers' performance under these contracts, but took a satisfactory sales record in lieu of proof of performance. Further evidence that the Ward 1955–57 arrangement was not in fact an advertising contract is found in the fact that the promotions participated in by the retailers while party to the contract were continued after Ward's withdrew the plan. This continuation occurred only because these promotions involve no expense to the retailer, and are of benefit to him in that they increase his volume of sales.[98]

The record establishes that Continental's continued refusal to meet discounts granted by competing wholesale bakers had, during the period 1948–52, a serious detrimental effect on its sales. Ellsworth Timberman, Regional Manager for Continental's New York region, which encompasses the market involved in this proceeding, testified that beginning in 1948 or 1949 Continental encountered sales problems directly traceable to discounts given by Continental's competitors. This decline in Continental sales took place at a time when, had Continental merely held its market position, its sales would have increased because demand throughout the market was increasing.[99]

Continental introduced documentary evidence graphically demonstrating the serious decline which occurred in its sales between 1948 and 1952 in the metropolitan New York and New Jersey markets. Continental's gross bread sales in 1948 for the regions served by its Hoboken and Paterson, New Jersey, bakeries and its Mount Vernon, Bronx and Jamaica, New York, bakeries totalled 92,915,491 pounds. In 1949 this volume dropped to 65,791,658 pounds. This loss was attributable in part to an extended strike which closed Continental's metropolitan New York bakeries for twenty-one weeks during that year. But the fact that the strike was not the sole cause is borne out by Continental's experience after the resumption of New York production and its experience in New Jersey, where its bakeries were not closed during the strike. After production was resumed in 1949, Continental's sales volume stayed well below the 1948 volume until 1953. Gross sales in 1950 of 81,273,978 pounds were more than 10 million pounds below 1948. Sales continued to decline in 1951, dropping to 79,018,528 pounds. Though sales in 1952 increased, 85,433,452 pounds, this figure was still well below the 1948 volume of nearly 93 million. Only when Continental began to grant discounts in situations of competitive necessity in 1953, did its sales

[98] See Sidders, Tr. 2678–80, 2694, 2693.
[99] See Timberman, Tr. 1836–37, 1844, 1885, 1890, 2110.

volume regain the 1948 figure—with the small excess over 1948 only commensurate with the overall growth in the market demand.[100]

Continental's experience in New Jersey similarly proves that its decline in sales in the metropolitan New York and New Jersey market during the period 1948–1952 was attributable in substantial part to competitive discounts. New Jersey sales declined in a pattern parallel to that of its total metropolitan New York-New Jersey sales, although the 1949 strike involved only the New York plants. In 1949, Continental's sales in New Jersey dropped more than two million pounds below 1948 sales—a decrease of more than 5%. 1950 saw another decline—more than two million pounds below 1949, and more than four million, over 10%, below 1948. 1951 was the low mark for this period in New Jersey, sales dropping to 33,549,005 pounds, nearly 18% below 1948. Despite an increase in 1952, to 36,721,032 [101A] pounds, sales remained substantially below 1948. Finally, in 1953, Continental regained in New Jersey as it did in the larger market area. These figures lend emphatic support to the testimony of Continental's employees that discounting by its competitors had seriously damaged its market position.[101B]

The use of discounts by some of Continental's competitors appears to have been stimulated by the 1949 strike. This strike, by the teamsters and salesmen of the New York bakeries, forced a shutdown not only of Continental's plants but the plants of General, Ward, and American. However, two major bakers in this area, Fischer and Gordon, were not members of the same bargaining unit, they were therefore able to replace the struck bakers in many retail outlets. Other bakers, such as Thomas, which did not ordinarily produce types of bread competitive with those of the major producers, began to manufacture and sell such products. More distant bakers who had not previously sold in the New York area entered this market to fill the void. After settlement of the strike, Continental thus found it impossible in many retail outlets to regain its shelf space and volume. However, Continental's unwillingness to discount as a method of restoring its competitive position was obviously not shared by General and Ward. In the new market conditions created by the strike, they made increasing use of discounts in the attempt to regain their pre-strike volume.[102]

In 1953, Continental finally concluded that some discounts would have to be granted to meet lower competitive prices and avoid con-

[100] RX 3A–C, 4A–C.
[101A] See Timberman, Tr. 2144.
[101B] RX 3B.
[102] See Timberman, Tr. 2112–13, 2125–26, 2144, 2128–30.

tinuing drastic loss of business. This decision was reached only after Continental had been subjected to heavy pressure by its retailer customers receiving discounts, from other bakers, and after it had been eliminated from many stores because of its refusal to grant discounts.[103]

Two situations represented the culmination of pressures on Continental and finally triggered the change in its policy. The first of these, described in detail in later Findings, involved Continental's sales to the Food Fair chain. Continental, though constantly solicited over an extended period, had flatly refused to grant Food Fair a discount. Faced with a final ultimatum, Continental had to choose either to meet competitive discounts or to lose completely this very important customer. At about this same time, members of the Twin Counties buying cooperative brought concerted pressures against Continental for discounts. The stores in this cooperative were at this time receiving discounts from all of Continental's major competitors. In their weekly meetings, the members decided to exact discounts from Continental through selected pressure. Choosing those stores where Continental did its greatest volume of business, the members began to cut down, and in some cases to discontinue, their purchases from Continental. The intensity of this effort is attested to by the fact that, during a period of three weeks in 1953, Continental was put out of about thirty stores owned by members of the cooperative. Subsequent findings detail specific instances in which members of the Twin Counties buying cooperative exacted discounts from Continental.[104]

Continental's decision to meet competitive discounts in the New York-New Jersey region was reached after lengthy deliberation by its officials. Its new policy, promulgated through frequent contacts by the regional manager with his plant managers and other sales personnel, was to permit discounts only where a competitor was giving a discount in as great or greater amount and where necessary for Continental to continue selling to that customer. Discounts were confined to product lines comparable to those on which Continental's competitors were offering discounts.[105]

The Continental sales personnel who appeared as witnesses during the hearings all testified that they understood the Company's policy to be that a discount could be granted only when they were satisfied that the customer was receiving a discount from a competitor and they were convinced that Continental had to meet this discount to

[103] See Timberman, Tr. 2128, 2135–36.
[104] See Lunch, Tr. 1986—1987; Heim, Tr. 2214—15, 2164.
[105] See Timberman, Tr. 1848–49, 2137, 2140–41.

continue to serve that customer. Continental's salesmen have refused to give a discount when a customer has not satisfied them that he is getting a discount from one or more of Continental's competitors. Similarly, where a customer has requested a discount but Continental has been able to continue to sell, no discount has been granted.[106]

Continental has not adopted a system of granting discounts on the basis of the size of the customer. Discounts have been given to small stores, as well as to supermarkets, where Continental has been satisfied that competitors were giving discounts and that Continental had to meet them to continue its sales. Accordingly, some chain stores sold by Continental—A&P most prominently—have never received a discount from Continental. On the other hand, proprietors of a single store, whether a supermarket or a neighborhood grocer, have received discounts when Continental was satisfied that they were receiving discounts from competitors and a failure to meet these discounts would result in discontinuation of purchases from Continental.[107]

The fact that a competitive situation exists which Continental must meet was, of course, determined initially by a customer's representation that he was receiving discounts from list prices from one or more competitors. On some occasions documentation was obtained in the form of discount checks, competitors' invoices, etc. In all instances, moreover, Continental's salesmen were able to check a grocer's claim that he was receiving discounts from competitors against their familiarity with the market, the customers, and the competitors. A grocer receiving a discount inevitably gives that supplier greater shelf space. Mr. Sidders, of Ward Baking Company, testified that a bread salesman knows whether a competitor is favoring a customer by his observation of the treatment given that competitor in rack position and space allocation. Ultimately, therefore, verification of a grocer's claim that he was receiving a discount from a competitor derived from the informed business judgment of the Continental salesman. Knowledge that other bakers in the market were giving discounts, and that the particular customer was an aggressive businessman who would obtain any discounts that were available, together with reduction in purchases from Continental and less desirable shelf space for Continental products, would lend strong support to the customer's contentions.[108] The accuracy of this business judgment is abundantly confirmed by the fact that in every record instance where Continental

[106] See McKinnon, Tr. 1930; Lynch, Tr. 1976; Heim, Tr. 2217, 2239–40; Sundell, Tr. 2362–63; Lynch, Tr. 1986; Heim, Tr. 2235; Lynch, Tr. 1986–87.

[107] See Heim, Tr. 2235–36.

[108] See Testa, Tr. 549–50; Lynch, Tr. 1978–79; Heim, Tr. 2218–22; Sundell, Tr. 2359–60; Brown, Tr. 447; Lynch, Tr. 1991–92; Sundell, Tr. 2362–64; Sidders, Tr. 2668; Brown, Tr. 443–47; Testa, Tr. 550–52; Lynch, Tr. 1987–92.

granted discounts proof was submitted that the customer had been offered, and that almost all were actually receiving, as great or greater discounts from one or more competitors.

Before Continental changed its discount policy in 1953, it had fallen from a strong second position to fourth or fifth baker. Subsequent to the adoption of its tightly controlled discount policy, Continental regained its position as second baker in the New York-New Jersey markets. The protracted delay in meeting competitors' discounts resulted, however, in serious continuing loss of business for Continental. Some customers who discontinued purchases because Continental refused to meet a discount have never resumed their former volume of purchases of Continental bread.[109]

Before Continental began to grant any discounts to retailer customers to meet competition, departures from list prices were a negligible percentage of its gross sales in the New York region. These departures were confined to pricing on sales to institutional customers such as schools and military installations. By 1959, total reductions from list on sales from the Paterson Bakery, which serves the largest market involved in this case, amounted to 2% of gross sales. This was the peak figure reached in the years 1953-59, and included, in addition to competitive discounts, both the lower prices on sales to institutional customers and geographic price decreases uniformly adopted for all retailers on portions of Paterson routes which ran into areas where Continental encountered lower competitive list prices.[110]

The competitive conditions which compelled Continental to meet some discounts continued throughout the period involved in this proceeding. In the case of each of the Continental discounts shown by the record, the competitive discounts which Continental met remained in effect through 1959. In no instance in which a competitor granted a discount was it later withdrawn. Indeed, when Ward Baking tried to eliminate its discounts in these markets, in March 1955, it found it impossible to do so and remain in business. In 1957, Ward again had to abandon an attempt to withdraw discounts under threats of termination of purchases.[111]

Testimony of customer witnesses further reveals the intensely competitive situation prevailing in these markets throughout these years. Alexander Jacob, owner of the Capitol Shop-Rite, testified that Fischer Baking Company negotiated a discount with headquarters of the Shop-Rite Cooperative, extending a discount to all its members.

[109] See Timberman, Tr. 1849–50, 1890–91; Heim, Tr. 2234–35, 2237.
[110] See Timberman, Tr. 1885, 1893, 1895–96.
[111] See Sidders, Tr. 2680, Tr. 2638–39.

Leroy Davidson, owner of the Davidson's Food Towns, testified that some major bakers, among them American Baking, had offered him discounts if he would allow them to serve his stores. There was also testimony that in 1956 or 1957 many bakers in the New Jersey market increased their discounts to 7%.[112]

Thus, the record abundantly documents the fact that competing wholesale bakers were already granting discounts in the market areas involved in this proceeding years prior to the time when Continental began to meet these lower competitive prices. Accordingly, and as revealed in subsequent findings dealing with the individual competitive situations, Continental's discounts were not used aggressively or "as a weapon to obtain new customers, at the expense of its seller-competitors." *Standard Motor Products*, 54 F.T.C 814, 822 (1957), aff'd, 265 F. 2d 674 (2d Cir. 1958). As detailed in subsequent findings, there was no instance in which Continental by granting a discount supplanted any competing wholesale baker then supplying the particular retail grocer. Moreover, the record shows no instances where any retail grocer became, as a result of the discounts, an exclusive Continental customer.

B. Comparability of Base Prices of Wholesale Bakers in the Market Areas in Question

The record establishes that, in the market areas involved in this case, retailers do not engage in price competition in the sale of brand bread. On the other hand, competition at the wholesale level is so keen that each baker of brand bread must meet the wholesale prices offered by his competitors or lose his volume.

Because bread is a perishable item, lower retail prices do not encourage large scale buying for future needs. And, because bread is a staple item for which there is relatively constant demand, retail price reductions do not increase over-all bread sales. At the same time, a grocer who can buy a brand of bread at a wholesale price below that of competing brands will not reduce the shelf price of that brand, but will sell it at the same retail prices as competitive brands. Because sales of the brand bought at lower wholesale prices yield him an additional profit, the grocer will favor that brand. This can be easily done because brand preference means relatively little, the bulk of bread sales being "impulse" purchases. The brand most prominently displayed in the most convenient location on the baker's rack will outsell competitive items. The wholesale baker's inability to exploit consumer preference means that he cannot sell his product in profit-

[112] See Jacob, Tr. 1702; Davidson, Tr. 2383–84, 2378; George, Tr. 1815.

able quantities at prices above those charged by his competitors. Nor can a brand bread baker increase sales by pricing below his competitors, inasmuch as they will feel compelled to come down to his price level.[113]

Similarly, if one baker in a market announces higher wholesale prices and the grocer finds that he can continue to get his markup by selling at higher retail prices, he typically increases retail prices on the comparable products of competing bakers who have not raised their wholesale prices. This phenomenon inescapably leads the other wholesale bakers to increase their wholesale prices. The fact that all these bakers are subject to the same cost increases serves as an added reason for similarly timed increases.[114]

C. Continental's Belief That the Lower Prices Met Were Lawful

The record also establishes that Continental had no reason to question the lawfulness of the competitive prices which it met. Instead, Continental's management could and did believe that its competitors' discounts were lawful.

In each of the markets involved, Continental faced the competition of up to five major bakers and numerous local and specialty bakers. Each of the major bakers, and many of the others, were giving discounts during the period in question. Fischer began discounting as early as 1937, and Ward began at least as early as 1942. All of the major bakers except Continental and Gordon were giving discounts by 1950. During this entire period there has been no decision by the Federal Trade Commission or any court holding unlawful a discount on the sale of bread to retailers. While actions of the Federal Trade Commission and the courts in past cases are not, of course, decisive of the issues here, they do bear on the question whether Continental had any reason to doubt the lawfulness of the prices which it met. From 1914, when the Clayton Act was enacted, until 1953, the year in which Continental granted its first discount, the Federal Trade Commission issued six complaints involving discriminatory price differences in the sale of bread. Three alleged violations of Section 2 of the amended Clayton Act,[115] and three alleged violations of Section 5 of the Federal Trade Commission Act.[116] Five of these com-

[113] See Brown, Tr. 447, 450; Testa, Tr. 589; Sidders, Tr. 2668; Brown, Tr. 482–83; Testa, Tr. 590; Timberman, Tr. 1861–62; Zaveckas, Tr. 629; Timberman, Tr. 736–37, 739–40, 1860–62; Lynch, Tr. 1967.

[114] See Testa, Tr. 566–569.

[115] *Continental Baking Co.*, 30 F.T.C. 1393 (May 31, 1940); *Continental Baking Co.*, 37 F.T.C. 670 (Oct. 18, 1943); *General Baking Co.*, 32 F.T.C. 1635 (Dec. 13, 1940).

[116] *Ward Baking Co.*, 264 F. 2d 330 (2d Cir. 1920); *New England Baking Co.*, 2 F.T.C. 465 (May 13, 1920); *Ward Baking Co.*, 5 F.T.C. 483 (July 20, 1922).

plaints were dismissed by the Commission, one against Continental itself being dismissed because the "allegations of the complaint have not been sustained by the evidence." [117] A sixth, upheld by the Commission, was reversed on appeal. In that case it was held that bread sold in the same manner as Continental's is not sold "in commerce." [118]

Since 1953, five complaints, excluding the present case, have been issued by the Federal Trade Commission, charging a violation of Section 2 in the sale of bread. One of these cases has already been dismissed.[119] Two have been settled by consent orders expressly stating that they do not constitute an admission by respondents that they have violated the law as alleged in the complaint,[120] and two are still pending.[121] In view of this history, and in the light of the serious and complex questions bearing on the validity of Continental's own prices entirely apart from its Section 2(b) defense, it is clear that Continental could reasonably believe its competitors' prices were lawful. The prices met by Continental were not the result of a two-price system or other inherently discriminatory pricing method. They were not a consequence of geographic price cutting or local price wars where all of the circumstances indicative of an unlawful price reduction were a matter of common knowledge. Continental had no reason to think that any price differences in its competitors' sales could not be cost justified or defended as made in response to changing market conditions. The long period of years over which the discounts of Continental's competitors went unchallenged also justified Continental's assumption that the prices it was meeting were lawful.

The exact number of retail customers served by Continental and the other bakers in the markets in question is not a matter of record; obviously, however, there are thousands of them. Equally obviously, no baker can know the nature and scope of all of his competitors' activities. He cannot, for example, know whether a competitor is offering discounts to all of his customers who compete with one another or just to some. Nor can he exchange price and other sales information with competitors without exposing himself to the gravest antitrust hazards.

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[117] *Continental Baking Co.*, 37 F.T.C. 670, 678 (Oct. 18, 1943).

[118] *Ward Baking Co.* v. *F.T.C.*, *supra*.

[119] *Huber Baking Co.*, Docket No. 7629, Sept. 15, 1961, CCH Trade Reg. Rep. Para. 15,389.

[120] *Ward Baking Co.*, 55 F.T.C. 1142 (Feb. 10, 1959); *William Friehofer Baking Co.*, 55 F.T.C. 993 (Jan. 7, 1959).

[121] *Southern Bakeries Co.*, Docket No. 7881; *American Bakeries Co.*, Docket No. 8120.

Furthermore, there is no evidence that the discounts met by Continental had themselves been given for purposes other than to meet the equally low and non-discriminatory prices offered by another baker.

D. Continental's Discounts Challenged Under Count I Necessary to Meet Competitive Discounts

Evidence was introduced with respect to 20 discounts granted from Continental's list prices to retail grocer customers. All but two of these customers were shown to have been, at the time and throughout the period covered by this proceeding, receiving at least as high discounts from one or more of Continental's competitors. In the other two instances, proof was presented that they had previously been offered, and had immediately available to them, discounts from Continental's competitors at least as high as that granted by Continental. As hereinafter set forth with respect to each of these customers, Continental never gave a discount greater or a resulting net price lower than those afforded by competitors to these particular customers, while in some instances the Continental discount was smaller and the net price accordingly was higher. Finally, the evidence establishes that Continental's salesmen consistently adhered to the Company policy of giving discounts only where they were competitively necessary. Although in minor instances [122] this, in a sense, involved the necessity of granting discounts in seeking new business, it was to meet old competition in the same trade area or to seek old customers at new locations under identical economic conditions prevailing in the meeting of competition to hold old business in a highly competitive low margin of profit grocery market. The policy enunciated by the Commission preclusive of a meeting competition defense as to new business would therefore not appear to be applicable under these facts as well as for other reasons herein set forth.[123]

Acme Markets

In late 1956, the stores in the Kearny Division of Acme Markets, were being supplied by the Fischer Baking Company and General Baking Company. Fischer was the leading wholesale baker in those

[122] See transactions re Capitol Shop-Rite, Food-O-Rama, King's Markets, Acme, Best Markets.

