the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.

4. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

5. Falsely or deceptively represents in any manner that prices of respondents' fur products are reduced.

D. Making claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims and representations are based.

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

IN THE MATTER OF

WATCHBANDS, INC., ET AL.

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

*Docket 8596. Complaint, Sept. 20, 1963—Decision, Feb. 5, 1964**

Order requiring North Attleboro, Mass., distributors of metal expansion watchbands to manufacturers and distributors of watches and to retailers for resale, to cease selling watchbands manufactured in whole or in part in Hong Kong or Japan with no disclosure of their foreign origin or with such statements imprinted on the packages as "Made in USA"; and to cease preticketing their watchbands with fictitious prices.

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 Watchbands, Inc., a corporation, and Charles H. Dolansky and John I. Mushey, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect

* Order of May 21, 1964, denied respondents' motion to vacate default and reinstate case for trial on the merits.

thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Watchbands, Inc., is a corporation organized, existing and doing business under and by virtue of the State of Massachusetts, with its office and principal place of business located at 380 East Washington Street in the city of North Attleboro, State of Massachusetts.

Respondents Charles H. Dolansky and John I. Mushey are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of metal expansion watchbands to manufacturers and distributors of watches as well as to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped from their place of business in the State of Massachusetts to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times herein mentioned have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Said watchbands consist in whole or in substantial part of components which were manufactured in, and imported from Hong Kong or Japan. When offered for sale or sold by respondents, said watchbands do not bear disclosure showing that they are substantially of foreign origin. In some instances respondents also affirmatively represent, directly or by implication on the packages of said watchbands that said watchbands are made in the United States of America by imprinting thereon certain representations, of which the following is typical:

Made in USA.

Such affirmative representations are false, misleading and deceptive, as substantial portions of said products are manufactured in and imported from Hong Kong or Japan.

PAR. 5. In the absence of an adequate disclosure that a product, including metal expansion watchbands, is of foreign origin, the public believes and understands that it is of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents' failure to clearly and conspicuously disclose the country of origin of said articles of merchandise, or substantial components thereof, is, therefore, to the prejudice of the purchasing public.

PAR. 6. Respondents, for the purpose of inducing the purchase of their watchbands, have engaged in the practice of using fictitious prices by attaching or causing to be attached to their watchbands, tickets or tags upon which certain amounts are printed, thereby representing, directly or by implication, that said amounts are the usual and regular retail prices of said watchbands. In truth and in fact, said amounts are not the usual and regular retail prices of said watchbands, but are in excess of prices at which said watchbands generally sell at retail in some of the trade areas where the representations are made.

PAR. 7. By the aforesaid practices, respondents place in the hands of watch manufacturers, distributors and retailers, means and instrumentalities by and through which they may mislead the public as to the usual and regular price of said watchbands and the place of origin of said watchbands or the substantial components thereof.

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of metal expansion watchbands of the same general kind and nature as that sold by the respondents.

PAR. 9. The use by respondents of the false, misleading and deceptive representations and practices hereinabove set forth, and the failure to disclose the foreign origin of their watchbands or of substantial components of their watchbands, have had, and now have, the capacity and tendency to mislead and deceive purchasers or members of the buying public in the manner aforesaid, and thereby to induce them to purchase respondents' watchbands.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Herbert L. Blume supporting the complaint.
No appearance filed for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

NOVEMBER 26, 1963

The complaint herein, charging respondents with violation of Section 5 of the Federal Trade Commission Act by the making of false and misleading representations, and the failure to disclose the foreign origin of their watchbands or of substantial components thereof, for the purpose of inducing the sale of merchandise, was issued September 20, 1963, and was duly served upon respondents by registered mail on October 10, 1963. The respondents have not filed their answers to this complaint within the time required and are now in default. Pursuant to the provisions of Rule 3.5(c) of the Commission's Rules of Practice for Adjudicative Proceedings, and on complaint counsel's motion, the hearing examiner hereby declares the respondents in default and now finds the facts to be as alleged in the complaint, and issues his initial decision containing such findings, appropriate conclusions drawn therefrom and order to cease and desist, as follows:

FINDINGS OF FACT

1. Respondent Watchbands, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 380 East Washington Street in the city of North Attleboro, State of Massachusetts.