[123] See *Sunshine Biscuits, Inc.* v. *F.T.C.*, July 11, 1962, 7 Cir., 306 F. (2) 48. There the abstract question of whether or not the granting of a lower price to obtain a new customer was permissable under 2(b) was answered in the affirmative. However, the Commission has recently issued a Public Statement to the effect that its decision not to seek Supreme Court review of that case does not reflect a change of position by the Commission on the point of law involved. Public Statement, press release, November 23, 1962.

stores, selling a full line of baked goods. However, the bulk of the baked goods carried in these Acme Markets were private label items, produced by Acme in its own bakeries.[124]

Joseph Alesi, grocery buyer for Acme's Kearny Division until 1957, testified that when he assumed that position in 1947 the Fischer Baking Company was giving a discount to the stores in that Division. This discount was never less than 5 per cent, and Mr. Alesi testified that it may have been more.[125]

In late 1956 or early 1957, Frederick McKinnon, then regional sales manager for Continental Baking Company's New York region, contacted Mr. Alesi in an effort to place its products on the shelves of the Acme Markets in that area. In the ensuing discussions Mr. Alesi told Mr. McKinnon that Acme was receiving a 5% discount on list prices from another baker, and that unless Continental granted equally low prices he would not authorize purchase of Continental bread. Mr. McKinnon recalled that Mr. Alesi told him of discounts from Fischer and General. Mr. Alesi specifically recalled telling Mr. McKinnon about the Fischer discount.[126]

A 5% discount was eventually negotiated between Mr. Alesi and Mr. McKinnon for Acme's Kearny Division. This Division encompasses Northern New Jersey, starting at Tom's River, and Staten Island and Long Island in New York. Because Acme's private label bread and the full line of Fischer products made purchase of another full line unnecessary, these stores never purchased any Continental product other than Profile Bread. The products purchased from Fischer included Hollywood Bread, a specialty item competitive with Continental's Profile. No competitor of Continental was replaced, and there is no evidence that Acme reduced its purchases from any competitor as a result of the discount granted by Continental.[127]

Both Fischer and General continued to grant discounts to Acme's Kearny Division stores throughout the period involved in this proceeding and thus to sell at prices at least as low as those offered by Continental.[128]

Capitol Shop-Rite

When the Capitol Shop-Rite first opened in 1955, it carried a full line of baked products from Fischer, General, NBC, and Gordon. All

[124] See Heim, Tr. 2193; McKinnon, Tr. 1932–33; Alesi, Tr. 2600–01, 2603, 2607, 2614, 2619.

[125] See Alesi, Tr. 2598–99, 2602–03, 2608–09, 2611, 2625.

[126] See McKinnon, Tr. 1930–31, 1932–33, 1936–37, 1943, 1956–57; Alesi, Tr. 2601–03, 2612–13.

[127] See Timberman, Tr. 1851; McKinnon, Tr. 1933; Alesi, Tr. 2599–2600, 2602, 2621, 2624.

[128] See Alesi, Tr. 2608–09, 2625.

these bakers sold comparable products at identical list prices. About one year after Capitol Shop-Rite opened, the Fischer Baking Company negotiated a 5% discount through Shop-Rite Cooperative headquarters, and their discount extended to all of the Shop-Rite stores, including the Capitol Shop-Rite. The individual store owners did not negotiate their discounts separately. Mr. Jacob, owner of the Capitol Shop-Rite, then told General Baking, NBC, and Gordon that they must meet this competitive offer or he would cease purchasing from them, and two or three [129A] months after the Fischer discount General and NBC gave the Capitol Shop-Rite a 5% discount. When Gordon refused a discount, Mr. Jacob stopped purchasing Gordon products. Gordon later extended a discount and Mr. Jacob resumed purchasing from that baker.[129B]

In about 1956, the Capitol Shop-Rite began purchasing from Continental but bought only a limited line because of limited space in his store. Mr. Jacob did not at first request a discount from Continental because Continental's volume with him was so small.[130]

In 1957, Mr. Jacob discontinued his purchases from Fischer Baking Company and the General Baking Company on the ground of poor service. Hearing of this, Jerry Lynch, of Continental, approached Mr. Jacob and discussed the possibilities of Continental's selling more products to the Capitol Shop-Rite. Mr. Jacob agreed on condition that Continental meet NBC's prices and discounts. NBC was serving Capitol Shop-Rite with a full line of baked goods, sold at the same list price as Continental's products, and was giving a 5% discount. Unless Continental met this discount, Mr. Jacob would not have purchased Continental products for his Capitol Shop-Rite store.[131]

The discount given by Continental in 1957, as well as the competitor's discount previously in effect, continued at 5% through the period covered by this proceeding.[132]

Davidson's

In the early 1950's, the Davidson Foodtown Stores were members of the Twin Counties buying cooperative. The Davidson stores were then buying a full line of baked products from Fischer, Ward, General, American, NBC, and Continental. Continental had been serv-

[129A] See Jacob, Tr. 1695, 1701–03.
[129B] See Jacob, Tr. 1703–4, 1691, 1705, 1709.
[130] See Jacob, Tr. 1692–93, 1714; Lynch, Tr. 1980–81; Jacob, Tr. 1692.
[131] See Jacob, Tr. 1692–94; Lynch, Tr. 1981; Jacob, Tr. 1697–98; Lynch, Tr. 1982–83, 2004; Jacob, Tr. 1694–95, 1697, 1704, 1711–12, 1692–94, 1697, 1714–15.
[132] See Jacob, Tr. 1698.

ing the Davidson stores since 1937-38. All of these bakers charged the same list prices for comparable products.[133]

During the early 1950's, Davidson received discounts from all of the bakers of brand bread supplying his stores. A 5% discount from the Fischer Baking Company was the first—beginning at least six months before the discount from the Continental Baking Company. Because Fischer was the first to give Davidson a discount, it was the favored baker in the Davidson stores and did the largest volume of business. The discounts given Davidson by Fischer extended to its full line of baked products.[134]

The discount from Continental was negotiated between Leroy Davidson, at that time secretary of the Davidson chain and responsible for the selection of bread suppliers for those stores, and Julius Heim, of Continental Baking Company. Mr. Heim testified that Mr. Davidson contacted him and told him that Fischer, NBC, Ward, and General were giving his stores a 5% discount and that in order to continue serving his stores Continental would have to meet the resulting lower prices. Mr. Heim at first refused to grant the requested discount and Davidson's began to reduce its purchases from Continental. From second or third position among wholesale bakers in the Davidson stores, Continental's standing during the period of reduced purchases dropped to last. When it became apparent that Mr. Davidson would continue to reduce his purchases until Continental was completely out of his stores, Davidson's was given a 5% discount.[135]

Davidson's did discontinue purchases from Gordon, bakers of Silvercup bread, and American, bakers of Taystee bread. These bakers were dropped, at least in part, because of their refusal to give a discount. Some other major bakers not serving the Davidson stores have offered Davidson discounts if he would purchase from them. Mr. Davidson testified that American Bakeries had made such an offer.[136]

A discount from Fischer, in effect when Continental granted its discount, has continued in effect, increasing to 7% at some time before October 1959. The discount given by Continental continued in effect at 5% throughout the time with which this proceeding is concerned.[137]

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[133] See Heim, Tr. 2154, Davidson, Tr. 2381–82; Heim, Tr. 2151, 2152; Davidson, Tr. 2372, 2397.

[134] See Davidson, Tr. 2374–78, 2389; Heim, Tr. 2149, 2153; Davidson, Tr. 2382, 2389–90, 2397.

[135] See Heim, Tr. 2149–53, 2154, 2153; Davidson, Tr. 2374–75.

[136] See Davidson, Tr. 2390–91, 2398–99, 2378, 2383–84.

[137] See Davidson, Tr. 2379, 2392.

Food Fair

The Food Fair stores in the markets covered by the evidence are divided into three separate regions—the Northern New Jersey region, the New York metropolitan region and the Philadelphia and Southern New Jersey region. The bread suppliers authorized to serve the Food Fair stores vary from region to region. Within each region the major bakers have sold comparable items at the same list prices.[138]

From 1950 to 1959, Fischer, General, Continental, and American bakeries served the New York metropolitan region Food Fair stores. General was the leading baker in those stores. Food Fair discontinued its purchases from Ward in this region sometime after 1953 because of poor service and stale merchandise. During the same period, the Northern New Jersey region of Food Fair was served by Fischer, General, Continental, and, in a few instances, by Ward. Fischer and General were the leading suppliers in this region. Continental was third or fourth.[139]

Friehofer, Fischer, General, and Continental served the Southern New Jersey and Philadelphia Food Fair stores. Friehofer and General were the principal suppliers in those stores.[140]

In 1953, Food Fair was receiving a 5% discount from Fischer Baking Company and General Baking Company in all three regions described above. Both of these discounts had been in effect since at least 1946. In addition, Ward Baking Company was giving a discount to Food Fair in its New York and Northern New Jersey regions.[141]

Beginning about 1950 or 1951, Lawrence Ellis, Bakery Division Director for Food Fair stores and responsible for purchasing bread products for those stores, asked for a discount from Continental. Mr. Ellis was told by Ellsworth Timberman, the Regional Manager for Continental's New York region which includes Northern New Jersey, that Continental could not give him a discount as a matter of Company policy. Mr. Ellis repeated his request over a period of at least a year and a half. During these conversations, Mr. Ellis informed Mr. Timberman that other wholesale bakers were giving him a discount. Finally, in 1953, Mr. Ellis told Mr. Timberman that Fischer and General were giving Food Fair a 5% discount, and that he could no longer justify purchasing from Continental at higher prices. Faced with the alternative of losing a customer as substantial

[138] See Ellis, Tr. 2051–52, 2074–75.
[139] See Ellis, Tr. 2053–54, 2099, 2052, 2056.
[140] See Ellis, Tr. 2054–56, 2067; Wilson, Tr. 2538.
[141] See Ellis, Tr. 2057, 2062–63, 2065–66, 2089, 2107–08.

as Food Fair, Continental decided it had to grant the demanded discount.[142]

The discount negotiated with Food Fair was initially denominated an "advertising allowance." One contract[143] provided for payments of $650 every three months covering Food Fair's purchases from Continental in the metropolitan New York region. The other contract[144] provided for payments of $1,300 every three months covering Food Fair's purchases from Continental in the Northern New Jersey region. These amounts were calculated to be equal to a 5% discount on Food Fair's purchases from Continental in the respective areas.[145]

Both Continental and Food Fair regarded these payments not as advertising allowances but as straight discounts estimated to equal 5% on Food Fair's purchases from Continental. Food Fair never rendered any advertising service on Continental products, nor did Continental expect Food Fair to do so.[146]

Since the lump sum payments were based on Food Fair's historical level of purchases from Continental, the parties agreed to review the amounts periodically so that they would continue to reflect a 5% discount. In accordance with this understanding, the sums originally negotiated with Continental for the New York Food Fair stores and the Northern New Jersey Food Fair stores were increased several times as they lagged behind Food Fair's increased purchases from Continental. In time, these lump sum payments were abandoned and a flat 5% discount on current sales was substituted.[147]

In 1956, Continental was serving some 16 of the 60 Food Fair stores in that chain's Philadelphia region. Arnold Wilson, of Continental's Norristown Bakery, contacted Lawrence Ellis and sought to increase Continental's sales to that chain. Continental was not at that time giving Food Fair a discount and Ellis refused to authorize expanded purchases from Continental in the Philadelphia region because of this. Mr. Ellis told Mr. Wilson that since Food Fair was getting discounts from other companies in the Philadelphia regions, Continental would have to meet them. Food Fair was at that time receiving a 5% discount from Fischer, General, Friehofer, and Stroehmann, all of whom were capable of serving all the Food Fair Philadelphia stores.[148]

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[142] See Timberman, Tr. 1844–45; Ellis, Tr. 2050, 2058–59; Timberman, Tr. 754, 1843–44, 1875, 1879–80; Ellis, Tr. 2060–61.

[143] CX 119A–C.

[144] CX 120A–C.

[145] See Timberman, Tr. 1846–47; Ellis, Tr. 2064.

[146] See Timberman, Tr. 751, 753–54, 1845–47; Ellis, Tr. 2061, 2064–65.

[147] See Ellis, Tr. 2101–02, 2062; Timberman, Tr. 1845–46; Ellis, Tr. 2108, 2064–65; Timberman, Tr. 1846.

[148] See Wilson, Tr. 2536–37; Ellis, Tr. 2065–66, 2068–69; Wilson, Tr. 2538–39, 2562.

Mr. Wilson finally worked out a discount which provided for a payment of $70 a month. This figure represented 5% of Continental's sales to the 16 Food Fair stores Continental was then serving. Thereafter, Continental began to sell to more of the Food Fair Philadelphia stores and, as the number of stores increased, the payment as a percentage of Continental's sales decreased, and fell as low as 3½%.[149]

In 1957, William Brown, who had become the Norristown Bakery Manager, checked with Mr. Ellis to determine whether it was competitively necessary to continue the $70 a month payment. He was told that it was necessary for Continental to continue its payments since Friehofer, General, and Stroehmann were giving discounts ranging from 5% to 10%.[150]

In 1958, Food Fair acquired the Best Markets stores, most of which were located in Philadelphia. Mr. Ellis of Food Fair discovered that Fischer and Friehofer had been giving 7% discounts to Best Markets and he demanded and received from those bakers a 7% discount for Food Fair. The other bakers supplying Best Markets also continued their discounts to those stores after the Food Fair acquisition. Mr. Ellis also discovered that Continental had been giving an advertising allowance to Best Markets. He complained that this allowance was more advantageous than the discount given by Continental to Food Fair's Philadelphia stores and, in negotiations with Mr. Wilson, of Continental, he insisted that the $70 a month payment be converted to a flat 5% to meet the discounts being given by Continental's competitors. The advertising allowance to Best Markets was no longer paid by Continental after those stores were acquired by Food Fair.[151]

Food-O-Rama

In 1956, the Food-O-Rama store on Amboy Road, in Tottenville, Staten Island, was being served with full lines of bread products by Fischer, Gordon, Bond, and Ward. In 1956, Continental Baking began to sell in the Tottenville area. Andrew Sundell, Sales Supervisor for Continental's Woodbridge, New Jersey, Depot, talked with Joseph Mazurek, Manager of the Food-O-Rama and responsible for its purchasing. Mr. Mazurek informed Mr. Sundell that the Fischer Baking Company was giving his store a 5% discount and that Continental would have to meet this.[152]

[149] See Ellis, Tr. 2068–70; Wilson, Tr. 2537–38, 2544, 2577; Brown, Tr. 4771-J; Wilson, Tr. 2538.

[150] See Brown, Tr. 477H-J, 486.

[151] See Ellis, Tr. 2079–80, 2085–86; Timberman, Tr. 1845–46; Ellis, Tr. 2070–71; Wilson, Tr. 2539–42, 2548–50.

[152] See Mazurek, Tr. 1658, 1670–71, 1651–52; Sundell, Tr. 2352, 2354–55; Mazurek, Tr. 1660–61, 1671–72; Sundell, Tr. 2360.

At the time, Fischer was in fact giving Food-O-Rama a 5% discount. Fischer granted this discount in 1952 when Mr. Mazurek found that Fischer was giving a discount to a competitor. When Continental granted a discount to the Amboy Road Food-O-Rama, Fischer was selling that store a line of products similar to the line purchased from Continental, charging list prices the same as the list prices charged by Continental for comparable products. After the Continental discount was negotiated, Gordon, General, and Ward all voluntarily extended discounts to Food-O-Rama. Food-O-Rama did not enter into any contract or assume any obligation to purchase from Continental, and none of Food-O-Rama's bread suppliers was displaced when Continental began to sell to that store.[153]

The second Food-O-Rama, located in Tottenville, was, before its acquisition by Food-O-Rama in 1958, a Rolls Food Store, which purchased Continental products. When Mr. Sundell contacted the manager of this store—an individual no longer with Food-O-Rama—he was told that in order to continue serving the store under its new ownership, Continental would have to meet 5% discounts being given that store by Fischer and General.[154]

Both the Food-O-Rama stores continued to receive 5% discounts from their baked goods suppliers, including Continental, during the period covered by this proceeding.[155]

Good Deal Markets

In the early 1950's, there were two Good Deal Markets, located in Irvington and Union, New Jersey. They were served by American and Fischer Baking Companies, and for a brief time by Continental Baking Company. Shortly after Continental began to sell to these stores, Mr. Aidekman, their owner, approached Julius Heim, of the Continental Baking Company, and asked for a discount. Mr. Heim told Mr. Aidekman that, because of Continental's strict policy, he could not extend discounts. Mr. Aidekman said that he was getting a discount from American, but Mr. Heim persisted in his refusal, and Mr. Aidekman therefore discontinued purchasing from Continental.[156]

By 1956, there were three Good Deal Markets, a store having been purchased that year in Chatham, New Jersey. This store had been served by Continental under its prior ownership and following the acquisition Good Deal continued to purchase a full line of Continental products in that store. In addition, Continental had succeeded in

[153] See Mazurek, Tr. 1659, 1664, 1677, 1659–60, 1672, 1677–78, 1657, 1662.
[154] See Sundell, Tr. 2354, 2355, 2356, 2360.
[155] See Mazurek, Tr. 1661–62.
[156] See Heim, Tr. 2173–74, 2175–77.

serving the other Good Deal Stores, but only with a limited line of products because of its refusal to give a discount.[157]

All three Good Deal stores were buying lines of products comparable to that of Continental in 1956 from American, Fischer, and General. These wholesale bakers charge the same list prices for comparable items. American, bakers of Taystee bread, was the leading baker in the Good Deal Markets in 1956, and held that position through 1960. In 1956, Good Deal was receiving 7% discounts from Fischer, American, General, and some of the specialty bread companies.[158]

Some time after Good Deal bought the Chatham store, Morton Roth, buyer-supervisor with the Good Deal Markets and responsible for the purchase of baked products, contacted Continental concerning a discount. Mr. Roth discussed this at different times with Messrs. Testa, Lally and Heim, of Continental Baking Company. A 5% discount was finally negotiated between Morton Roth and Julius Heim. During these negotiations, which took place over a 6-month period, Mr. Roth insisted that Continental grant a discount in order to continue serving the Chatham store and also as a condition to Continental's selling a full line to the other two Good Deal Markets. He informed Mr. Heim that the other wholesale bakers were giving Good Deal a 7% discount. [159]

Continental finally granted a 5% discount to the Good Deal Markets and was allowed to supply all three stores. The discount from Continental continued at 5% from the time it was granted through the period in question. The discounts from American, Fischer, and General continued at 7% throughout this period.[160]

Grand Union

In 1955, the Grand Union stores in the market areas involved in this proceeding were served by Continental, Fischer, Ward, and General. These bakers all supplied the Grand Union stores with full lines of baked products which sold at the same wholesale list prices and were resold by Grand Union at the same retail prices. Ward was the major supplier, and served all of the Grand Union stores in New York and New Jersey that were served by Continental. Fischer also served all of the Grand Union stores in the New Jersey

[157] See Roth, Tr. 2307, 2308–09, 2311, 2315.

[158] See Roth, Tr. 2307–08, 2313; Heim, Tr. 2183–84; Roth, Tr. 2327–28, 2308–09, 2314, 2324.