Respondents Charles H. Dolansky and John I. Mushey are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of metal expansion watchbands to manufacturers and distributors of watches as well as to retailers for resale to the public.

3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said product, when sold, to be shipped from their place of business in the State of Massachusetts to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times herein mentioned have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. Said watchbands consist in whole or in substantial part of components which were manufactured in, and imported from Hong Kong or Japan. When offered for sale or sold by respondents, said watchbands do not bear disclosure showing that they are substantially of foreign origin. In some instances respondents also affirmatively represent, directly or by implication on the packages of said watchbands that said watchbands are made in the United States of America by imprinting thereon certain representations, of which the following is typical:

Made in USA.

Such affirmative representations are false, misleading and deceptive, as substantial portion of said products are manufactured in and imported from Hong Kong or Japan.

5. In the absence of an adequate disclosure that a product, including metal expansion watchbands, is of foreign origin, the public believes and understands that it is of domestic origin, a fact of which the Commission takes official notice.

As to the aforesaid articles of merchandise, a substantial portion of the purchasing public has a preference for said articles which are of domestic origin, of which fact the Commission also takes official notice. Respondents' failure to clearly and conspicuously disclose the country of origin of said articles of merchandise, or substantial components thereof, is, therefore, to the prejudice of the purchasing public.

* * * * * * *

6. Respondents, for the purpose of inducing the purchase of their watchbands, have engaged in the practice of using fictitious prices by attaching or causing to be attached to their watchbands, tickets or tags upon which certain amounts are printed, thereby representing, directly or by implication, that said amounts are the usual and regular retail prices of said watchbands. In truth and in fact, said amounts are not the usual and regular retail prices of said watchbands, but are in excess of prices at which said watchbands generally sell at retail in some of the trade areas where the representations are made.

7. By the aforesaid practices, respondents place in the hands of watch manufacturers, distributors and retailers, means and instrumentalities by and through which they may mislead the public as to the usual and regular price of said watchbands and the place of origin of said watchbands or the substantial components thereof.

8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of metal expansion watchbands of the same general kind and nature as that sold by the respondents.

* * * * * * *

9. The use by respondents of the false, misleading and deceptive representations and practices hereinabove set forth, and the failure to disclose the foreign origin of their watchbands or of substantial components of their watchbands, have had, and now have, the capacity and tendency to mislead and deceive purchasers or members of the buying public in the manner aforesaid, and thereby to induce them to purchase respondents' watchbands.

CONCLUSION

The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Watchbands, Inc., a corporation, and its officers, and Charles H. Dolansky and John I. Mushey, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of watchbands or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering for sale, selling or distributing any such products which are substantially, or which contain a substantial part or parts, of foreign origin or fabrication without affirmatively disclosing the country or place of foreign origin or fabrication thereof on the products themselves, by marking or stamping on an exposed surface, or on a label or tag affixed thereto, of such degree of permanency as to remain thereon until consummation of consumer sale of the products, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the products.

2. Offering for sale, selling, or distributing any such product packaged, or mounted in a container, or on a display card, without disclosing the country or place of foreign origin of the prod-

uct, or substantial part or parts thereof, on the front or face of such packaging, container, or display card, so positioned as to clearly have application to the product so packaged or mounted, and of such degree of permanency as to remain thereon until consummation of consumer sale of the product, and of such conspicuousness as to be likely observed and read by purchasers and prospective purchasers making casual inspection of the product as so packaged or mounted.

3. Representing, directly or indirectly, in any manner or by any means, that their products are of domestic origin when said products or substantial portions thereof are of foreign origin.

4. The act or practice of preticketing merchandise at an indicated retail price when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.

5. Placing in the hands of jobbers, retailers, dealers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above.

Decision of the Commission and Order to File Report of Compliance

Pursuant to Section 3.21 of the Commission's Rules of Practice, effective August 1, 1963, the initial decision of the hearing examiner shall on the 5th day of February, 1964, become the decision of the Commission; and accordingly:

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

In the Matter of

RETAILERS MARKETING GUILD, INC., ET AL.

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

Docket C-704. Complaint, Feb. 5, 1964—Decision, Feb. 5, 1964

Consent order requiring three associated Chicago distributors of various articles of merchandise to cease such unfair practices as supplying credit furniture and jewelry stores with "traffic builders"—consisting of advertising brochures and proofs thereof, layouts and other advertising materials—to encourage customers to open and use credit accounts, falsely representing excessive amounts to be the usual retail prices and their "Sale" prices to be reductions therefrom, and making various other misrepresentations concerning the comparative merits of their products, "free" gifts, and guarantees.

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 Retailers Marketing Guild, Inc., Retailers Advertising Service, Inc., and Mayfair Purchasing, Incorporated, each a corporation, and Maurice D. Cramer, Alvin Levy, and George Ross, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of 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. Respondents Retailers Marketing Guild, Inc., Retailers Advertising Service, Inc., and Mayfair Purchasing, Incorporated, are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, with their principal offices and places of business located at the Merchandise Mart, Merchandise Mart Plaza, in the city of Chicago, State of Illinois.

Respondents Maurice D. Cramer, Alvin Levy, and George Ross are officers and directors of each of the respondent corporations. They formulate, direct and control the policies, acts, and practices of the said corporate respondents, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

Par. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of various articles of merchandise, such as furniture, home furnishings, electrical and other household appliances, jewelry, watches, clocks, cookware, dinnerware, tableware, and luggage to retailers and dealers for resale to the public.

Respondents are also now, and for some time last past have been, engaged in the composing, or causing to be composed, of advertising brochures, proofs of the foregoing, layouts, other advertising materials, and the offering for sale, sale and distribution of said advertising materials to the said retailers and dealers for their use in promoting the sale of the aforesaid merchandise in their respective trade areas. The said advertising materials offered for sale, sold and distributed by respondents are published and circulated by the said retail dealers, with the retail dealers' name and address imprinted thereon, and are primarily designed and utilized as "traffic builders" to encourage customers to visit credit furniture and jewelry stores and to open and use credit accounts.

PAR. 3. In the course and conduct of their business, the respondents now cause, and for some time last past have caused, their said merchandise and advertising materials, when sold, to be shipped from their place of business in the State of Illinois and from other sources of supply in various States of the United States to purchasers thereof located in various other States of the United States other than the State in which the shipment originated, and maintain, and at all times mentioned herein, have maintained, a substantial course of trade in said merchandise and advertising materials in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, in the course and conduct of their business, and for the purpose of inducing the sale of their merchandise, have engaged in the practice of supplying their customers, who are retail dealers with advertising material, proofs, layouts, and other printed matter, containing various statements and representations.

Typical but not all inclusive, of the said statements and representations, are the following:

Save ⅓
Enjoy deluxe sleeping comfort!
Englander * * *
Air conditioned mattress * * *
Regular $59.95
Now only $39.95 * * *

* * * * * * *

Never before at this low price * * * $19.95!
Decorated Melmac service for 8 * * *
Unbreakable heavy quality * * *
Sale price $19.95
Regular $29.95 * * *

* * * * * * *

⅓ Off during this sale
These Imperial Watches * * *
$24.88 * * * Yes!

* * * * * * *

* * * Hi-poster Tester bed with Canopy top * * *
Specially priced!
$69.00

* * * * * * *

Special $179
6-pc. walnut dining room
By famous Stanley * * *
At this special group-saving low price!