[159] See Heim, Tr. 2178–79, 2230–31; Roth, Tr. 2306–07, 2321–22; Heim, Tr. 2177–78; Roth, Tr. 2310–11; Heim, Tr. 2180–81, 2183; Roth, Tr. 2313.

[160] See Heim, Tr. 2181–83, 2205–06; Roth, Tr. 2312.

area. Continental was the second largest baker in the Grand Union stores, being substantially smaller than Ward, slightly larger than Fischer, and larger than General. Ward was also supplying Grand Union's private label bread—"Fresh Bake." [161]

In 1955, Ward Baking Company offered a discount to Grand Union. The Ward discount, given in an effort to increase sales to Grand Union, was 5% on total purchases from Ward of any store which bought over $50 per week of Ward products. Grand Union was not required to provide any promotional services to obtain this discount and all of the Grand Union stores were at that time purchasing over $50 per week from Ward, as they were from Continental. After Ward granted its discount to Grand Union, it was given the preferred position on the Grand Union bread racks, next to the private label bread. Continental's position and space on the Grand Union bread racks suffered and Ward's sales increased while Continental's sales diminished.[162]

Because of Continental's deteriorating position in the Grand Union stores, Frederick McKinnon, then New York Regional Sales Manager for Continental, called on James Litchhult, the bakery Sales Manager of Grand Union's New York region and the person responsible for selecting its bread suppliers. During the ensuing conversations Mr. Litchhult initiated discussion of the possibility of Continental giving Grand Union a discount. He told Mr. McKinnon that Continental's sales were suffering in the Grand Union stores because Grand Union was favoring bakers that gave discounts, and that, unless Continental met the prices of these bakers, its sales to Grand Union would in all probability cease completely. Mr. Litchhult testified that he told Mr. McKinnon that he was receiving a 5% discount from Ward. McKinnon recalled that Litchult identified General and Fischer, as well as Ward, as bakers giving Grand Union 5% discounts.[163]

From his talks with Mr. Litchhult, it became obvious to Mr. McKinnon that Continental could not hold its business with Grand Union unless it met the competitive prices and he finally agreed to do so.[164]

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[161] See Litchhult, Tr. 2019–20; McKinnon, Tr. 1924–25, 1936, 1958; Litchhult, Tr. 2018, 2024; McKinnon, Tr. 1925–26; Litchhult, Tr. 2038–39, 2042; McKinnon, Tr. 1932, 1958; Litchhult, Tr. 2018.

[162] See Litchhult, Tr. 2019–21, 2037–38, 2049, 2026–27; McKinnon, Tr. 1928–29; Litchhult, Tr. 2022.

[163] See McKinnon, Tr. 1923–24, 1926; Litchhult, Tr. 2016–17, 2019, 2022; McKinnon, Tr. 1927, 1941; Litchhult, Tr. 2022, 2024; McKinnon, Tr. 1926–27, 1936.

[164] See McKinnon, Tr. 1928; Litchhult, Tr. 2021.

Both the discount given by Continental to Grand Union and the earlier discount given that customer by Ward continued in effect at 5% during the entire period in question.[165]

Guarantee Meat Markets of Paterson

In 1956, all four Guarantee Meat Markets were purchasing full lines of bread products from Fischer, Ward, General, American, Gordon, and Continental. These bakers had been serving the Guarantee Meat Markets since at least 1942. The list prices charged by these bakers were the same for comparable products.[166]

The Guarantee Meat Markets were, in 1956, receiving discounts from Fischer, Ward, and General. Mr. Scheraga, in charge of grocery buying for that chain, had obtained discounts from these bakers as it came to his attention that they were granting discounts. He first heard that discounts were available from the Fischer Baking Company and upon demand was able to obtain a 5% discount. This occurred approximately five or six years before he obtained a discount from Continental. When Mr. Scheraga heard that Ward and General were giving discounts he approached them, informed them that Fischer was giving him a discount, and demanded one from them. These discounts were granted in the amount of 5% on all purchases, and were also given before he obtained a discount from Continental.[167]

In 1956, when Mr. Scheraga heard that Continental was granting discounts to meet competition, he approached Continental and demanded one for Guarantee. Mr. Scheraga felt that because of his volume of business he was entitled to a discount from Continental. Mr. Scheraga obtained a 5% discount from Continental after telling Continental that he was getting 5% discounts from Continental's competitors.[168]

The earlier discounts from competitors and the Continental discount all continued at 5% through the period in question.[169]

Heritage Dairies

Continental began to serve the first Heritage Dairy store when it opened in 1957. That store was also served by the Sanitary Baking Company, which supplied Heritage with white bread and specialty bread at lower list prices than those charged by Continental.[170]

[165] See Litchhult, Tr. 2024–25.
[166] See Scheraga, Tr. 1721–23, 1727–28, 1739, 1721–22.
[167] See Scheraga, Tr. 1724–25, 1727, 1740, 1715, 1724–25, 1728, 1735, 1739, 1740, 1728, 1731–32, 1736.
[168] See Scheraga, Tr. 1741–42, 1724–25, 1740, 1742.
[169] See Scheraga, Tr. 1726, 1745.
[170] See Heritage, Tr. 2444–45; Zaveckas, Tr. 2565.

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When Heritage's opened a second store in March 1958, Frank Zaveckas, of Continental, approached Mr. Heritage and sought authorization to serve it. This authorization was not given, however, and when the store opened Mr. Heritage bought exclusively from the 20th Century Baking Company, taking a full line of that baker's products. He gave two reasons for doing this: First, the location of the second store was such as to make it desirable to carry a lower price bread like 20th Century and, second, the exclusion of Continental gave him leverage to pressure that company for a discount. Mr. Zaveckas was told by Mr. Heritage that he knew that discounts were available and that unless Continental gave him a 5% discount he would not allow them to serve this second store. When Continental did not agree to grant the discount, Mr. Heritage turned the matter over to a Mr. Frank Deluca, whom he had retained as an advisor to make arrangements with suppliers to the second Heritage store.[171]

Mr. Zaveckas discussed serving the second Heritage store with Mr. Deluca, who had been a supermarket owner. Mr. Deluca reiterated Heritage's demand for a discount and told Zaveckas that he would be able to obtain one from Ward. While Mr. Deluca was operating his own supermarket, he had been a Continental customer and had demanded a discount from Mr. Zaveckas and told him that he was then receiving one from Ward. Mr. Zaveckas had refused to meet this discount on this occasion and Mr. Deluca had therefore drastically reduced his purchases from Continental. Mr. Zaveckas was aware, from dealing with other customers in the same area, that Ward was offering 5% discounts. About two or three weeks after the second Heritage store opened, Mr. Zaveckas capitulated, the discount was given, and Continental was allowed to serve this second store.[172]

In addition to meeting the threatened discount from Ward Baking Company, Continental was confronted with a situation where both the Heritage stores were buying a line of bread products at lower wholesale prices and selling them at lower retail prices than those of Continental products. The first Heritage Dairy was served by the Sanitary Baking Company. That baker produced a white loaf of bread which retailed at 15¢ as compared with 25¢ for the comparable Continental product. The respective products were sold on the Heritage shelves in direct competition for the consumer's dollar. In the

[171] See Heritage, Tr. 2445–46, 2448, 2450, 2452, 2472–73, 2449–50, 2457–58; Zaveckas, Tr. 2566–68.

[172] See Zaveckas, Tr. 2570–71, 2576–77; CX 93 A-B; Heritage, Tr. 2447, 2452–53.

second Heritage Dairy, Heritage purchased baked goods from the 20th Century Baking Company at lower wholesale prices for resale at lower retail prices than Continental products. For example, a loaf of 20th Century bread sold at 5¢ less than a loaf of comparable Continental bread. The fact that 20th Century bread products were competitive with Continental's is demonstrated by the fact that Heritage proposed initially to stock only the 20th Century line in his second dairy store. Thus, the Continental discount, which amounted to but about 1¢ per loaf, was not only no greater than the discount available from Ward but was necessary to lessen the differential between Continental's prices and those of Sanitary Baking and 20th Century.[173]

As Heritage opened new stores, Continental began to serve those stores, as did 20th Century. The Continental discount of 5% has continued in effect in the Heritage stores and the list prices of 20th Century products have continued to be greater than 5% below the list prices of comparable Continental products.[174]

King's Supermarkets

Beginning in 1948, both Julius Heim and Charles Struble, the latter the Sales Manager for Continental's New York region, called on King's Supermarkets in an effort to sell Continental products to those stores. At that time the King's markets were purchasing full lines of bread products from Ward, Bond, Fischer, and NBC. The Continental salesmen were unsuccessful in this effort. Mr. Max Atlas, the grocery buyer for King's until his death in 1960, told Mr. Struble that he would not purchase Continental's merchandise without a discount. Mr. Struble was also told by Mr. Atlas that those bakers then serving King's were giving discounts.[175]

By 1955 Continental was selling one of its white bread products to the King's stores. Sometimes thereafter King's agreed to accept a full line of Continental products on condition that Continental meet the discounts of its competitors. A discount of 5% was negotiated by Mr. Struble, of Continental, and Mr. Atlas, of King's. The only King's employee who might have been familiar with the negotiation, other than Mr. Atlas, who is deceased, was a Mr. Hillenbrand, no longer with King's markets and whose present whereabouts are unknown.[176]

Fischer Baking Company, one of the bakers mentioned by Max Atlas as giving King's a discount, was the principal supplier of

[173] See Zaveckas, Tr. 2579–80; Heritage, Tr. 2447–48; 2453–54; Zaveckas, Tr. 2574.
[174] See Heritage, Tr. 2473–74; Zaveckas, Tr. 2583.
[175] See Heim, Tr. 2191; Bildner, 2272; Struble, 2405–08.
[176] See Struble, Tr. 2408–10; Bildner, Tr. 2272.

baked goods to those stores and served the entire area within which the King's markets were located in 1955. Mr. Struble was advised that the Fischer discount and the other discounts in effect when Continental gave its discount extended to their full lines of products.[177] Even after acceding to King's demand for a discount, Continental was allowed to serve but six of their ten stores.[178]

It is claimed that King's representatives involved in negotiation of this discount were not available to testify, and King's records are not available for any period earlier than July 1957. Those records indicate that in July 1957, King's was purchasing full lines of bread products from General, Fischer, Ward, American, Koester, and Continental. King's paid the same list price to all of these bakers for comparable products. In July 1957, and throughout the period involved here, King's was receiving a discount from all of these bakers. Fischer and General were giving King's a discount of 7%; Continental and the others gave discounts of 5%. Alan Bildner, General Manager of King's markets, and possessing the authority to terminate purchases from any supplier, testified that had Continental or any other bread supplier withdrawn its discount, King's would have ceased purchasing from them.[179]

Mayfair

The Quality Market of New Brunswick and the Kenilworth Supermarket, members of the Twin Counties buying cooperative, were the original stores in the chain which came to be known as Mayfair Supermarkets. Their General Manager was Mr. Stanley Kaufelt. The name Mayfair Supermarkets was adopted in 1959 when six stores purchased from the King Supermarkets were added to the original two stores.[180]

Since 1950, all of the stores operated by Mr. Kaufelt have purchased full lines of baked products from General, Fischer, Ward, Continental, NBC, Gordon, and Gourmet. These stores have paid all of their suppliers of advertised brand breads the same list prices. The price of Gourmet, a private label brand, is lower than that of advertised brand breads.[181]

Before the Quality and Kenilworth stores received any discounts, Continental was the largest seller in both stores. Ward and Bond

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[177] Struble, Tr. 2410–11, 2414, 2440–41. Respondent's Exhibit 5, prepared in the ordinary course of business in connection with the discount negotiated by Mr. Struble with King's, records Continental's understanding that the discount was necessary in order "* * * to meet competitors offer * * *." Struble, Tr. 2409–10.

[178] See Struble, Tr. 2415–16.

[179] See Bildner, Tr. 2269–71, 2273–74, 2278, 2283, 2282.

[180] See Kaufelt, Tr. 1749; Heim, Tr. 2155, 2164; Kaufelt, Tr. 1772–73.

[181] See Kaufelt, Tr. 1758–61, 1774.

were second and third, each selling about $500 a week to each store. Fischer was last. Fischer was the first baker to give a discount to the Kaufelt stores, offering a 5% discount to get a better position. Thereafter, Fischer was featured and given additional space. Ward and General followed Fischer, giving an equivalent discount. The additional shelf space granted Fischer because of the discount enabled that baker to move from fourth position to first position, replacing Continental, in the Kaufelt stores. Ward and General also improved their positions and Continental dropped to fourth place in the Kaufelt stores.[182]

In 1953, Mr. Kaufelt, who as General Manager was responsible for the procurement of grocery products in the Kenilworth and Quality stores, had several discussions with Julius Heim, of Continental, regarding a discount. Mr. Kaufelt told Mr. Heim that other suppliers — among them Fischer, Ward, and General — were giving his stores a 5% discount. Mr. Kaufelt also told Mr. Heim that unless Continental met these competitive prices he would discontinue purchases. Initially, Continental refused to give Mr. Kaufelt a discount, stating that it was contrary to company policy. Mr. Kaufelt then began to cut down on his purchases from Continental. This contributed further to Continental's loss of position in the Quality and Kenilworth stores. Under this pressure Continental finally yielded to Mr. Kaufelt's demands and granted a 5% discount. Even after this discount was granted, Continental never regained the position it had enjoyed before the other bakers serving the Kaufelt stores began to discount.[183]

The discount granted by Continental stayed in effect in the Mayfair Supermarkets throughout the period at issue here. The discounts which were in effect when Continental granted its discount also stayed in effect through that time. All of them remained at 5% and were extended to the National Stores when they were acquired by Mayfair in 1959.[184]

Mutual Super Markets

In 1953, the store which became the original store in the Mutual Super Market chain was a part of the National Stores chain. In 1955, the two owners of that store split off from the National Stores partnership and founded the Mutual chain. The

[182] See Kaufelt, Tr. 1770, 1777; Heim, Tr. 2155–56; Kaufelt, Tr. 1769–70, 1778–82, 1761, 1765–66, 1768, 1771–72, 1769, 1778–83; Heim, Tr. 2157.

[183] See Kaufelt, Tr. 1750, 1753, 1762; Heim, Tr. 2155; Kaufelt, Tr. 1762–65; Heim, Tr. 2160–61; Kaufelt, Tr. 1777–78; Heim, Tr. 2156, 2158; Kaufelt, Tr. 1778–83; Heim, Tr. 2159–60.

[184] See Kaufelt, Tr. 1764–65.

discount which had been negotiated in 1953 by Continental with Mr. George George, of the National chain, was continued when this store became the Mutual Super Market. The discounts of the other bakers which had been granted to this store as one of the National Stores continued also when it became a Mutual store.[185]

From 1955 to 1960, the Mutual stores bought full lines of baked products from Bond, Fischer, Taystee, NBC, and Continental. These bakers had the same list prices for comparable products and their products sold at identical retail prices.[186]

In 1955, the Mutual chain opened its second store in Woodbridge, New Jersey. Leonard Silverman, Mutual's Vice President in charge of store operations and responsible for selecting its bread suppliers, called in all of the bakers who had been serving the original Mutual store and told them that in order to serve the second Mutual store they would have to extend their discounts to their sales to that store. Mr. Silverman called the Fischer representative in first because that baker was then his largest supplier. Fischer was at that time giving a 5% discount. Silverman asked Fischer for a 7% discount, which Fischer refused. In an effort to coerce a higher discount, Mr. Silverman cut down on his purchases from Fischer for three or four weeks, but the Fischer discount remained at 5%. After Fischer and some others had concluded arrangements for serving the second Mutual store, Silverman called in the Continental representative and told him that Fischer, Bond, and NBC had agreed to give Mutual a 5% discount on sales to the second Mutual market. Silverman told the Continental representative that in order to serve the second Mutual market Continental would have to meet these competitive offers. In 1960, Mr. Silverman asked Continental for a 7% discount but was refused.[187]

From 1955 through 1960, the Mutual stores received a 5% discount on their purchases from all of their major bread suppliers. This was a necessary condition of doing business in these stores and Mutual would have discontinued any bread supplier that discontinued its discount.[188]

National Stores

In 1953, the major bakers serving the National Stores were Ward, General, Fischer, Millbrook, Gordon, American, and Continental.

[185] See George, Tr. 1797–99; Heim, Tr. 2165–66; Silverman, Tr. 2339; Heim, Tr. 2170, 2209–13, 2171; Silverman, Tr. 2334.
[186] See Silverman, Tr. 2332–33.
[187] See Silverman, Tr. 2330–31, 2341, 2335, 2342, 2344, 2350, 2346, 2335–36.
[188] See Silverman, Tr. 2333, 2336.

All of these bakers served the National Stores with a full line of bread products, and charged the same list prices for comparable products. General, Fischer, Millbrook, and Ward served all of the National Stores, and Gordon and American served all but the Trenton store. Fischer was the largest seller in the National Stores, Ward was second, General third, and Continental, Millbrook and Gordon tied for a poor fourth. At one time Continental had been among the leading bakers in the National Stores, but after the other bakers began discounting, Continental lost space and consequently lost volume.[189]

By 1952 or 1953, the only bakers serving the National Stores with full lines of bread products and not giving discounts were Continental and American Baking. Among those giving discounts were Fischer, Ward, General, NBC, and Gordon. Some of the discounts had been in existence since before 1950, and all were in the amount of 5%.[190]

In 1952 or 1953, Mr. George George, then General Manager and responsible for purchasing grocery items for the National Stores, asked Continental to meet the discounts of its competitors. His request was refused and he was told that, as a matter of company policy, Continental did not give discounts. Sometime later, Mr. George contacted Julius Heim, the Continental sales representative and renewed his demands for a 5% discount. Mr. George told Mr. Heim that it would be "advantageous" for Continental to extend him a discount, for if they refused he would discontinue purchases by the National Stores. During these discussions, Mr. George informed Mr. Heim that the other bakers then serving him were giving him a discount of 5%.[191]

After first being refused a discount, the National Stores cut down on their purchases of Continental products. The store managers would wait until the Continental salesman arrived in the morning, and they then would tell the salesman to leave substantially less bread than the customary amount. This pressure, coupled with the renewed threats by Mr. George to discontinue completely purchases from Continental, finally resulted in his being granted a 5% discount.[192]

The granting of a discount from list prices became a necessary prerequisite to a wholesale baker's doing business with the National

[189] See George, Tr. 1796, 1810, 1818; Heim, Tr. 2211; George, Tr. 1810, 1820, 1824–26; Heim, Tr. 2167–68.

[190] See George, Tr. 1802, 1812, 1811, 1821–22, 1829–30, 1800–01.

[191] See George, Tr. 1789–91, 1801, 1799–1800, 1802–03, 1812; Heim, Tr. 2165; George, Tr. 1800, 1802–03, 1831–32; Heim, Tr. 2166–67; George, Tr. 1804, Heim, Tr. 2166–67.

[192] See Heim, Tr. 2167–68, 2216–17.