* * * * * * *

Kroehler nylon and foam
3-pc. sectional or deluxe 2-pc. suite * * *
Your choice $199
Famous Kroehler now at special sale prices

* * * * * * *

* * * Decorator cabinet * * *
Sale priced $14.88 * * *

* * * * * * *

New all steel cabinets * * *
Never before at this low price !!!
* * * $29.95 * * *

* * * * * * *

Sale! Beveled edge Venetian mirrors
Unconditionally guaranteed for 10 years * * * 30″ x 20″ $7.99 * * *

* * * * * * *

* * *Mirror automatic electric percolator
* * *Only during this sale so low priced * * *
$8.88 * * *Fully guaranteed * * *

* * * * * * *

Complete 50-pc. dinnerware * * * $19.88 * * *
Made to sell for $39.88!
Save $15.00! Free bonus!
This exquisite coffee-tea pot included at no extra cost! * * *

* * * * * * *

* * * Tree and * * * pole lamps * * *
Not $30 * * * Not $25 * * *
But only $19.95

* * * * * * *

Movie outfit * * *
Never before at this low price * * *
$119.95 * * * Compare with ensemble selling at $179.95 * * *
2 years free film developing * * *
7 added free bonus gifts * * *
Including instruction books and guarantee * * *

* * * * * * *

(Illustration of tables, commode, and chest)
Luxurious imported marble—
Your choice * * * Any piece
* * * $39.88 * * * Compare at $79.50

* * * * * * *

* * * Two for one
Super bonus offer! * * *
50-pc. stainless tableware * * *

Melmac 47-pc. * * *
Dinner service * * *
All 97 pieces sale priced
$29.88 * * *
Lifetime guarantee

* * * * * * *

2 years free film developing * * *
7 added free bonus gifts * * *
Including instruction books and guarantee * * *

* * * * * * *

$8.88 * * * Fully guaranteed * * *

* * * * * * *

All 97 pieces sale priced
$29.88 * * *
Lifetime guarantee

* * * * * * *

25 jewels * * *
What a buy! * * *
25 jewel genuine Swiss movement * * *
Imperial * * * with reservoil

* * * * * * *

A * * * waterproof, dustproof, shockproof and * * * guarantee!
Imperial Watch and our store
Guarantee these watches against
Manufacturers's defects * * *

* * * * * * *

* * * Bulova Surf King * * *
Your choice $24.75 * * *
Waterproof*, unbreakable mainspring, shock resistant * * *

*When case, crystal and crown are intact.

* * * * * * *

Water resistant watches

* * * * * * *

PAR. 5. Through the use of the aforesaid practices, respondents have represented, and have placed in the hands of retailers the means and instrumentalities of representing, directly or by implication, that:

1. The higher stated amounts in connection with the representations "Save 1/3 * * * Regular $59.95, Now Only $39.95 for Englander mattresses" and "Never Before at this Low Price * * * $19.95 * * * Sale Price $19.95 Regular $29.95" for Melmac Service, were the prices at which the said articles had been usually and customarily sold at retail by said retailers in the recent regular course of their business and in connection with the representation "1/3 Off During This Sale * * * $24.88" for Imperial watches, the usual and regular

price of said watches of said retailers in the recent regular course of their business had been reduced by one-third, and that the differences between the higher and lower prices or said "1/3 off" represented savings to purchasers from the respective retailers' usual and customary prices at retail for said articles.

2. The price amounts set forth in said advertising material in connection with the representation "Specially priced $69.00" for Tester Beds, "Special $179 for Walnut Dining Room Suites", "Your Choice $199 * * * Now at Special Sales Price" for Kroehler Sectionals, "Sale Priced * * * $14.88" for Decorater Cabinets, "Never Before at This Low Price! * * * $29.95" for Steel cabinets, "Sale * * * $7.99" for Venetian Mirrors and "Only During this Sale So Low Priced * * * $8.88" for percolators, constituted actual and significant reductions from respondents' retailers usual and customary selling prices at retail of the said merchandise in the recent regular course of their business and that said reductions represented savings to the purchasers of said merchandise.