Stores. Mr. George discontinued his purchases from American Baking Company because of its refusal to grant him a discount.[193]

In 1957, all of the discounts given to the National Stores by wholesale bakers of brand breads increased to 7%. Fischer, Ward, and General were the first bakers to increase their discounts, and the Gordon discount increased shortly thereafter. In fact, Mr. George testified that, with the exception of[194A] Continental and American, all of the major bakers were "pretty easy as far as discounts were concerned." Several weeks after these discounts went into effect, Mr. George again approached Julius Heim and asked for a comparable increase from the Continental Baking Company. Mr. George told Mr. Heim that Fischer, General, and Ward had increased their discounts to 7%, and that unless Continental increased theirs to that amount, he would discontinue purchases. Continental again refused to accede to these demands and Mr. George cut down drastically on his purchases from Continental in the Elizabeth, New Jersey National store. This pressure, and the constant threats to stop purchases from Continental, finally resulted in Continental's granting the additional 2%. Continental was the last major baker to increase its discount to the National Stores to 7%. At a later date, the Paterson Bakery Manager, Oscar Testa, approached Mr. George in an effort to reduce Continental's discount. Mr. George told Mr. Testa that if Continental cut its discount back to 5%, he would throw them out of his stores.[194B]

The discount given by Continental to the National Grocery Stores remained in effect until those stores were sold to the Mayfair Supermarkets. The discounts given by Continental's competitors also remained in effect until that time.[195]

Pied Piper Supermarkets

Continental has been serving the Pied Piper Supermarkets with a full line of baked products since at least 1949. In 1953, Mr. Samuel Wald, owner of the Pied Piper Supermarkets, called Mr. Lynch, of Continental, and demanded a 5% discount. Mr. Wald, a member of the Twin Counties buying cooperative, told Mr. Lynch that Ward, General, NBC, and American—the other major bakers serving the Pied Piper stores at that time—were giving him a discount and that unless Continental met this he would discontinue his purchases. Because at this time Continental was allowing no discounts, Mr. Lynch

[193] See George, Tr. 1806–07, 1812, 1814.

[194A] See George, Tr. 1803.

[194B] See George, Tr. 1815–16, 1822, 1804, 1805, 1818, 1830, 1832; Heim, Tr. 2207–09, 2171–73; George, Tr. 1803–04, 1829–30; Testa, Tr. 607–08.

[195] See George, Tr. 1803.

refused Mr. Wald's demand. Mr. Wald immediately changed Continental's position on the bread racks in his stores and reduced his purchases from Continental by one-half. Before Mr. Wald began to exert this pressure to exact a discount, Continental had been the second largest baker in the Pied Piper stores. His action resulted in Continental's decline to the fourth baker[196A] in his stores. Mr. Wald renewed his demands for a discount and again threatened to discontinue completely his purchases from Continental, reiterating to Mr. Lynch that he was receiving discounts of 5% from Continental's competitors. When Continental continued to refuse, Pied Piper's purchases from Continental ceased completely. Approximately three weeks to a month thereafter, Continental's absolute ban on discounts was relaxed and Mr. Lynch was able to offer a 5% discount to Mr. Wald to meet the competitive discounts. Mr. Wald then resumed purchasing from Continental, but Continental's sales to the Pied Piper stores never returned to the former volume.[196B]

The discount given Pied Piper by Continental continued at 5% throughout the period involved here, as did the discounts granted earlier by competitors. Subsequent checks by Mr. Lynch with Mr. Wald revealed that these competitive discounts continued at 5%.[197]

Safeway

Prior to May of 1957, the New York Division of Safeway Stores had authorized its individual stores to purchase bakery products from Continental, General, Gordon, Ward, Harrison, Messing, and "* * * dozens of small local bakeries mostly baking Italian and Jewish products." The list prices of these bakers were the same for comparable products. Continental had been serving the New York Division of Safeway for several years. Gordon was Safeway's largest supplier of bread. On at least two occasions, in order to promote the sale of its self-produced private label bread, Safeway had ceased purchasing from all of its outside suppliers except Gordon and the small bakeries supplying specialty items.[198]

In May 1957, the Division Manager of the New York Division of the Safeway Stores, Mr. Weymer, informed the Division supply Manager, Mr. A. J. Davis, that Safeway Stores would accept discounts which met with the approval of the corporation's legal department. Prior to this time Safeway Stores had refused discounts. For example, Safeway did not accept a discount offered by Harrison prior to 1957.[199]

[196A] See Lynch, Tr. 1966–67, 1965, 1975, 2004.
[196B] See Lynch, Tr. 1996, 1971, 1968–69.
[197] See Lynch, Tr. 1969–70, 2002–03.
[198] See Deposition of A. J. Davis, RX 1, p. 4; RX 7, p. 20, pp. 6, 13–14.
[199] RX 1, pp. 7, 8, 9.

After being informed of the change in Safeway's policy, Mr. Davis contacted his major suppliers regarding discounts. This initial contact was followed by a letter to all the bakers supplying Safeway. One of the first to offer a discount, Ward, conditioned its offer on the right to establish a special display and preferred position for Ward products, and would extend a discount only to Safeway Stores purchasing above a certain minimum. For this reason Safeway refused Ward's offer. Gordon, its largest supplier, offered Safeway a 5% discount which was approved by the Safeway legal department. This discount went into effect on June 10, 1957. General next offered a similarly acceptable discount in the same amount which went into effect on June 24 or 25, 1957. Harrison and Messing also offered discounts which Safeway accepted.[200]

When first approached for a discount, Continental did not respond with an immediate offer. Rather, Continental asked for information about competitive discounts. Davis acknowledged that Continental's competitors were giving discounts, although he refused to specify names or amounts. The Continental representative involved, Mr. Timberman, knew that 5% was the prevailing discount granted by competitors. A discount of 5% was finally offered by Continental and accepted in November of 1957 by Safeway on the explicit understanding that the discount was necessary to meet competition.[201]

In February 1958, Ward renewed its overtures to Safeway and offered a flat 5% discount on all bread and cake purchases. Thereafter, Safeway received a 5% discount on the items purchased from Ward.[202]

Scotch Plains Shop-Rite

In the early 1950's, Continental was serving the Scotch Plains Shop-Rite. Continental was the second-ranking baker in this store. Fischer was first, General third, and NBC fourth. In 1953, Mr. Herbert Brody, owner of the Scotch Plains Shop-Rite, got in touch with Jerry Lynch, of Continental Baking Company, and asked for a discount. Mr. Brody told Mr. Lynch that Fischer, General, and NBC were giving him discounts of 5% and that unless Continental met these competitive prices he would discontinue his purchases from Continental. Mr. Lynch [203A] refused a discount to Scotch Plains at this time and Mr. Brody discontinued his purchases from Continental. Mr. Lynch was informed that Continental's sales to

[200] RX 1, pp. 8, 9, 19–20, 28, 31; CX 249; RX 1, pp. 10, 33–34, 40–41, 9.
[201] RX 1, pp. 10, 11; Timberman, Tr. 764, 765.
[202] CX 250; Sidders, Tr. 2661, 2666.
[203A] See Lynch, Tr. 1970–71, 1974; Brody, Tr. 2289–90, 2293; Lynch, Tr. 2011–18.

this store were being discontinued because of the refusal to grant the requested discount.[203B]

A short time after Mr. Brody discontinued his purchases from Continental, Continental began to grant discounts where necessary to meet competition. Mr. Lynch told Mr. Brody that Continental was prepared to meet his demands for 5%, but Mr. Brody refused to resume purchasing because Continental had delayed too long.[204]

In about 1955 or 1956, the Scotch Plains Shop-Rite was purchasing a full line of bread products from Fischer, General, and NBC. The purchases from Fischer included Hollywood Bread, a product competitive with Continental's Profile Bread. All of these bakers were giving Scotch Plains a minimum discount of 5% on all products purchased, including Fischer's Hollywood Bread. At about this time Continental made a renewed effort to resume its sales to this store. Mr. Brody reiterated his demands for a discount, asking first for 10%. The Continental representative was told that the bakers supplying this store—Fischer, General, and NBC—were giving Scotch Plains a 5% discount. Mr. Brody eventually settled for a 5% discount and accepted a limited line of products from Continental, confining his purchases to Profile and Daffodil Farms White Bread. To this day, Continental has been unable to sell its full line of bread to the Scotch Plains Shop-Rite.[205]

The discount received from Continental continued at 5%, as did the discounts from Continental's competitors. Mr. Lynch, of Continental, was kept aware of the fact this his competitors continued their discounts to Scotch Plains Shop-Rite.[206]

Sickel's Market

The Sickel's Market in Woodbury, New Jersey, from its opening in 1954, was served with full lines of bread products by General, Fischer, Friehofer, Parkway, and Continental, all of whom charged the same list prices for comparable products. During 1955, Sickel's discontinued purchasing from General, Friehofer, and Parkway, because they would not give him discounts and also because of poor service.[207]

In June 1955, Fischer, then the leading baker in the Sickel's Market, gave Sickel's a 10% discount. At that same time, Ward gave Sickel's a 5% discount. These discounts both applied to the full line

[203B] See Brody, Tr. 2302; Lynch, Tr. 1972, 2004.

[204] See Lynch, Tr. 1973–74.

[205] See Brody, Tr. 2290–92, 2294–95; Lynch, Tr. 1972; Brody, Tr. 2305–06, 2291–92; Lynch, Tr. 1974, Brody, Tr. 2302.

[206] See Lynch, Tr. 2003; Brody, Tr. 2292–93.

[207] See Sickel, Tr. 2477, 2479; Zaveckas, Tr. 2577–78; Sickel, Tr. 2499.

of bread items Sickel's was purchasing from each of these suppliers, and they continued in effect after 1955. The Ward discount of 5% was not dependent upon any minimum amount of purchases by Sickel's and, though termed a "promotional allowance", Sickel's was not in fact required to do anything in the way of promoting Ward's products. The only difference between Ward's and his other discounts was that Sickel's had to sign a written agreement.[208]

In 1956, Mr. Sickel called Frank Zaveckas, of Continental, to his store and demanded a 5% discount. Mr. Sickel told Mr. Zaveckas that Fischer was giving him a 10% discount and Ward a 5% discount and that Continental would have to equal the Ward discount or be thrown out of his store. Faced with this ultimatum, Continental granted the demanded discount.[209]

Continental, Fischer, and Ward continued to serve the Sickel's Market through the period in question here, and the discounts given by these bakers stayed in effect through that time. Though Mr. Sickel has tried, he has not been able to get Continental to increase its discount to more than 5%. Friehofer, since they were discontinued, has offered a discount to Mr. Sickel if he would take them back in his store, but Mr. Sickel has refused to do so.[210]

Trunz

In 1958, there were 69 Trunz stores. Most of these stores carried only one brand of bread, although some of the larger stores carried two brands. About 90% of the Trunz stores were served by Continental; General, Gordon, and/or American served the remaining stores. The list prices charged by these bakers were the same for comparable items. All of these bakers were capable of serving all of the Trunz markets.[211]

About a year or so after 1956, when he had assumed responsibility for the retail operations of the Trunz markets, Robert Trunz learned through conversations with other grocers of the existence of discounts from some wholesale bakers. He heard specifically that discounts were available from General, American, and Gordon. In several conversations with a General salesman, Mr. Trunz was informed that General would give him a 5% discount if they were allowed to replace Continental in the Trunz stores Continental served. The General salesman said he had been assured by his superior that Trunz would get the discount if they increased their purchases. Armed with this offer, Mr. Trunz called the Continental representative with

[208] See Sickel, Tr. 2480–81, 2483, 2489, 2490–91, 2493.
[209] See Sickel, Tr. 2481, 2483, 2485; Zaveckas, Tr. 2578–79.
[210] See Sickel, Tr. 2480, 2489–91, 2499.
[211] See Trunz, Tr. 1919, 1907, 1898–99, 1901, 1900, 1912.

whom he customarily dealt and requested a discount from Continental. He told this Continental representative that General had offered him a 5% discount if they could replace Continental, that he would prefer continuing to do business with Continental, but unless Continental would meet this competitive offer he would discontinue purchasing from them in favor of General. When faced with this potential loss of a substantial customer, Continental granted the requested discount in May of 1958.[212]

The discount given by Continental to the Trunz stores continued at 5% until Trunz stopped buying altogether from Continental and began purchasing from General, which gave Trunz the 5% discount which that supplier had previously offered. Continental no longer sells in any of the Trunz markets. American and Gordon, which had also granted Trunz a discount, were also eliminated from these stores in favor of General.[213]

Two Guys From Harrison

In 1958, the Two Guys From Harrison store in Bordentown, New Jersey, opened a grocery department. It was the second Two Guys store to have such a department. Continental was serving the first Two Guys grocery department, located in the Brunswick, New Jersey, store. Edward Kraus, General Manager of the grocery departments of the Two Guys stores, was responsible for the selection of bread suppliers. Mr. Kraus negotiated with Julius Heim and Oscar Testa, of Continental, in connection with Continental's servicing of the Bordentown store.[214]

When the Bordentown Two Guys store was about to open Friehofer, Fisher, Ward, General, Schaible, and Continental contacted Mr. Kraus for authorization to serve that store. The list prices were generally the same for comparable products, except that the prices of Friehofer and Schaible were slightly lower than those of the other major bakers. Because of their lower list prices the white bread of Friehofer and Schaible was retailed at a price slightly lower than the price of the other major bakers. Despite this difference in retail price, these brands were viewed as products of a quality comparable to the higher-priced brands.[215]

Mr. Kraus required all bakers he authorized to serve the Bordentown Two Guys store to contribute $300 each to the furnishing of the bread fixture. He also required that they grant a 5% discount from

[212] See Trunz, Tr. 1898, 1900, 1902–03, 1917, 1904, 1906.
[213] See Trunz, Tr. 1913–14, 1918.
[214] See Kraus, Tr. 2242–43, 2241; Testa, Tr. 606; Heim, Tr. 2186; Kraus, Tr. 2245.
[215] See Heim, Tr. 2187–88, 2213–14; Kraus, Tr. 2243–44, 2246–47, 2249–50.

list prices. When discussing Continental's being authorized to serve the Bordentown store with Mr. Heim and Mr. Testa, Mr. Kraus told them of these conditions and told them further that those bakers he had thus far authorized to serve that store had agreed to contribute to the cost of the bread stand and had granted a 5% discount. Mr. Kraus had, at that time, completed negotiations with all of the other bakers eventually authorized to serve the Bordentown store, Friehofer being the first baker to agree to pay for its share of the bread stand and to give the requisite 5% discount. When it became obvious that Continental could not serve this customer without granting the discount and contributing to the cost of the bread stand, Continental extended a 5% discount and paid $300 for its share of the stand.[216]

The discounts given to Two Guys From Harrison by Continental and its competitors upon the opening of the Bordentown store continued in effect in the Bordentown store and were extended to the other Two Guys stores opened during the period in question. These discounts all remained at 5%.[217]

Weiss

In 1956, there were three Weiss Brothers Markets located in Camden. All three of those stores were served by Continental, General, Ward, and Dugan, and two were served by Friehofer. All of these bakers sold a comparable line of bread products to Weiss and had the same list price.[218]

Sometime in 1956, Weiss was offered and accepted a discount from the Ward Baking Company. This discount of 5% was supposedly conditioned on Weiss' purchasing $50 or more worth of bread and cake. Mr. Weiss was unable to recall whether the $50 was the minimum purchase per store or minimum aggregate purchases for the three Weiss stores. He does recall, however, that as long as this discount was in effect, he never failed to qualify for the 5%.[219]

The evidence suggests that the $50 per week minimum included the combined purchases of the three Weiss stores. This conclusion is reached on the basis of these facts: In 1956, when the Continental discount was negotiated, each of the Weiss stores purchased a total of between $75 and $100 per week from all of its bakers. There were at that time five bakers serving two of the Weiss stores and four bakers serving the third store. Mr. Weiss estimated that Continental's pur-

[216] See Kraus, Tr. 2244; Testa, Tr. 606, 610, 612; Heim, Tr. 2189–90; Kraus, Tr. 2245, 2251–52, 2254, 2244–46, 2253; Testa, Tr. 612–13; Heim, Tr. 2188; CX 197A–B.

[217] See Heim, Tr. 2188–89; Kraus, Tr. 2247–48, 2250–54.

[218] See Weiss, Tr. 2503–6; Zaveckas, Tr. 2574–75.

[219] See Weiss, Tr. 2505–07, 2510, 2514–16.

chases of about $25 to $50 per week per store equaled his purchases from Ward's. Inasmuch as Ward's sales were no more than Continental's, and since the total purchases in these stores did not exceed $100, and, since each store was served by a total of 4 or 5 bakers, neither Ward nor Continental could have sold as much as $50 a week to each of the Weiss stores. The fact that Mr. Weiss never failed to qualify for the Ward discount leads to the conclusion that the ostensible $50 minimum, if it was observed at all, applied to the purchases from all of his stores and not each individual store. After December of 1957, Ward's payments to customers were all flat 5% discounts.[220]

After receiving the Ward discount, Mr. Weiss approached Continental, his next largest supplier. He first spoke to the Continental driver-salesman and told him that unless Continental gave him a discount he would cease handling their products. Mr. Weiss was then contacted by Frank Zaveckas, the Bellmawr Depot Manager. Mr. Weiss repeated his demand for a discount from Continental, telling Mr. Zaveckas that since he was receiving a discount from Ward he would no longer purchase from any baker who did not meet that discount. Mr. Weiss told Mr. Zaveckas that the Ward discount was 5% but made no mention of any $50 per week requirement. Faced with the alternative of losing this customer, Continental extended a 5% discount to the three Weiss stores.[221]

After the Continental discount, both General and Dugan granted discounts on their full lines of products sold to the Weiss stores. The General discount was 5% and the Dugan discount was 8% for all purchases over $25 per week. These discounts, and the Ward and Continental discounts, remained in effect through the period in question at the amounts originally negotiated.[222]

IX. RESPONDENT'S ADVERTISING ALLOWANCES TO MEET COMPETITION

The evidence presented by complaint counsel under Count II of the complaint involved a single transaction wherein Continental paid advertising allowances to Best Markets. The following findings set forth the competitive situation that led to the advertising arrangements between Continental and this customer.

In the early 1950's, Continental was the weakest baker in the Philadelphia market, with only six or eight routes serving only 350 stops

[220] See Weiss, Tr. 2503–06, 2510; Sidders, Tr. 2689.
[221] See Weiss, Tr. 2507–08, 2511; Zaveckas, Tr. 2575–77, 2589–90.
[222] See Weiss, Tr. 2508–09.

in the total market. Continental's major competitors there were Fischer, General, Ward, Friehofer, Fleischmann, and Stroehmann. Arnold Wilson, manager from 1949 to 1957, of Continental's Norristown Bakery, which served the Philadelphia market, made several efforts to improve Continental's position. He approached several chains in the area but they all insisted that Continental give them a discount. Mr. Wilson, because of company policy, was unable to do so. Mr. Wilson also investigated the possibility of advertising in order to create demand for Continental's products in the Philadelphia market, but the rates in the major newspapers and television stations serving the area were prohibitive in view of Continental's very small sales in that market.[223]

In 1954, Arnold Wilson approached Milton Radler, of Best Markets, in an effort to begin selling to that chain in the area served by Continental's Norristown Bakery. Best Markets was at the time buying from Continental in New Jersey. Mr. Radler told Mr. Wilson that General, Fischer, Friehofer, and Stroehmann were paying Best Markets 10% and participating in cooperative advertising arrangements with them, and, that to sell to Best Markets, Continental would have to agree to a similar arrangement. After negotiating with Mr. Radler for a period of six months, Mr. Wilson concluded an arrangement whereby Continental would pay $10,000 a year to Best Markets, and Best Markets undertook to advertise Continental's products through storecasts, handbills, newspapers, and on the metropolitan bus line. The $10,000 payment was estimated to equal 10% of what Continental would sell Best Markets during the first year. Because Best Markets promised Continental space equal to the space held by other bakers in their stores, and because Best Markets promised intensive advertising of Continental's products, Mr. Wilson estimated that Continental could sell at least $100,000 worth of its products to Best Markets in that first year. Mr. Wilson also investigated the actual cost of the advertising which Best Markets promised to do and concluded that Continental could not do this advertising on its own for an equivalent sum of money.[224]

The payment from Continental to Best Markets was based of necessity on estimated potential sales to those stores, for Best had no obligation to purchase any fixed amount from Continental. Further, Continental was merely allowed to enter into competition with those bakers already serving Best, since Best did not eliminate any suppliers on Continental's entry.[225]

[223] See Wilson, Tr. 2520–23, 2541.
[224] See Wilson, Tr. 2524–27, 2529, 2531–32; RX 2, p. 24, 2541–42, 2545–46, 2553–54.
[225] See Wilson, Tr. 2545, 2554; Deposition of Theodore Zalles, RX 2, pp. 14, 33.

Theodore Zalles, then advertising director for Best Markets, stated that all the bakers supplying Best before 1955, were in fact paying advertising allowances, the average rate of which was 10% of their sales to Best. The services rendered by Best to each of these bakers were valued under a set scale of rates. In this manner equal treatment per dollar paid was assured. Mr. Zalles mentioned such arrangements with General, Ward, Stroehmann, and Friehofer. Mr. Zalles also stated that entering into a cooperative advertising arrangement was a necessary precedent to Continental's serving Best Markets.[226]

Throughout his tenure as Norristown Bakery manager, Arnold Wilson checked every two weeks on Best's performance of its advertising obligation under the contract. Best advertised Continental's products in both the *Inquirer* and the *Bulletin*, metropolitan Philadelphia newspapers, and promoted Continental's products through handbills, in-store displays, storecasts, and window signs. Best purchased the advertising space on the side of a trolley car of the Philadelphia metropolitan transportation system and advertised Continental's products thereon.[227]

Mr. Wilson's successor as Norristown Bakery manager, William Brown, also maintained a continuing check, on Best's performance under the contract. In addition to these observations by Continental's people, Best Markets sent material to Continental indicating the manner in which they were performing their advertising obligations.[228]

The $10,000 annual payment to Best Markets was, after Continental's first year's sales to those stores, less than 10% of those sales. Continental's sales to the Best Markets continued to improve so that by 1956, the $10,000 payment was less than 5% of its sales. Because Continental's sales were much larger than anticipated, Milton Radler often asked Continental to increase its payments so that they would equal the 10% being given Best by its other baked goods suppliers, a request to which Continental never acceded.[229]

The arrangement with Best Markets was renewed in 1957, while William Brown was manager of the Norristown Bakery. Mr. Brown was told by Mr. Zalles and Mr. Isdana, Mr. Radler's successor in charge of purchasing for Best Markets, that General, Ward, Stroehmann and Friehofer were parties to similar arrangements with Best. Mr. Brown was told that these competitive arrangements

[226] RX 2, pp. 7–8, 10–23, 27, 38, 29.
[227] See Wilson, Tr. 2530–31, 2542; RX 2, pp. 11–12, 16, 19–20, 32–33, 36, 38.
[228] See Brown, Tr. 401, 413, 431, 433, 478–79; CX 161A, 162A, 164A, 165A, 166A, 167A, 169A, 171A.
[229] See Wilson, Tr. 2524–25, 2532–34.

amounted to from 5% to 10% of sales to Best Markets. In particular, he was told that General's allowance ranged from 5% to 8% and Ward's equaled 10%. Mr. Brown also was told of Continental's competitors' deals by Best's field supervisor.[230]

Theodore Zalles testified that the arrangements with General, Ward, Stroehmann ,and Friehofer did in fact continue in effect in the Best Markets until those markets were acquired by the Food Fair stores in 1958.[231]

X. EVIDENTIARY AND CASE ANALYSIS OF RESPONDENT'S MEETING COMPETITION DEFENSE

Respondent has established by substantial evidence that each of the discounts evidenced was given in good faith to meet the equally low prices of one or more competitors. The advertising arrangement with Best Markets, challenged under Count II, has been shown to have been necessary to meet equivalent arrangements granted by Continental's competitors.

The Supreme Court has emphasized that Section 2(b) "does not place an impossible burden on sellers." *F.T.C.* v. *A.E. Staley Co.*, 324 U.S. 746, 749 (1945). It has also announced some basic guides by which the legal sufficiency of an asserted defense under Section 2(b) is to be tested. In *Staley*, the Court stressed that one asserting a Section 2(b) defense must come forward with a showing of diligent efforts to learn of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would only meet the equally low price of a competitor. *Cf.*, *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61 (1953). In its *Standard Oil of Indiana* decisions, (*Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231 (1951) and *F.T.C.* v. *Standard Oil Co.*, 335 U.S. 396 (1958)), the Court emphasized the requirement that competitive necessity be shown for the challenged discriminations. Continenatl has satisfied these tests.

Prior to 1953, when competitive necessity forced Continental to grant its first discounts, in the markets in question, discounting by other wholesale bakers was prevalent and was spreading. Fischer Baking Company, a powerful factor in these areas, had established a strong market position through the use of discounts beginning in the late 1930's. Ward Baking Company, a major baker of advertised brand breads, had begun discounting in the early 1940's.

In 1949, a strike took place in the New York City area, closing the plants of Continental and some of its major competitors. While these

[230] See Brown, Tr. 477K, 478, 488.
[231] RX 2, pp. 13–14.

bakers were shut down, several new bakers entered the market, and those wholesale bakers who were not struck, such as Fischer and Gordon, expanded their sales. Upon resumption of production, Continental and the other bakers which had been struck found that much of their former volume had been lost to new suppliers. Although Continental refrained from discounting as a method of re-establishing its market position, the record establishes that its competitors began to employ this practice vigorously. As a result, Continental fell from its position as second baker in the market to fourth or fifth place. By the end of 1953, Continental's sales in the New York market had returned only to their 1948 level despite the rapidly expanding market.[232]

Because bread is not a product for which there is substantial brand preference, and because the granting of a discount does not result in a lowered resale price, a grocer will favor the baker that gives him a lower price and thus maximizes his profits. As discounting by its competitors became rampant in the market areas involved, retail grocers began demanding discounts from Continental and threatening to cut down or discontinue purchases unless Continental met its competitors' lower prices. These pressures came from major chains such as Food Fair, from small chains, and from single-store operators. For example, the members of the Twin Counties buying cooperative, an association of small supermarket operators, brought concerted pressure by cutting down or discontinuing purchases in those stores where Continental did its largest volume of business.

These highly competitive market conditions might not, standing alone, suffice to justify under Section 2(b) the granting of any one specific discount. However, the market situation within which Continental was forced to compete is relevant in determining whether its discounts were given in good faith. Indeed, the prevalence of competitive discounts was such that Continental perhaps could have instituted widespread price cuts lawfully in order to protect its position. *Ludwig* v. *American Greetings Corp.*, 282 F. 2d 917 (6th Cir. 1960); *Balian Ice Cream Co.* v. *Arden Farms*, 231 F. 2d 356, 366 (9th Cir. 1955) *cert. denied*, 350 U.S. 991 (1956); *Maryland Baking Co.* v. *F.T.C.*, 243 F. 2d 717, 719 (5th Cir. 1957). See *Anheuser Busch, Inc.*, 54 F.T.C. 277, 301 (1957), *rev'd on other grounds*, 265 F. 2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 536 (1960). The evidence establishes, however, Continental limited itself to meeting individual

[232] Continental's experience in the area served by its New Jersey bakeries, which were not struck in 1949, establishes that the New York strike was not the only cause for Continental's failing sales position in that market. Sales in New Jersey followed a pattern similar to those in New York, declining from 1949 on and not returning to the 1948 level until 1953.

competitive situations and to granting discounts in situations of compelling competitive necessity.

In deciding that Continental had to meet its competitors' prices in order to survive in the markets in question, Continental's management established a rigid policy within which their salesmen were required to act. This policy dictated first that Continental would not offer discounts, but would only consider them if demanded by a customer. A further requirement was that Continental sales personnel negotiate discounts only when they were convinced that the customer was already getting, or had immediately available to him, a discount which resulted in prices equal to or lower than the prices that would result from the discount demanded of Continental.[233] Finally, the salesmen were instructed not to give discounts unless it was, in their judgment, necessary to do so in order to continue a profitable volume of business with the customer in question.

As the foregoing suggests, Continental's policy envisioned the granting of discounts only in individual situations, when necessary to meet competition, and not to any particular class of customers nor within any pre-defined "system of pricing which results in routine and continuing discrimination in favor of a particular group of cuostomers."[234] Certain major customers, such as A&P, bought from Continental without discounts. On the other hand, Continental gave discounts to smaller and non-supermarket customers, such as Weiss Brothers, Heritage's Dairy and Food-O-Rama, when competitive necessity required.

The record bears out the rigid adherence of Continental's salesmen to this company policy on meeting competitive discounts. Some customers were quick to volunteer the names of all competitors giving discounts and the amounts involved. Some were blatant in asserting that unless Continental met these discounts its bread would be excluded from the grocers' shelves. The record reveals, moreover, that when Continental tested such threats, it frequently found its shelf space reduced or its bread discontinued completely. At times, even after Continental had yielded to the pressure and met the competitive prices, it was unable to regain its former position. This occurred, for example, in the Mayfair and Pied Piper supermarkets and in the Scotch Plains Shop-Rite.

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[233] The wholesale bakers of brand breads in the market areas involved sold comparable products at comparable list prices. Thus, equal discounts resulted in the same net prices.

[234] See *Purolator Products, Inc.*, Docket 7850 (Initial Decision, Hearing Examiner Kolb, December 14, 1962).

The most reliable evidence of a competitive situation that had to be met came, however, from the knowledge and experience of Continental's sales representatives. Whatever the customers' representations, they had to be verified by Continental personnel from their complete familiarity with the market and their informed analysis of the customers' business conduct.

Verification of the existence of competitive discounts came from observation of the favored treatment given to those bakers charging lower prices.[235] This favoritism includes such things as increased shelf space or a better rack position. These are indicia of competitive activity which a trained salesman could understand. As to amounts, Continental sales personnel had, by 1953, and during later years, learned enough about competitive discounts so that the amounts given by each baker were generally known.

Some grocers requesting a discount would not overtly threaten to cut down or cease their purchases from Continental if their demands were refused. At times the determination of whether refusal of the discount would detrimentally affect sales to the demanding customer would have to depend on the salesman's knowledge of prevailing competitive conditions and the customer's characteristics. In an area where there was no significant consumer preference for Continental bread, and when the particular customer was known to be an aggressive business-man, a Continental salesman would be compelled to conclude that failure to meet competitive prices would seriously prejudice Continental's sales position.

But whatever the source or nature of the information relied upon in determining whether to grant a discount, the record establishes that—before any of the discounts in question were negotiated—the Continental salesman had convinced himself that the customer was receiving a discount or that one was immediately available to him, that such discount resulted in prices equal to or lower than Continental's prices after the discount, and that a discount must be granted in order to continue to do business with the particular customer. These facts satisfy the test of subjective good faith.

The realistic accuracy of Continental's salesmen's business judgment is confirmed by the customer testimony in this proceeding. Their conclusions, whether based solely on customer assertions, or on circumstantial corroboration and documentation, proved unerringly correct. In every case involved here, Continental was, in fact, meet-

[235] The testimony of Mr. Sidders, of Ward Baking Company, establishes that anyone familiar with the bread business can tell, from the way in which a grocer treats his bread suppliers,which of those suppliers is extending favors to the grocer.

ing its competitors' discounts and the at least equally low net prices charged by competitors.

Special mention should be made of the Ward Baking Company discounts that Continental had to meet. From March 1955, through December 1957, Ward offered a so-called "promotional allowance." By its terms, this required that a store purchase $50 worth of Ward's products a week to qualify for the lower price. The record, including the testimony of Mr. Sidders, Ward's sales manager, establishes that in many, if not most, instances these "promotional allowances" were only disguised discounts. Even the written agreements did not purport to require that the grocer expend any time or effort or funds on Ward's behalf. They specified only that he permit Ward to conduct a few in-store promotions each year—at times of his choosing.[236] Several of the witnesses testified that they were never called upon by Ward to provide any services. Mr. Sidders acknowledged that there was no real monitoring of performance under the plan, but only a survey of the customer's sales record. Few, if any, on-the-spot checks were made. The requirement that a customer's purchases from Ward exceed $50 per week per store appears also to have been honored principally in the breach. This ostensible requirement is, in any event, irrelevant here, for none of the customers in question ever were held not to qualify. At all times they received a discount that made the prices paid to Ward's equal to those paid to Continental for comparable products.

The record abundantly documents the fact that the meeting of competitive discounts became for Continental a matter of commercial survival. Not only has Continental's subjective good faith been proven, but the uncontroverted facts meet the objective test of the good faith meeting of competition set out by the Supreme Court in its *Standard Oil* decisions.

The advertising arrangement with Best Markets was also given under circumstances which must satisfy any reasonable interpretation of Section 2(b). Although the Commission has acknowledged that the defense of the good faith meeting of competition is available to a charge of the violation of Section 2(d) of the act, it has not spoken to the question of the content of the defense in such a situation.[237] Respondent correctly argues that the standards applicable must be

[236] Mr. Sidders acknowledged that customers continued to participate in such promotions after the plan was withdrawn, proof of the fact that their participation during the plan was not prompted by nor in exchange for the payments made to them by Ward.

[237] See *Shulton, Inc.* v. *F.T.C.*, 1962 Trade Cas., ¶ 70,321 (7th Cir. 1962) [7. S.&D. 472]; *J. A. Folger and Co.*, Docket 8094 (Opinion of the Commission, September 18, 1962) [61 F.T.C. 1166, 1184].

identical to those used in evaluating the defense to a charge under Section 2(a). It must be shown that the seller, after diligent efforts, reasonably believed that a competitor or competitors had similar arrangements with the customer and that its arrangement would meet and not beat those competitive arrangements. *F.T.C.* v. *A. E. Staley*, *supra.* Further, it must be shown that the offering of the challenged allowance was competitively necessary.[238] *Standard Oil*, *supra.*

In determining whether an advertising allowance is equivalent to that of a competitor, it is probably sufficient to show that the challenged allowance, when expressed as a percentage of sales, is no greater than the allowance met. Reference to the services performed by the customer for each competitor, and exact identity in this respect, appears unnecessary. Benefit to the seller is not relevant in a 2(a) case in determining whether a price given to meet competition does no more than meet a competitor's price, and there appears no greater reason to consider relative benefits to sellers in a 2(d) case.

The fact that under an advertising allowance some observable services are performed on behalf of the seller does not distinguish Section 2(d) from Section 2(a) for purposes of the Section 2(b) defense. A price discrimination, cognizable under Section 2(a), is never given unless the seller expects to realize some commercial benefit. That such benefits take a form different from those realized by a seller as a result of an advertising arrangement makes them no less real. If a seller meets and does not beat a competitor's price, 2(b) is satisfied in that respect notwithstanding the fact that meeting the price may bring the seller commercial benefits which far surpass those that had been realized by the competitor whose price is met. By a parity of reasoning, if a seller gives a customer an advertising allowance which is equal to allowances given by competitors when expressed in terms of a percentage of sales, then Section 2(b) is satisfied in this respect. The fact that the customer may have used one seller's payments for services different from those afforded a competitor is irrelevant.

This interpretation is inherent in Section 2(b). That Section specifically allows "the furnishing of services or facilities * * * in good

[238] In *J. A. Folger & Co., supra.* the Commission denied the asserted defense of meeting competition, declaring that "good faith" was refuted by the Examiner's finding that respondent would have entered into the challenged arrangements in order to advance its sales, irrespective of what its competitors had done. The facts will not support such a finding here. The long negotiations which preceded Continental's deal with Best, during which competitive deals were often discussed, indicate that Continental's primary purpose in giving the deal was to meet competition. Naturally, in entering this arrangement Continental's sales through the Best Markets were advanced, but this of course is the intended consequence of any advertising arrangement. The Commission in *Folger* makes it clear, however, that this alone will not vitiate an asserted 2(b) defense to a 2(d) charge.

faith to meet * * * services or facilities furnished by a competitor." No mention is made of any need to evaluate the respective benefits accruing to the sellers furnishing services or facilities. A similar construction must be given whether the Section 2(b) defense is invoked for a Section 2(d) allowance or a Section 2(e) service. See *Exquisite Form Brassiere, Inc.* v. *F.T.C.*, 1961 Trade Cas. ¶ 70,157 (D.C. Cir. 1961 [7 S.&D. 259]; *Elizabeth Arden, Inc.* v. *F.T.C.*, 156 F. 2d 132 (2nd Cir. 1946), *cert. denied*, 331 U.S. 806 (1947). Any difference in construction would lead to absurd results. An allowance given to a customer to pay a demonstrator's salary is cognizable under 2(d). Direct provision of a demonstrator in a customer's store comes within 2(e). In neither case need the seller asserting good faith meeting of competition demonstrate that he received no greater benefits than the competitor whose allowance or whose services or facility he met.

In the case of the allowance to Best Markets, Continental has borne the burden of the good faith defense. Continental's representative negotiated over an extended period of time with Best Markets, during which time he was informed that the other wholesale bakers supplying those stores were parties to cooperative advertising arrangements. He was further told that these bakers were giving Best Markets allowances equal to at least 10% of sales. The Continental allowance was calculated to reach this same 10%. In fact, this allowance amounted to less than 10% of sales even at the end of the first year. The Continental representative testified that he was told by the buyer that entering into the cooperative advertising arrangement was a prerequisite to Continental's servicing Best Markets, and this was corroborated by the Best Markets advertising manager.

At the time Continental entered into the challenged cooperative advertising agreement the Best Markets were, in fact, receiving payments under such arrangements from all of the wholesale bakers serving those stores. These payments, expressed as a percentage of sales, were equal to or greater than the payments given by Continental.

The discount given by Continental to the Food Fair stores was originally cast in the form of an advertising allowance. Continental established that this arrangement was intended, from its very inception, to be a discount, given to meet equal discounts from competitors. Food Fair provided no services under this arrangement that it would not have provided absent such payments. But even if this arrangement were cognizable under Section 2(d), it is clear that it would be defensible under Section 2(b).

The payments to Food Fair were, as the testimony of Continental's employees and the Food Fair official involved establish, based on a

percentage of Continental's sales to those stores. That percentage was equal to, or lower than, the competitive discounts being given Food Fair at the time. If Food Fair had in fact been required to provide services and facilities to Continental under this arrangement, the cash benefits to Food Fair would have been commensurately reduced. Thus, if it could be viewed as a 2(d) arrangement, it would have to be held that Continental's payments to Food Fair were actually less than the payments made to those stores by its competitors.