3. The higher stated amounts set forth in said advertising material in connection with the representation "$19.88 * * * Made to sell for $39.88 * * * " for Dinnerware and "Not $30 * * * Not $25 * * * But Only $19.95" for tree and pole lamps represented the general prevailing prices in the trade areas where the representations were made and the differences between the higher and lower prices represented savings to purchasers from said trade area prices.

4. The marble top tables, chest and commode advertised at $39.88 are comparable in value to products of a like grade and quality in all material respects usually and regularly sold at a retail price of $79.50 in the trade area or areas where the representation is made and that purchasers of said merchandise from respondents' retail dealers would realize a saving of the difference between the represented $79.50 price and said retail dealers' price of $39.88.

The movie outfit advertised at a price of $119.95 is comparable in value to ensembles of like grade and quality in all material respects usually and regularly sold at a retail price of $179.95 in the trade area where the representation is made and that purchasers of said merchandise from respondents' retail dealers would realize a saving of the difference between the represented $179.95 price and said dealer's price of $119.95.

5. In connection with the sale of the movie outfit, that seven (7) added bonus gifts will be given "free", that is, as a gift or gratuity without cost to the purchaser.

6. The 47 piece set of Melmac dishes and the 50 piece set of stainless steel tableware are being offered for sale for the usual price of one of the sets of said merchandise.

7. Certain merchandise is "fully guaranteed", that is, without limitation, condition or qualification for an unlimited period of time. Other merchandise is offered for sale with a "lifetime guarantee" "unconditionally guaranteed for 10 years", that is, the merchandise so described was guaranteed for a lifetime or a definite period of time without any limitation, condition or qualification, other than that indicated in the advertisement.

8. Certain watches are waterproof, water resistant, shockproof, or shock resistant in every respect, without qualification or limitation.

9. Imperial watches advertised at $24.88 are equipped with a device called "Reservoil" and contain 25 jewels, each of which jewel is functional and protects against wear and friction by providing a mechanical contact with a moving part at a point of wear.

PAR. 6. In truth and in fact:

1. The higher amounts set out in connection with the word "Regular", were in excess of the prices at which the respondents' retail dealers customarily and usually sold the articles of advertised merchandise in the recent regular course of business and the differences between the said higher amounts and the lesser prices at which the articles were offered for sale do not represent savings over the prices at which said retailers had usually and customarily sold said articles of merchandise.

2. The price amounts at which said merchandise is being offered for sale in connection with the words "Special", "Now at Special Sales Price", "Never Before at This Low Price", "Sale", "Only During this Sale So Low Priced" are not sale or special prices, *i.e.*, they are not reductions from or lower than the prices at which said merchandise was sold at retail by the respondents' retail dealers in the recent regular course of their business and do not constitute savings to the purchasers of said merchandise.

3. The higher stated amounts set out in juxtaposition with the lower prices in connection with the words "Made To Sell For * * *" "Not $30, Not $25, But Only $19.95" are not the generally prevailing prices at which the merchandise is sold at retail in the trade area or areas where the representations are made but were in excess of the prices at which the merchandise was generally sold in said trade area or areas and the difference between the higher and lower prices do not represent savings to the purchasers thereof from the generally prevailing price in the trade area where the representation is made.

4. The marble top tables, chest and commode advertised at $39.88 do not have a value comparable to other products of like grade and quality in all material respects retailing at $79.50, and are not generally available for purchase at the higher comparable price in the same trade area or areas where the representation is made.

The movie outfit advertised at $119.95 does not have a value comparable to ensembles of like grade and quality in all material respects retailing at $179.95 and are not generally available for purchase at the higher comparable price in the same trade area or areas where the representation is made.