Continental does not contest that two of the twenty discounts challenged in this proceeding, those to American Stores (Acme Markets) and the Food-O-Rama, were negotiated at the time when Continental began selling to those customers. The Commission has ruled, in *Sunshine Biscuits*, Docket 7708 (Opinion of the Commission, September 25, 1961) [59 F.T.C. 674, 678], that the good faith meeting of competition defense is not available to a seller who grants discriminatory price reductions aggressively for the purpose of gaining new customers. This ruling is inapposite in this case.[239]

The position that a reduction made to meet competition is lawful if "defensive", rather than "aggressive", is no more than an attempt to give content to the "good faith" criterion of Section 2(b). Where the reduction sought to be justified has had the effect of disrupting business relationships and depriving a competitor of an established customer, a showing of good faith competitive necessity would be difficult in the extreme. Indeed, where a customer has abandoned his previous source and begun to purchase instead from a new supplier, the inference might well exist that the new supplier's deal was somehow more advantageous.

Here, however, no such situations are presented. No wholesale baker has retail grocer customers that are all his own. Not only are exclusive purchasers virtually nonexistent, but there are no term contracts and no continuing commitments between the grocer and the wholesale baker. Bread is bought on a day-to-day basis and, as the record shows, even the smaller retail grocers purchase daily from several wholesale bakers. Most of them handle every brand for which there is any appreciable consumer demand—if it is offered at competitive prices.

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[239] Despite the reversal of its ruling in this case by the Court of Appeals, *Sunshine Biscuits, Inc.*, 306 F. 2d 48 (7th Cir. 1962), the Commission has indicated it will adhere to its ruling. Federal Trade Commission News Release, November 25, 1962. Counsel in support of the complaint claims other discounts to obtain new business. Even assuming this to be correct, the circumstances in this case do not justify the conclusion that the respondent allowed any discounts for "aggressive" competitive purposes as distinguished from "defensive" competitive purposes.

Accordingly, acquisition of a new customer in this business means no more than the opportunity to share in the available shelf space. Thus, in none of the cases in question, did Continental replace any existing bread supplier. With respect to Food-O-Rama, the store manager testified that his store's purchases from Continental were made without displacement of any competitor.

From a realistic viewpoint, whether a competitive reduction is "defensive" or "aggressive" can have significance only where primary level competitive injury is involved. Here, of course, the record is devoid of a serious attempt to show adverse effect on Continental's competitors. Where the inqury into probable competitive consequences is restricted to the secondary level, among customers of the seller, the question whether the grocer receives the lower price from an old or a new supplier can have no conceivable importance. Whatever the competitive relationships between Retailer "A" and Retailer "B" may have been, they are wholly unaffected by the fact that Retailer "A", who previously bought bread at a lower price from two wholesale bakers, now buys his bread, at that same lower price, from three wholesale bakers.[240] In discussing the *Sunshine Biscuit* case, in its recent decision *In the Matter of Forster Mfg. Co., Inc.*, the Commission explicity recognized this concept and stated:

> The court held, however, that the protection of Section 2(b) was not lost simply because Sunshine had acquired new customers as a result of its meeting competition; the fact remained that *each* of the buyers to whom Sunshine offered the low price was already purchasing at that identical price from his regular supplier. Docket 7207, p. 32 (January 3, 1963).

Finally, the respondent seller here has only met prices which it had reason to believe were lawful. The record in this case is abundant with evidence establishing that Continental's management, as reasonable and prudent businessmen, believed that the lower prices met were lawful.

To demand any further showing of facts that Continental had determined its competitors' prices to be lawful would be to ignore commercial realities and to require an inquiry of extreme hazard under the antitrust laws. In each of the markets involved in this case, there are several bakers selling in competition. The number of grocers in these markets is in the thousands. The only conclusive way in which Continental could ascertain whether any competitor was treating all of his customers equally and, if not, whether customers receiving unequal treatment were in competition and were threatened

[240] This was recognized by the Supreme Court in *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231 (1951).

with injury, would be to exchange information as to prices and competitive practices with other wholesale bakers.

Furthermore, there is nothing explicit in Section 2(b) that remotely requires that the seller invoking this defense establish the lawfulness of his competitors' prices.

In this proceeding every element of the good faith meeting of competition defense has been established. To require more would be to make a nullity of Section 2(b) and to deprive it of any realistic application.

XI. TERMINAL CONCLUSIONS

1. In the case of some of the transactions shown in the record, the products sold at differing prices to differing customers were produced and distributed wholly within the State of production pursuant to interstate controls, negotiations and authorization as to terms of sale. The evidence, therefore, establishes that as to price differences there have been discriminations (although legally defensible) in the course of commerce and purchases in commerce. Accordingly, these transactions are cognizable under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

2. In the case of some sales of Continental products shown in the record, involving products baked by Continental outside the State of sale, and shipped in for sale to retail grocers, the record shows that these interstate shipments were made to insure the performance of locally executed contracts for bake goods, the terms of which were negotiated and authorized by respondent in commerce and through the use of interstate media of communication and controls. For the reasons stated in paragraph 1 of these terminal conclusions, as well as other reasons more specifically hereinbefore set forth in this decision, discriminations in the course of commerce and purchases in commerce are also apparent and cognizable under the Clayton Act as to such transactions.

3. It has been established that respondent's discounts or payments to certain favored customers, but not to all customers in the same competitive market hereinbefore described, may be substantially to lessen competition or tend to create a monopoly in the sale of baked goods, or to injure, destroy, or prevent competition as alleged in the complaint, and that an order requiring respondent to cease and desist from continuing such practices should issue unless respondent prevails in its "meeting competition in good faith defense".

4. However, respondent Continental has established that each discount shown by the record to have resulted in differing prices to

differing customers located in the same general marketing area was granted in good faith to meet the equally low net prices, including discounts, of one or more competing wholesale bakers.

5. With respect to the payments made by respondent Continental to the Food Fair stores, it is concluded that these were intended as and accepted as discounts in price and were neither paid nor received in consideration of any advertising or promotional services to be rendered by Food Fair to respondent Continental. These payments hence must be regarded as yielding price differences cognizable under Section 2(a) of the act. As such, it has been proved that the discount to Food Fair was granted in good faith to meet the equally low or lower prices of competing wholesale bakers.

6. With respect to the payments made by respondent Continental to Best Markets, it has been established that these were payments made for services or facilities furnished by Best Markets in connection with the sale of Continental baked goods and hence, that these payments are subject to Section 2(d) of the amended Clayton Act. It has been proved that respondent Continental made these advertising allowances to Best Markets in order to meet the equivalent advertising allowances paid by competing wholesale bakers for comparable services or facilities afforded by Best Markets.[241] It is further concluded, on the basis of both recent Court and Commission [242] decisions, that the good faith meeting of competition defense is available as justification of a challenge brought under this subsection of the act.

7. With respect to the $300 paid by respondent Continental to Two Guys From Harrison as a contribution to the furnishing of the bread rack in that customer's Bordentown, New Jersey, store, it is concluded that this must be treated as a contribution to a service or facility connected with the offering for sale of baked goods in this store and hence, that the payment is subject to Section 2(e) of the act. No violation of that subsection is charged in the complaint. It has been proved, moreover, that this furnishing of a service or facility to Two Guys From Harrison was made in good faith to meet the services or facilities furnished by competing wholesale bakers to that retail customer and that, therefore, this contribution was justified under Section 2(b).

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[241] *Exquisite Form Brassiere, Inc.* v. *F.T.C.*, 301 F. 2d. 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); *Shulton, Inc.* v. *F.T.C.*, 1962 Trade Cas. ¶70,321 (7th Cir. 1962) [7 S.&D. 472].

[242] See Remand Order in Docket No. 7717, *Max Factor & Co.* (Nov. 10, 1962); *J. A. Folger & Company*, Docket No. 8094, Commission Opinion of Sept. 18, 1962, p. 5 [61 F.T.C. 1166].

Accordingly, no showing has been made of any violation of Section 2(a) of the amended Clayton Act, as charged in Count I of the complaint. Neither has there been any showing of a violation of Section 2(d) of the amended Clayton Act as charged in Count II of the complaint. The evidence, therefore, clearly justifies a dismissal of the complaint. Accordingly, the following order shall issue:

ORDER

It is ordered, That the complaint is herein and hereby dismissed.

APPENDIX

DOCKET 7630—CONTINENTAL BAKING CO.

Tabulation of data pertaining to sales and profits—Prepared from official transcript of proceedings before the FTC

Transcript page No.	Business	Total sales (12 mos.)	Gross profit (12 mos.)		Net profit before owners renumeration	
			Percent of sales	Amount	Percent	Amount
804	Homestead Market, Amedeo Dimuro, owner, 7220 Amboy Rd., Tottenville, Staten Island, N.Y.	$80,000	19.45	$15,560	9.25	[1] $7,400
831	William Timmerman, Donald E. Winters, owner, 8 Central Ave., Pearl River, N.Y.	150,000	15	22,500	6.7	[1] 10,000
857	Quality Market, August Bergman, coowner, 65 Center St., Pearl River, N.Y.	72,000	18-20	[2] 13,680	8-10	6,480
871	Hoffman's Delicatessen, William A. Pizzuti, owner, 375 Park Ave., Scotch Plains, N.J.	65,000-70,000	23-24	[3] 15,860	----------	----------
903	Elm Delicatessen, William Eiffler, owner, 37 Elm St., Westfield, N.J.	100,000	25	25,000	8	8,000
926	Lillian Blum, owner, 1316 Clinton Ave., Irvington, N.J.	43,309	15	6,441	12	5,089
936	Sam's Country Store, Rae Rosenbaum, owner, 1115 East George Ave., Roselle, N.J.	25,000-26,000	20-25	[4] 5,738	----------	----------
950	Broadway Quality Market, Vincent Blanco, owner, 309 Broadway, Passaic, N.J.	45,000-48,000	17-18	[4] 8,138	9	4,185
971	Quadrel's Market, Anthony Quadrel, owner, 644 Valley Rd., Upper Montclair, N.J.	[5] 76,777	24	18,714	11	[6] 8,467
1004	Ridustelli's Market, Louis Ridustelli, owner, 159 Monmouth St., Red Bank, N.J.	----------	17	----------	5	----------
1027	Steves Dairy, Steve Szabatin, owner, 277 Smith St., Perth Amboy, N.J.	58,000	20	11,600	13-15	8,120
1034	Kemmer's Delicatessen, Stephen Kemmer, owner, 102 Rockland Pl., Nanuet, N.Y.	120,000	20-22	[5] 25,200	9	10,800
1053	Mickey's Market, Michael D'Amico, owner, 30 South Plainfield Ave., South Plainfield, N.J.	61,000	17	10,370	4-6	3,500
1076	Henry's Delicatessen and Appetizing Store, Henry Glickman, owner, 141 Broad St., Red Bank, N.J.	120,000	25	30,000	1.25	[7] 1,500
1101	Harris Food Market, H. Schonberger, owner, 309 Smith St., Perth Amboy, N.J.	25,000-30,000	----------	----------	----------	----------

See footnotes at end of table.

APPENDIX—Continued

DOCKET 7630—CONTINENTAL BAKING CO.—Continued

Transcript page No.	Business	Total sales (12 mos.)	Gross profit (12 mos.)		Net profit before owners renumeration	
			Percent of sales	Amount	Percent	Amount
1131	Clark's Delicatessen, Charles R. Clark, owner, 203 Giffords Lane, Great Kills, Staten Island, N.Y.	43,000	17	7,310	8-9	3,655
1164	Applegate Delicatessen, Frank Applegate, owner, 75 Crosswick St., Bordentown, N.J.	39,000-40,000	----------	----------	15	6,000
1185	Miserendino's Walt Whitman Store, Frank Miserendino, owner, Delcia Dr. and Summit Ave., Westville Grove, N.J.	75,000	14	10,500	4	3,000
1221	Melvins Market, Melvin Morris, owner, 5th and Erie, Camden, N.J.	36,412	19	6,981	12	4,455
1244	Fritz' Food Market, Samuel Fritz, owner, 7th & York, Camden, N.J.	100,000	----------	----------	6.8	6,800
1278	Evergreen Cold Cuts, Dominic Arcari, coowner, 312 Evergreen Ave., Woodbury, N.J.	100,000	24	24,000	12	12,000
1299	Dunn's Market, Edna Mae Dunn, owner, 324 Division St., Woodbury, N.J.	37,000	----------	----------	11.4	4,200
1322	Lennies Delicatessen, Leonard Carlucci, owner, 898 10th St., Camden, N.J.	----------	----------	4,600	----------	3,600
1339	Public Meat Market, Victor J. Venanzi, employee, 565 Clinton Ave., Trenton, N.J.	[8] 61,422	12.7	7,800	(0.8)	(516)
1376	Melillo's Food Market, Joseph Melillo, owner, 2954 North 22d St., Philadelphia, N.J.	170,000	20	34,000	5.6	9,500
1427	Powellton Food Market, Max Burt, owner, 3237 Powellton Ave., Philadelphia, N.J.	110,000	18-20	21,500	5	[9] 5,500
1446	Georges Market, George Gould, owner, 57 Mary St., Bordentown, N.J.	1,000	15-15½	12,150	4½-5	4,000
1478	C. Granadas Grocery, James Granada, owner, 27 Crosswick St., Bordentown, N.J.	23,000	12	2,760	6	1,380
1494	Fran's Delicatessen, Francis A. Colosi, owner, 834 Parkway Ave., Trenton, N.J.	50,000-55,000	20	10,500	7½	3,938
1551	Barron's Market, Abraham Barron, coowner, 601 North 5th St., Camden, N.J.	65,000	14	9,000	10.2	6,600

[1] Net profit after owner's salary of $5,200.
[2] Based on average gross profit to total sales.
[3] Based on average gross profit to average total sales.
[4] Based on average gross profit to average total sales.
[5] Based on average gross profit to total sales.
[6] See Commission Exhibits 233 and 234.
[7] After owner's salary.
[8] Grocery department only.
[9] After owner's salary of $3,900.

OPINION OF THE COMMISSION

DECEMBER 31, 1963

By ELMAN, *Commissioner:*

The complaint in this matter alleged that respondent, a corporation engaged in the manufacture and sale of bakery products, granted discriminatory discounts on sales of its products to retail grocery

stores, in violation of Section 2(a) of the amended Clayton Act, and granted non-proportional advertising allowances to competing customers, in violation of Section 2(d) of the Act. Respondent in its answer denied these allegations and, in addition, alleged meeting of competition in good faith as a complete affirmative defense. After full evidentiary hearings on the allegations of the complaint and answer, the hearing examiner filed an initial decision in which he dismissed the complaint on the ground that respondent has sustained its defense of meeting competition in good faith. Complaint counsel has appealed from this finding. Respondent, on this appeal, while supporting the examiner's finding on the meeting-competition issue, has excepted to certain other findings of the examiner. Since we have concluded that respondent has sustained its meeting-competition defense, and since meeting of competition in good faith is a complete defense both to the 2(a) charge (see *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231) [5 S.&D. 221] and to the 2(d) charge (see *J. A. Folger & Co.*, F.T.C. Docket 8094 (decided November 14, 1962) [61 F.T.C. 1166], we need not reach respondent's exceptions; and we express no view on the correctness of the findings of the examiner to which respondent excepts.

Section 2(b) of the amended Clayton Act enables a seller to justify a price discrimination by showing that it was made in good faith to meet a competitor's equally low price. The burden of justifying discriminatory conduct in such fashion is, of course, on the respondent.

At the heart of Section 2(b) is the concept of "good faith". This is a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759–60 [4 S.&D. 346, 356]; see *Standard Oil Co* v. *F.T.C.*, 340 U.S. 231, 249–50 [5 S.&D. 221, 232–233]. Such a standard, whether it be considered "subjective" or "objective", is inherently *ad hoc*. Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application. Thus, the same method of meeting competition may be consistent with an inference of good faith in some circumstances, inconsistent with such an inference in others.

In the present case, we find as a fact that respondent has sustained its 2(b) defense. A record of more than 1,000 pages was compiled

on the 2(b) issue in this case. It consists of the exhaustive examination and cross-examination of many customers and employees of respondent, covering every discount or service challenged in the complaint. After carefully analyzing this record, the hearing examiner concluded that respondents' discount policy had been formulated and implemented in good faith, honestly, reasonably and prudently, in order to meet competition. We agree with his analysis of the evidence. We do not, however, necessarily agree with his entire discussion of the law of Section 2(b). Accordingly, we do not adopt that part of the initial decision.

Briefly, the record shows the following. Prior to 1953, respondent refused to grant discriminatory discounts, although its major competitors had, for many years, been granting such discounts on a large scale. As a result of its forbearance, however, respondent's market position had been so impaired that by 1953 respondent felt compelled to reconsider its no-discount policy. Its officers decided that in order to avert a further drastic loss of business it would be necessary to grant some discounts.

The discount policy adopted by respondent as a result of the competitive situation it faced was a highly selective one. It permitted a discount to be granted to a particular customer only where an equal or larger discount had been given by a competitor of respondent on a competing product line and respondent would not be able to continue selling to the customer in question without granting such a discount. In other words, discounts by respondent were available only in actual competitive situations.

Care was taken by respondent to ensure the genuineness of the competitive necessity for particular discounts. In every case, customers' claims that they were receiving discounts from competitors of respondent were adequately verified by respondent's on-the-spot sales representatives. In fact, in every instance of record in which respondent granted a discount, its competitors' discount to the customer in question was equal to or larger than respondent's, and the latter's net price to the customer was no lower than its competitors' net prices.

We have concluded that the foregoing facts and circumstances (which apply equally to respondent's grant of advertising allowances to meet equivalent advertising allowances granted by competitors of respondent) demonstrate respondent's compliance with the good faith meeting of competition standard. Where, as here, a seller has affirmatively shown justification for selective price reductions, as "good

faith" responses to the exigencies of competition, Congress provided the shelter of Section 2(b).

Accordingly, the complaint against respondent is dismissed.

Commissioner MacIntyre has filed a separate opinion.

Commissioner Anderson concurred in the result.

OPINION

DECEMBER 31, 1963

By MACINTYRE, *Commissioner:*

The complaint in this case charged that the respondent, one of the largest firms engaged in the production, sale and distribution of bread and other bakery products, with annual sales in excess of three hundred million dollars, had been engaging in discriminations in violation of Sections 2(a) and 2(d) of the amended Clayton Act. Paragraph Seven of the complaint alleged that:

> The effect of such discriminations in price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its customers are respectively engaged; or to injure, destroy or prevent competition with respondent or with purchasers therefrom who receive the benefit of such discrimination.

The hearing examiner found that the grocery business is "highly competitive"; is characterized by "small profit margins"; that "bakery products account for a substantial share of a grocery store's business"; and that 5 percent price discriminations were granted by respondent "in the course of commerce." In Finding No. 3, Page 2159 of the initial decision, the hearing examiner stated that:

> It has been established that respondent's discounts or payments to certain favored customers, but not to all customers in the same competitive market hereinbefore described, may be substantially to lessen competition or tend to create a monopoly in the sale of baked goods, or to injure, destroy, or prevent competition as alleged in the complaint, and that an order requiring respondent to cease and desist from continuing such practices should issue unless respondent prevails in its "meeting competition in good faith defense."

In the initial decision it was found that accordingly these transactions are cognizable under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

In conclusion, the hearing examiner found that the discriminations practiced by the respondent were in good faith to meet equally low net prices and advertising allowances of competitors. Therefore, it

was ordered that the complaint be dismissed. It was from that ruling that complaint counsel appealed to the Commission for a review of the matter. The Commission has now concluded and decided that the respondent has sustained its meeting competition defense, both as to the 2(a) charge (*Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231 (1951)) [5 S.&D. 221], and the 2(d) charge (see *J.A. Folger & Co.*, *Docket* 8094, 61 F.T.C. 1166 November 14, 1962).

Thus, this case becomes one of the rising number in which the Commission has ruled that the "good faith defense" provided for in subsection 2(b) of the Robinson-Patman Act so limits the Commission's application of the law as to preclude it from proceeding to the entry of an order to cease and desist.

It makes no difference that the discriminations involved proved to be destructive, as found by the hearing examiner, for the Supreme Court, in deciding the *Standard Oil* case stated:

> * * * We may * * * conclude that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor. (340 U.S. at 250)

Also, it makes no difference whether the facts of the record amply demonstrate that the destruction wrought by respondent's discrimination is that of smaller competitors who were *not* engaging in unlawful conduct. Indeed, as the Court held in the *Standard Oil* case, one of the necessary ingredients of the "good faith defense" upon which respondent here relied, is that the equally low price of the competitor being met must be a *lawful* price. The Court's opinion in that context uses the word "lawful" at least half a dozen times. The effect of this requirement that the price being met be a *lawful* price was demonstrated during the course of the oral argument before the Commission in this case. Relevant questions to and answers by counsel for respondent during the course of the oral argument are quoted as follows:

> COMMISSIONER MACINTYRE: The burden that you are contending the Commission must carry in this case, on this point, is no less than the burden that the Supreme Court in the 2(f) case, Automatic Canteen matter, imposed on the Commission there, with respect to its burden on cost justification and so on.
>
> MR. WARNKE: You mean with respect to showing that the buyer had reason to believe that the price he was receiving was unlawful?
>
> COMMISSIONER MACINTYRE: It was the Commission's burden to prove that much.
>
> MR. WARNKE: I would think that it would have to be, yes.

* * * * * * *

COMMISSIONER MACINTYRE: To follow up, need this lower price be one that is discounted? It need not be a discount that is being met?

MR. WARNKE: According to the statute, you are entitled to meet an equally low price.

COMMISSIONER MACINTYRE: A non-discriminatory price?

MR. WARNKE: It could be.

COMMISSIONER MACINTYRE: And it could be by a small competitor who is operating in a single-area market.

MR. WARNKE: It could be, sir, provided that your competitive response does not exceed in scope the competitive offer that you are meeting. (Transcript of Oral Argument, pages 44 and 56.)

It is said that it is necessary so to stretch the shelter of the 2(b) "good faith defense" and thus extend it in order to provide a seller with the right to use the weapon of discrimination in price in self defense against another seller engaged in non-discriminatory selling. Compare the right thus extended with the right of self defense long recognized in the law. The right of self defense long recognized is available only to counteract wrongful and unlawful conduct. It is not available to one who would damage his fellow man going about his affairs in a lawful manner. This inconsistency between recognized right of self defense and what has been provided in the way of self defense under the "good faith proviso" is left unexplained by the Court and the Commission.

Without attempting to explain or reconcile this mentioned inconsistency, it may be interesting and useful to look for the basis of the use of the term "lawful" price in the *Standard Oil* case. It seems clear that the Court in the *Standard Oil* case concluded that the pricing being met should not be *unlawful*. Also, it is clear that in reaching this conclusion the Court looked back to its earlier ruling in *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U.S. 746 (1945). Thus it would appear reasonable to inquire regarding the basis used by the Court in the *Staley* case for its ban there on meeting an *unlawful* price. Such inquiry makes it clear that the Court's ban in the *Staley* case on meeting an *unlawful* price was based on a showing that Staley had adopted an unlawful pricing system utilized by its competitors.[1] Indeed, the Court, in reaching that conclusion, approved the modified findings made by the Commission in the *Staley* case.[2] Among the modified findings of the Commission thus approved by the Court in the *Staley* case were those which not only made it clear that Staley merely had not adopted but also was in a measure

[1] See *Staley* case, *supra*, pp. 753–757.

[2] *Id.* pp. 756–757.

a party to the maintenance of the unlawful pricing system utilized by it and its competitors.[3]

The record thus indicates that in the *Staley* case the Court did not approve Staley's meeting of the *unlawful* price of its competitors because Staley was a party to the maintenance of the unlawful pricing system. The Court had little difficulty in seeing Staley's complicity in the unlawfulness of the conduct of Staley's competitors in that instance. Of course, the matter of relying upon one's own unlawful conduct as the basis for a self defense plea cannot be accepted for as we have seen it was not accepted by the Court in the *Staley* case. Staley's complicity with the Corn Derivitives Institute members in adopting and maintaining an unlawful pricing system and the Court's rejection of Staley's attempted injection of a self defense plea in meeting such prices under the "good faith proviso" are so different from the factual situation and the Court's ruling in the *Standard Oil* case that it does not appear possible to reconcile the two or explain one on the basis of the other. In the *Standard* case there is no hint that Standard was involved in setting the prices it claimed to be meeting. In the *Standard* case, as here, it appears that the prices being met were competitive, *lawful* prices of competitors of Standard. Nevertheless, the Court in the Standard Oil case approved Standard's use of the weapon of *unlawful* price discrimination to meet the equally low non-discriminatory *lawful* price of a competitor who was going about his business and doing no harm to anyone except to provide Standard with a measure of competition.

The Commission is leaving this case where the Supreme Court in the *Standard Oil* case ruled that it should leave it. The Commission

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[3] See modified findings, Paragraph 6(f) appearing *In the Matter of A.E. Staley Mfg. Co., et al.*, F.T.C. Docket No. 3803, 34 F.T.C. 1362, Sept. 13, 1943, following remand in *A.E. Staley Mfg. Co., et al* v. *Federal Trade Commission*, May 10, 1943, 135 F. 2d 453. Those modified findings, printed at 4 Statutes and Decisions (1944–1948) 795, 805, are quoted as follows:

"6(f) The Commission is of the opinion that in order to successfully avail of the defense provided by subsection (b) of Section 2 of the Act, a respondent must show affirmatively that his lower prices were made in good faith to meet an equally low price of a competitor and the Commission is not required to prove that such lower prices were made in bad faith. If it were necessary for the Commission to prove bad faith, appropriate steps would be taken for the consideration of the entire background of the Chicago-base-plus-freight pricing system used by respondents and their competitors, including the final decree issued April 6, 1932, by the United States District Court for the Northern District of Illinois in *United States* v. *Corn Derivatives Institute, et al.*, Equity No. 11634 (in which the respondents herein were defendants and consented to the entry of such decree). This decree enjoined the defendants from maintaining or continuing a conspiracy in restraint of trade and commerce in violation of the Sherman Act, which included the agreed use of Chicago as an arbitrary freight basing point from which to compute and charge freight in addition to the quoted price for the purpose of enabling defendants to maintain oppressive and uniform net delivered prices for various corn products, including corn syrup."

here is trying to go as far as the Supreme Court indicated that it may go in permitting destructive price discriminations under the Robinson-Patman Act.

Perhaps, in the years ahead, the Supreme Court again will be provided with an opportunity to review this sort of problem. If it should, I feel confident it will reconsider its use of the term "*lawful price*" in the *Standard Oil* case and modify its ruling so as to preclude justification of unlawful destructive price discriminations on the basis of self defense against lawful conduct. If that should be done, undoubtedly the Court will make it clear that the "good faith defense", while not applicable to such situations of unlawful pricing as were involved in the *Staley* case, is, nevertheless, available as a matter of self defense and in complete justification for the use of price discrimination to combat unlawful and wrongful pricing practices of competing sellers.

Final Order

This matter has been heard on complaint counsel's appeal from, and respondent's exceptions to, the initial decision of the hearing examiner. For the reasons stated in the accompanying opinion, the Commission has determined that the findings contained in the initial decision should be adopted by the Commission in part only, and that the complaint should be dismissed. Accordingly,

It is ordered, That the initial decision be, and it hereby is, adopted as the decision of the Commission to the extent consistent with the accompanying opinion.

It is further ordered, That the complaint against respondent be, and it hereby is, dismissed.

By the Commission, Commissioner Anderson concurring in the result.

In the Matter of

GREAT WESTERN DISTRIBUTING COMPANY ET AL.

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

Docket 8525. Complaint, Aug. 10, 1962—Decision, Dec. 31, 1963

Order requiring Lewiston, Idaho, distributors of punchboards and a variety of items of general merchandise to jobbers and retail dealers for resale, to cease selling punchboards or other devices, either with or without mer-

chandise, which are designed to be used in ultimate sale of the merchandise by means of a lottery scheme.

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 Great Western Distributing Company, a corporation, and Earl C. Jasper, individually and as an officer of said corporation, and Edward J. Carr, an individual, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Great Western Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its office and principal place of business located at 125 – 22nd Street North, Lewiston, Idaho.

Respondent Earl C. Jasper is an individual, and is president of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

Respondent Edward J. Carr is an individual, and is an agent engaged in making sales for the account of the corporate respondent and also for his own account. His business address is the same as that of the corporate respondent.

All of the aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter referred to.

PAR. 2. Respondents are now. and for some time last past, have been, engaged in the offering for sale, sale, and distribution of various devices including those commonly known as punchboards; and of a variety of items of general merchandise to jobbers, and to retail dealers, for resale and distribution to members of the general public.

PAR. 3. Respondents, in the course and conduct of their business, now cause, and for some time last past, have caused, said devices and merchandise, when sold, to be shipped and transported from their place of business in the State of Idaho to purchasers and distributors thereof located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said devices and merchandise

in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as hereinabove described, respondents sell and distribute, and have sold and distributed, to said jobbers and retail dealers, punchboards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in selling and distributing merchandise to members of the general public. Respondents sell and distribute, and have sold and distributed, various kinds of punchboards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise and vary only in detail. Many of respondents' said punchboards have blank spaces on the face thereof so that respondents or their customers may place instructions or legends thereon, or attach "flares" thereto, that explain the manner in which said devices are to be used, or may be used, in the sale and distribution of various specified articles of merchandise to the general public. Usually the winning numbers and the prizes to be awarded are set forth on said legends or flares. Said devices are used by said jobbers and retail dealers in distributing merchandise in the following manner:

The prices of the punches on said punchboards vary in accordance with the individual device. When a punch is made a printed slip is separated from the punchboard and a number is disclosed. The numbers are effectively concealed from the general public until a selection has been made, a punch completed. Certain designated numbers entitle the customer to a specified article of merchandise. Persons securing lucky or winning numbers receive such articles of merchandise without additional cost and therefore at prices which are lower than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a punch from said board. The various articles of merchandise used in combination with said punchboards are thus sold or distributed to members of the general public wholly by lot or chance.

The use to be made of such punchboard devices, and the manner in which they are used by respondents' customers, is in combination with such merchandise so as to enable said customers to sell or distribute said merchandise by means of lot or chance as herein alleged.

PAR. 5. Many persons, firms and corporations engaged in the sale and distribution of merchandise to the general public, pack and assemble, or have packed and assembled, various articles of merchan-

dise which they secure from respondents and from others, into assortments comprised of such articles together with punchboards purchased from respondents, or from customers of respondents. Many of said retail dealers have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said punchboards to members of the general public in the manner hereinabove described. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said punchboards, many members of the general public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof many of said retail dealers have been induced to deal directly with respondents, or with jobbers who sell and distribute said merchandise together with respondents' said devices.

PAR. 6. The sale and distributon of merchandise to the general public through the use of, or by means of, such devices in the manner above alleged involves a game of chance or the sale of a chance to procure articles of merchandise at prices lower than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The sale of said devices for use in the sale and distribution of said merchandise, and the sale of merchandise by and through the use thereof, are practices which are contrary to an established public policy of the Government of the United States and constitute unfair acts and practices in said commerce.

The sale and distribution of said punchboard devices by respondents, as hereinabove alleged, supplies to and places in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the sale and distribution of said merchandise. The respondents thus supply to, and place in the hands of, said persons, firms, and corporations, the means of, and instrumentalities for, engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. The aforesaid acts and practices of respondents, as hereinabove alleged, are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. John J. McNally for the Commission.
Mr. Paul C. Keeton, Lewiston, Idaho, for the respondents.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

JANUARY 31, 1963

On August 10, 1962, the Commission issued and subsequently served its complaint, charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act through the sale of "punchboards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in selling and distributing merchandise to members of the general public." The answer of the respondents denied the essential charges of the complaint.

An informal prehearing conference was held in Washington, D.C., on September 25, 1962, and hearings in support of and in opposition to the complaint were held in Lewiston, Idaho, on November 6 and 7, 1962. The transcript of testimony consists of 180 pages, and 27 Commission exhibits were received in evidence. One exhibit offered by respondents was rejected. Both sides rested at the conclusion of the hearings on November 7, 1962, and proposals were thereafter filed within the time allowed.

After having carefully considered the entire record in this proceeding and the proposals and contentions of the parties, the hearing examiner issues this initial decision. Findings proposed by the parties, which are not adopted herein either in the form proposed or in substance, are rejected as not being supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent Great Western Distributing Company, sometimes hereinafter referred to as Great Western, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Idaho, with its office and principal place of business located at 125 - 22nd Street North, Lewiston, Idaho.

2. Respondent Earl C. Jasper, sometimes hereinafter referred to as respondent Jasper, is an individual, and is president of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent. From 1950 until the incorporation of Great Western in 1960, he operated essentially the same business under the same name as a wholly owned unincorporated enterprise.

3. Respondent Edward J. Carr, sometimes hereinafter referred to as respondent Carr, is an individual, and is an agent engaged in making sales for the account of the corporate respondent. He is also engaged in buying and selling for his own account. His business address is the same as that of the corporate respondent.

4. Great Western is engaged in a general wholesale business. It issues a yearly catalog, travels three salesmen, and sells to approximately 2,000 accounts on a wholesale basis. Many of these accounts are sold to through its salesmen and many are sold to directly as house accounts. It sells a wide variety of merchandise, including hardware, sporting goods, watches, silverware, cameras, shavers, luggage, novelties, etc., including many nationally advertised brands. This merchandise is regularly shipped by it from its place of business in Lewiston, Idaho, to its customers located in the areas in which it operates, including the States of Washington, Oregon, Utah, Wyoming, Montana, and Idaho.

5. In the course and conduct of its business, Great Western sells and distributes, and has sold and distributed, to jobbers and retail dealers, various devices, including those commonly known as punchboards and flares, so prepared and arranged as to involve games of chance, gift enterprises, or lottery schemes when used in selling and distributing merchandise to members of the general public. It sells and distributes, and has sold and distributed, various kinds of punchboards and flares, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise, and vary only in detail.

6. Many of its said punchboards have blank spaces on the face thereof so that said respondent or its customers may place instructions or legends thereon or attach "flares" thereto that explain the manner in which said devices are to be used or may be used, in the sale and distribution of various specified articles of merchandise to the general public. Usually the winning numbers and the prizes to be awarded are set forth on said legends or flares. Said respondent also sells, or supplies without additional charge, flares for use in connection with punchboards supplied by it or by others, or for use in connection with other devices, to implement or facilitate the sale or distribution of merchandise by lot or chance.

7. As the punchboards and flares are used by said jobbers and retail dealers in distributing merchandise, the prices of the punches vary in accordance with the individual device. When a punch is made, a printed slip is separated from the punchboard and a number is disclosed. The numbers are effectively concealed until a selection of the

slip to be punched has been made and the punch completed. Certain numbers entitle the customer to an article of merchandise designated on the punchboard or on the flare. Persons securing lucky or winning numbers receive such articles of merchandise without additional cost and at prices which are substantially lower than the normal retail price of said articles of merchandise. Persons who do not secure such lucky or winning numbers receive nothing for their money other than the privilege of making a punch from said board. The various articles of merchandise used in combination with said punchboards or flares are thus sold or distributed to members of the general public wholly by lot or chance.

8. The number of punches on punchboards sold by Great Western may vary widely, and large punchboards may be used in combination with relatively small boards. In such combination, the punch is made in the first instance on the small or "counter board," and a person receiving a winning number on the counter board thereby wins a punch on the larger or "master board" for a chance to win a relatively valuable item of merchandise.

9. The merchandise assortments distributed by said punchboards may also vary widely, both in the number of items to be distributed and in the value of each item. These assortments of merchandise are arranged or made up in advance by Great Western, or they may be made up in particular combinations requested by specific customers. In either event, they are sold as "deals" or as combinations of punchboards or flares and merchandise typically involving the essential features hereinabove described.

10. In some instances, Great Western sells punchboards to its customers who do not at that time buy merchandise "deals" or sufficient merchandise for distribution by the punchboards so purchased. It is clear, however, that it sells or supplies punchboards and flares, either separately or in combination with merchandise, for the purpose of stimulating its merchandise sales. Respondent Jasper testified that "The only reason we sell these flares is for the benefit we get out of the merchandise sales" (Tr. 166). He testified that it is competitively necessary for his company to supply punchboards and flares in order to sell merchandise for distribution by means of these devices, and in order to be competitive in selling merchandise unrelated to flares and punchboards (Tr. 166–7).

11. Respondent Carr operates as a salesman for and agent of Great Western in selling its merchandise in the State of Montana and, to a limited extent, in the eastern section of the State of Washington. As a salesman for Great Western, his sales in Montana amount to

about $40,000 per year, to approximately fifty accounts, most of which is shipped from Great Western's place of business in Lewiston, Idaho, to the Montana accounts.

12. Substantially all of respondent Carr's sales to the Montana accounts for Great Western consist of merchandise assortments or "deals" for sale or distribution in connection with punchboards. Most of those accounts have their own boards, and he sells relatively few boards to them; but in about 40% of his sales to those accounts, he supplies flares for attachment to punchboards, as hereinabove described, which flares define and explain the particular lottery plan under which the merchandise is distributed.

13. In addition to his employment as a salesman for Great Western, which is only for limited periods of time during the year, respondent Carr also buys and sells for his own account under the name "Ed Carr Sales." His sales in this operation are confined to the eastern part of the State of Washington. They consist almost entirely of punchboards and flares sold in combination with merchandise, as hereinabove described, and he makes an average of approximately fifteen such combination sales per month. He purchases his punchboards and 95% of his merchandise from Great Western.

14. The punchboards and merchandise obtained for his own account by respondent Carr from Great Western are sold to him on consignment and picked up by him in his automobile at the warehouse of Great Western in Lewiston, Idaho. He then travels a limited route in the eastern section of the State of Washington where he regularly calls upon about twenty-four customers. Upon his return to Lewiston, Idaho, after completing his sales route in Washington, he pays Great Western for the merchandise and boards which he has sold and returns the unsold portion to Great Western and receives credit for it. Most of the deliveries of punchboards and merchandise sold by him on his own account are made from his automobile and he makes the sales, but in about five or six instances per month shipments are made on his orders by Great Western from its warehouse in Lewiston, Idaho.

15. Great Western and respondent Jasper are well acquainted with the operations of respondent Carr, and actively participate in assisting and furthering them. For all practical purposes, the sales of respondent Carr, both for his own account and as a salesman for Great Western, constitute an extension of the business of Great Western, and are wholly consistent therewith. Accordingly, all of the respondents cooperate and act together in connection with sales made by respondent Carr for his own account and as a salesman for and agent of Great Western.