5. Purchasers of the movie outfit advertised at $119.95 do not receive seven (7) bonus gifts free or without cost because the price charged for the merchandise purchased includes the price of the said bonus gifts.

6. Two sets of merchandise are not being offered for the usual price of one set of merchandise.

7. The guarantees for the said advertised merchandise are not "fully guaranteed," "lifetime guarantee" nor "unconditional" for any definite period of time, but are subject to limitations and conditions not disclosed in the advertisements.

8. Some of the advertised watches are not waterproof, water resistant, shockproof, and shock resistant in every respect as represented, without qualification or limitation, and qualifying language regarding preservation of the waterproof quality is not set forth clearly and conspicuously in immediate conjunction with the term "waterproof."

9. The Imperial watches do not have 25 jewels that are functional and protect against wear and friction by providing a mechanical contact with a moving part at a point of wear.

Therefore, the statements and representations referred to in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

Par. 7. The respondents by and through the use of the aforesaid acts and practices place in the hands of retailers the means and instrumentalities whereby said retailers may mislead and deceive the public in the manner herein alleged.

Par. 8. In the conduct of their business at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

Par. 9. The use by respondents 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 respondents' merchandise by reason of such erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission, having reason to believe that the respondents have violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings and enters the following order:

1. Retailers Marketing Guild, Inc., Retailers Advertising Service, Inc., and Mayfair Purchasing, Incorporated, are corporations organized, existing and doing business under and by virtue of the laws of the State of Illinois, with their offices and principal places of business at the Merchandise Mart, Merchandise Mart Plaza, Chicago, Illinois. Illinois.

Maurice D. Cramer is the president and a director of each of the said corporations; Alvin Levy is the secretary and a director of each of the said corporations; and George Ross is a vice president and a director of each of the said corporations and their address is the same as that of the corporate respondents.

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

ORDER

It is ordered, That respondents Retailers Marketing Guild, Inc., Retailers Advertising Service, Inc., Mayfair Purchasing, Incorporated, each a corporation, and their offices, and Maurice D. Cramer, Alvin Levy, and George Ross, individually and as officers of said corporate respondents, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the promotion or offering for sale, sale or distribution of any merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or indirectly, that:

(1) Any amount described as "Regular" or words of similar import is the usual and customary price of merchandise when it is in excess of the price at which said merchandise was sold at retail by respondents' dealers in the recent regular course of their business.

(2) Any amount described as "made to sell For", "Not $________ Not $________ But Only $________, * * *" or words of similar import, is the usual and customary retail price of merchandise when it is in excess of the generally, prevailing price or prices at which the merchandise is sold at retail in the trade area or areas where the representation is made.

(3) Any savings are afforded in the purchase of respondents' merchandise from respondents' retail dealers amounting to the difference between the stated retail selling price and any other price used for comparison with that selling price, unless the comparative price used represents the price at which such merchandise has been usually and regularly sold at retail by respondents' retail dealers in the recent, regular course of their business or the price at which the merchandise is usually and customarily sold at retail in the trade area or areas where the representation is made.

(4) Any product of respondents is of a value comparable to any other product retailing at a higher price unless

respondents' product is at least of like grade and quality in all material respects as the product with which it is compared and such other product is generally available for purchase at retail at the comparable price in the same trade area or areas where the representation is made.

(5) Any saving is afforded in the purchase of respondents' product as compared to the purchase of another produuct unless respondents' product is at least of like grade and quality in all material respects as the product with which it is compared and such other product is usually and customarily sold at retail at the comparable price in the same trade area or areas in which the representation is made.

(6) Any price is a sale or special price unless such price is a reduction from or lower than the price at which said merchandise was sold at retail by the respondents' retail dealers in the recent regular course of their business.