16. Great Western's total annual sales amount to approximately $500,000. Its sales of punchboards, punchboards in combination with merchandise, and merchandise in combination with flares, excluding its sales to respondent Carr, amount to approximately $40,000 per year; and its sales to respondent Carr for his own account amount to approximately $10,000 per year. Its sales of punchboards and flares separately or in combination with merchandise as hereinabove described are shipped from its place of business in Lewiston, Idaho, to customers located in the States of Washington, Oregon and Montana.

17. Shipments by Great Western upon the orders of respondent Carr of punchboards and merchandise from its warehouse in Lewiston, Idaho, to customers of respondent Carr in the State of Washington constitute interstate transactions. The consignment sales by Great Western to respondent Carr, and his sales and deliveries to customers in Washington, are also in the flow of interstate commerce, involving, as they do: the delivery of merchandise to respondent Carr in Lewiston, Idaho; its transportation by him into Washington, where part of it is sold and delivered to customers whom he regularly serves; return of the remainder to Great Western in Lewiston, Idaho; and payment to Great Western only for that part sold in Washington.

18. Respondents, accordingly, maintain, and have maintained, a substantial course of trade in punchboards and flares, separately or in combination with merchandise, as hereinabove described, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Great Western and respondent Jasper engage, and have engaged, in such commerce in connection with sales to purchasers located in the States of Washington, Oregon and Montana; and respondent Carr engages, and has engaged, in such commerce in connection with sales to purchasers located in the States of Washington and Montana. Great Western also sells and ships merchandise to customers located in the States of Utah, Wyoming and Idaho, but there is no evidence that it sells punchboards or flares, separately or in combination with merchandise, to customers located in those States, except certain sales formerly made in Utah, to which reference is made below.

19. Many persons, firms and corporations located in the States of Washington, Oregon and Montana, and engaged in the sale and distribution of merchandise to the general public as retail dealers, pack and assemble, or have packed and assembled, various articles of merchandise which they secure from respondents and from others, into assortments comprised of such articles, together with punchboards and flares purchased from respondents, or from customers of respondents. Many of said retail dealers have exposed the same to the pur-

chasing public and have sold or distributed said articles of merchandise by means of said punchboards and flares to members of the general public in the manner hereinabove described. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said punchboards and flares, many members of the general public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof, many of said retail dealers have been induced to deal directly with respondents, or with jobbers who sell and distribute said merchandise together with respondents' said devices.

20. Prior to the issuance of the complaint in this matter, Great Western also made substantial sales in the State of Idaho of merchandise "deals," which included flares and tickets for use in connection with games of skill. When the complaint in this matter was issued, the company discontinued sales of such merchandise deals in Idaho because of the possibility that they may constitute a violation of law.

21. In these deals, the assortment of merchandise sold by Great Western was usually mounted upon a display board, and was sold in combination with a flare and a supply of tickets. The flare listed the winning number for each item of merchandise, and the tickets, typically 2,000, were numbered consecutively. These deals were ordinarily purchased and used by operators of games of skill, such as bowling, shuffleboard, etc. Their customers participated in the game at the regular price, and those who made a sufficiently high score were entitled to draw from a box, glass jar, spindle, or other container, a ticket or coupon so folded or sealed as to conceal the number on the inside. If, when the ticket was opened, the number corresponded with a number on the flare identifying an item of merchandise on the display board, the holder of the ticket was entitled to receive that item without additional cost. The high score affording the right to draw a number was, therefore, determined by the customer's skill in the game, and thereafter his receiving or not receiving an item of merchandise was determined wholly by chance.

22. It seems clear that part of the consideration which induced the customer to pay for the privilege of playing the game of skill was the opportunity to obtain as a prize an item of merchandise by lot or chance if he made a sufficiently high score. It is thus apparent that these merchandise deals, including flares and numbered tickets, also constituted devices for distributing merchandise by lot or chance. There is, however, no evidence of sales by respondents of such merchandise deals to customers located in States other than Idaho; and

accordingly there is no evidence of sales of said devices by respondents in interstate commerce.

CONCLUSIONS

1. The sale and distribution of merchandise to the general public through the use of, or by means of, punchboards and flares in the manner above described involves a game of chance or the sale of a chance to procure articles of merchandise at prices lower than the normal retail prices thereof, and teaches and encourages gambling among members of the public, all to the injury of the public. The sale of said punchboards and flares for use in the sale and distribution of said merchandise, and the sale of merchandise by and through the use thereof, are practices which are contrary to an established public policy of the Government of the United States and constitute unfair acts and practices in said commerce.

2. The sale and distribution of said punchboards and flares by respondents, as hereinabove described, supplies to and places in the hands of others the means of conducting lotteries, games of chance, or gift enterprises in the sale and distribution of said merchandise. The respondents thus supply to, and place in the hands of, said persons, firms, and corporations, the means of, and instrumentalities for, engaging in unfair methods of competition and unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

3. Respondents' defense is predicated upon the contention that their operations in the State of Washington are sanctioned by the laws of that State and by the regulations of the communities in which they have operated. Respondents contend that in such circumstances any action by the Federal Trade Commission to bar the practice here challenged is not justified. They argue that any such action interferes with local and intrastate authority, and that:

The manufacturer of punchboards is not chargeable with unfair trade practices where their use in given areas is valid in law, since all purveyors in the area on compliance with local laws, may use such boards. The Commission may not bar the transportation of punchboards merely because such action would be beneficial to the public.

4. This defense is not specifically made with respect to respondents' operations in Montana and Oregon, and the record is silent with respect to the legality of such operations in those States. Presumably, however, respondents urge the same principle as a bar to the Commission's jurisdiction over any of their interstate sales of lottery devices which are designed to be used in the sale of merchandise. In any

event, the lack of affirmative evidence on this point with respect to respondents' sales in Montana and Oregon is not of consequence in view of the disposition which must necessarily be made of respondents' contention.

5. The only case cited by respondents involving a proceeding by the Federal Trade Commission is *J. C. Martin Corporation, et al* v. *FTC*, 7 Cir., 242 F. 2d 530 (1957). That authority, however, affords no support for the contention upon which respondents defend their position. The Court held in that case that the device there involved did not constitute a lottery scheme because it did not incorporate the element of prize—the opportunity to get something for nothing. There can be no question that the devices here involved incorporate the element of prize and constitute lottery schemes, and the respondents do not contend otherwise.

6. In the *Martin* case, the Court did not consider the question of the Federal Trade Commission's jurisdiction of a lottery scheme operated in accordance with local regulations. In 1960, however, in the same Circuit, the Court considered and decided that question adversely to the present contention of these respondents. In *Peerless Products, Inc., et al* v. *FTC*, 7 Cir., 284 F. 2d 825 (1960), *cert. denied* 365 U.S. 843, the Court stated, in pertinent part:

> Petitioners, in addition, contend that local policy sanctioning the use of merchandise boards, evidenced here by certain municipal ordinances in the State of Washington, limits the power of the Commission over unfair or deceptive acts of competition in interstate commerce. We disagree. Unless Congress specifically withdraws authority in particular areas, the Commission, upon its general grant of authority under 15 U.S.C.A. §45(a)(6), can restrain unfair business practices in interstate commerce even if the activities or industries have been the subject of legislation by a state or even if the intrastate conduct is authorized by state law. *Royal Oil Corporation* v. *F.T.C.*, 4 Cir., 262 F.2d 741, 743 [6 S. & D. 477] (1959). *Lichtenstein* v. *Federal Trade Commission*, 9 Cir., 194 F.2d 607, 609–10 [5 S. & D. 677] (1952), cert. denied, 344 U.S. 819. In this case there is no congressional limitation on the Commission's use of its full power to order petitioners to cease shipping in commerce punchboards designed for distribution of merchandise when such shipment is so clearly a violation of federal policy as indicated in *Surf Sales, supra.* A local ordinance cannot here circumscribe the plenary power granted to the Commission to police unfair and deceptive practices in interstate commerce.

Counsel have cited, and the hearing examiner has found, no contrary authority.

7. Accordingly, it is concluded that the aforesaid acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public, and constitute unfair acts and practices in commerce in violation of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents Great Western Distributing Company, a corporation, and its officers, and Earl C. Jasper, individually and as an officer of said corporation, and Edward J. Carr, individually, and respondents' agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, punchboards or other devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

OPINION OF THE COMMISSION

DECEMBER 31, 1963

By MACINTYRE, *Commissioner:*

The respondents herein are charged with violation of Section 5 of the Federal Trade Commission Act through the sale of devices so arranged as to involve games of chance, gift enterprises or lottery schemes in the sale and distribution of merchandise to the general public. The hearing examiner, at the conclusion of the hearings, issued his initial decision and order sustaining the allegations of the complaint and the matter is now before the Commission on respondents' appeal from his decision.

Respondents in their exceptions launched a rather broad gauge attack on the initial decision as contrary to both the facts and the law. On oral argument, however, it quickly became apparent that respondents in their appeal do not seriously seek a reversal of the examiner's findings that their distribution of punchboards and related activities violated the law. Rather, they are concerned with the scope and possible construction of the order entered below. Our opinion and order on appeal will be confined to that issue.

At the outset, a brief description of respondents and their activities challenged in this proceeding will be helpful in focusing on the problem at hand. The corporate respondent, Great Western Distributing Company, of Lewiston, Idaho, is engaged in a general wholesale business selling a wide variety of merchandise, including hardware, sporting goods, watches, silverware, cameras, luggage, etc. to approximately 2,000 accounts in the States of Washington, Oregon,

Utah, Wyoming, Montana and Idaho. In addition to its general wholesale business, Great Western has sold various devices, including punchboards and flares [1] designed to sell merchandise to the general public through games of chance, gift enterprises, or lottery schemes. Respondents also furnish assortments of merchandise, which throughout the course of this proceeding have been described as "deals", to customers utilizing punchboards or other gambling devices in the distribution of such products. A "deal", according to Great Western's attorney, is a large board upon which respondents mount a wide variety of merchandise for display purposes, and we adopt that definition for the purposes of this opinion.[2]

Great Western may sell punchboards and/or flares to customers in conjunction with or without merchandise assortments mounted as "deals". Conversely, respondents may sell "deals" to customers not purchasing punchboards or flares from Great Western. In some instances the record shows that purchasers secure punchboards from sources other than respondents as a device to facilitate resale of respondents' merchandise; in other cases, respondents assert, their customers merely use the deals purchased from Great Western as door prizes or for other purposes not involving the sale or distribution of merchandise within the scope of the Commission's jurisdiction under Section 5 of the Federal Trade Commission Act.[3]

The examiner entered the order standard in these cases requiring respondents to refrain from:

> Selling or distributing in commerce, * * * punchboards or other devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

Respondents object that the prohibition against selling "other devices" which are "designed or intended to be used" in the sale or distribution of merchandise by games of chance is so broad that they would be inhibited from selling merchandise assortments or "deals" for legal purposes, or at least for uses over which the Commission has no jurisdiction merely because the merchandise in question might be distributed or sold in the prohibited manner. They contend their activities will be unduly hampered by uncertainty as to the manner in which the provisions therein will be construed. Respondents have

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[1] Flares are apparently legends on cardboard describing prizes and winning numbers which may be attached to punchboards or other gambling devices of a similar nature.

[2] Pages 4 and 5, Oral Argument.

[3] The Commission does not have jurisdiction over lotteries, as such, and confines its regulatory activities to lotteries or other gambling devices used in connection with the merchandising of goods. *Cf. Lichtenstein, et al* v. *Federal Trade Commission,* 194 F. 2d 607, 611 (9th Cir. 1952), *cert. denied* 344 U.S. 819 (1952).

expressed the fear that they might innocently sell a merchandise deal in the expectation that it would be used as a door prize but nevertheless be held in violation of the order should the customer subsequently sell the merchandise assortment in conjunction with a punchboard.

Respondents apparently are not concerned with the impact of the order insofar as its provisions run against the sale or distribution of punchboards or flares.[4] They request, however, modification of the order to exempt those of their transactions involving solely deals. Failing such exemption, they apparently desire advice as to the manner in which the prohibition against the sale of "other devices" with or without merchandise "designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance * * *" will be applied to their sales of merchandise assortments mounted as deals.

There is at this time no necessity for modifying the terms of the order. However, we are persuaded that advice as to the manner in which its terms will be construed in connection with Great Western's sales of merchandise deals will facilitate enforcement of the order by the Commission's staff and compliance by respondents. Our holding herein will be limited to that issue.

Mounting merchandise on a board for display purposes is a neutral device which may be useful in many sales situations not involving the sale or distribution of the goods so mounted by a game of chance or lottery device. In those instances, where the deals on their face indicate no other purpose than display, these devices will not, without more, be construed as coming within the terms of the order's prohibition. Where a deal has obvious utility for legal uses, we will not hold such a device as inherently designed or intended for the prohibited use, although it could be employed for illegal purposes. In this connection, we note that deals as such are not basic to the illegal practices which the Commission has challenged in this proceeding.

On the other hand, if the design of the board indicates by the legend affixed thereto, or in some other manner, that it has been arranged to facilitate the merchandising of products by way of gambling schemes or lottery devices, or if a deal is sold in conjunction with punchboards or other devices with inherent appeal to the public's gambling instinct, then the Commission may well determine, depending on other relevant facts, that the sale of deals under such circumstances is within the scope of the order's prohibition.

The Commission cannot, at this time, anticipate all the problems with which respondents may be faced in complying with the terms

[4] Pages 19, 25 Oral Argument.

of the order. Respondents, however, are always free to consult the Commission's staff should they require advice as to whether a proposed course of action will constitute compliance with the order, and if they so desire they may file a more formal request pursuant to Section 3.26 of the Commission's Rules of Practices, directing such question to the Commission itself.

The initial decision as supplemented to conform to the views expressed herein will be adopted as the decision of the Commission.

By ANDERSON, *Commissioner, Concurring:*

I concur in the result reached by the majority, with the understanding that the order to cease and desist entered herein will have been violated if the merchandise deals offered by respondents are designed for gambling or are normally used in connection with the sale of merchandise by lottery or game of chance.

FINAL ORDER

DECEMBER 31, 1963

This matter has been heard by the Commission on respondents' exceptions to the initial decision of the hearing examiner and complaint counsel's answer in opposition thereto. The Commission has determined that respondents' exceptions should be denied and that the initial decision, as supplemented to conform to the views expressed in the accompanying opinion should be adopted as the decision of the Commission. Accordingly:

It is ordered, That the respondents Great Western Distributing Company, a corporation, and its officers, and Earl C. Jasper, individually and as an officer of said corporation, and Edward J. Carr, individually, and respondents' agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

> Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, punchboards or other devices, either with merchandise or separately, which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the initial decision as supplemented to conform to the views expressed in the accompanying opinion be adopted as the decision of the Commission.

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

IN THE MATTER OF

GERT SALOMON TRADING AS KNITTING MACHINES UNLIMITED ETC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-672. Complaint, Dec. 31, 1963—Decision, Dec. 31, 1963

Consent order requiring a Los Angeles retailer of yarns, to cease violating the Wool Products Labeling Act by such practices as labeling as containing "100% Mohair", yarns which contained substantially less than 100% Mohair and contained a substantial amount of non-woolen fibers, failing to disclose on labels the percentages of woolen and other fibers in yarns, describing fiber content on labels as "vinylic (Rhovyl)" instead of using the common generic name, and failing to comply with other labeling requirements; and to cease violating the Federal Trade Commission Act by advertising as "100% Italian Mohair", yarn which contained fibers other than Mohair.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gert Salomon, also known as George Salomon, an individual trading as Knitting Machines Unlimited trading as Yarns Unlimited, hereinafter referred to as respondent, has violated the provisions of the said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gert Salomon, also known as George Salomon, is an individual doing business as Knitting Machines Unlimited trading as Yarns Unlimited. Said individual respondent formulates, directs and controls the acts, policies and practices of said proprietorships including the acts and practices hereinafter referred to.

Respondent is an importer and retailer of wool products with his office and principal place of business located at 915 Wilshire Boulevard, Santa Monica, California, with a branch outlet at 6130 Wilshire Boulevard, Los Angeles, California.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondent has introduced into commerce, sold, transported, distributed, delivered for shipment and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondent within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain yarns stamped, tagged or labeled as containing 100% Mohair, whereas in truth and in fact, said yarns contained substantially less Mohair than represented and in addition contained a substantial amount of non-woolen fibers.

PAR. 4. Certain of said wool products were further misbranded by respondent in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain yarns with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) woolen fibers; (2) each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; and (3) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 4(a)(2) of the Wood Products Labeling Act of 1939 and the Rules and Regulations described a portion of the fiber content as "vinylic (Rhovyl)" instead of using the common generic name of said fiber, in violation of Rule 8 of the aforesaid Rules and Regulations.

(b) The percentages required to be given of each name specialty fiber were not set forth on labels in violation of Rule 18 of said Rules and Regulations.

PAR. 6. The acts and practices of the respondent as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 7. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale and sale of yarn to the general public.

PAR. 8. In the course and conduct of his business, respondent now causes and for some time last past, has caused his said products, when sold, to be shipped from his place of business in the State of California to purchasers located in various other states of the United States, and maintains, and at all times mentioned herein, has maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. In the course and conduct of his business respondent has engaged in disseminating and causing to be disseminated in newspapers of interstate circulation, advertising designed and intended to induce the sale of said yarn.

PAR. 10. In the course and conduct of his business and for the purpose of inducing the sale of yarn offered for sale and sold by him, respondent has made and is now making statements and representations directly or by implication with respect to the fiber content of said yarn. Said statements and representations have been made in newspaper advertisements of interstate circulation. Among and typical of the statements and representations contained in the aforesaid newspaper advertisements, but not all inclusive thereof, are the following:

Blue label—100% Finest Italian Mohair 100% Italian Mohair.

PAR. 11. By and through the use of the aforesaid statements and representations of respondent, respondent represented directly or by implication, that the aforesaid yarn was composed of 100% Mohair, whereas in truth and in fact the yarn contained fibers other than Mohair fibers.

Therefore, the statements and representations as set forth in Paragraph Ten, were and are false, misleading and deceptive.

PAR. 12. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has

had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous mistaken belief.

PAR. 13. The aforesaid acts and practices of respondent as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce, and unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Gert Salomon, also known as George Salomon, is an individual trading under his own name, as Knitting Machines Unlimited and as Yarns Unlimited with his office and principal place of business located at 915 Wilshire Boulevard, in the City of Santa Monica, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Gert Salomon, also known as George Salomon, an individual trading as Knitting Machines Unlimited trading as Yarns Unlimited and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment in commerce, of wool yarn or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Failing to set forth the common generic name of fibers in the required information on labels, tags or other means of identification attached to wool products.

4. Failing to set forth the percentages of specialty fibers in required information on stamps, tags, labels or other means of identification attached to wool products when an election is made to use the generic name of the specialty fiber instead of the term wool.

It is further ordered, That respondent Gert Salomon, also known as George Salomon, an individual trading as Knitting Machines Unlimited trading as Yarns Unlimited and respondent's representatives, agents and employees directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of yarn or any other textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in yarn or any other textile products in advertisements applicable thereto or in any other manner.

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