(7) Two sets of any merchandise are being offered for the usual price of one set unless the selling price for the two sets is the usual and customary retail price of respondents' retail dealers for the single set in the recent, regular course of their business.

(8) Merchandise is given free or without charge in connection with the purchase of other merchandise when the price charged for the merchandise purchased includes the price of the so-called free merchandise.

(9) Any merchandise offered for sale is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

(10) Any watches are waterproof, water resistant, shockproof or shock resistant unless said watches are waterproof, water resistant, shockproof or shock resistant in every respect without qualification or limitation.

(11) Any watches are waterproof, water resistant, shockproof or shock resistant under certain conditions or with certain qualifications or limitations unless such aforesaid conditions, qualifications, or limitations are clearly and conspicuously set forth in immediate conjunction with the terms "waterproof", "water resistant", "shockproof" or "shock resistant".

(12) Any watches contain a designated number of jewels, unless said watches actually contain the stated number of

jewels, each and every one of which serves a purpose of protecting against wear from friction by providing a mechanical contact with a moving part at a point of wear.

B. Misrepresenting in any manner, directly or indirectly, the quantity, quality, or usual price of any merchandise.

C. Misrepresenting in any manner, directly or indirectly, the savings available to purchasers of respondents' merchandise or the amount by which the price of such merchandise has been reduced from the price at which it is usually and customarily sold at retail by respondents' retail dealers in the recent regular course of their business or from the generally prevailing price areas in the same trade area or areas in which the representation is made.

D. Furnishing or otherwise placing in the hands of distributors or dealers in said products the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove prohibited.

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

IN THE MATTER OF

SCHULZE AND BURCH BISCUIT CO.

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

Docket 7452. Complaint, Mar. 25, 1959—Decision, Feb. 7, 1964

Consent order requiring Chicago manufacturers of biscuit products—mainly cookies and crackers—to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by their use of a discount schedule which classified their retailer customers into (1) independents owning a single store, (2) chains and (3) voluntary groups of independents banded together for buying and advertising, and permitting chains and voluntary groups to combine purchases of all their stores for the purpose of computing the percentage bracket of the schedule to be granted;

And by paying advertising allowances to certain of their customers in accordance with the terms of an advertising plan which were not made known to many smaller competitors of those favored; and paying special advertising allowances to large chain and voluntary group customers which were not made available on proportionally equal terms to all of its competing customers, in violation of Sec. 2(b).

Complaint

The Federal Trade Commission, having reason to believe that Schulze and Burch Biscuit Co., a corporation, has violated and is now violating the provisions of subsection (a) and subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15 Sec. 13), hereby issues its complaint stating its charges with respect thereto as follows:

COUNT I

Charging a violation of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended, the Commission alleges:

PARAGRAPH 1. Schulze and Burch Biscuit Co., hereinafter sometimes referred to as respondent, is a corporation organized and existing under and by virtue of the laws of the State of Illinois with its headquarters and principal place of business located at 1133 West 35th Street, Chicago 7, Illinois.

PAR. 2. Respondent is now, and for many years last past has been, a manufacturer, distributor and seller of biscuit products which consist for the most part of cookies and crackers. Respondent manufactures its biscuit products at its plant located at Chicago, Illinois.

Respondent distributes and sells its biscuit products of like grade and quality to a large number of purchasers located throughout many States of the United States, for use, consumption and resale therein.

Respondent's business is substantial with gross sales in excess of $17,000,000 for the fiscal year 1957.

PAR. 3. In the course and conduct of its said business respondent is now, and for many years last past has been, shipping its biscuit products from the State in which they are manufactured to purchasers located in other States, in a constant current of commerce, as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent sells in excess of 90 percent of its biscuit products to retail food dealers who in turn resell these products to the consuming public.

Respondent delivers its biscuit products directly to the stores of its retail food dealer customers in respondent's own trucks.

Respondent classifies its retail food dealer customers into three categories. The categories are independents, chains and voluntary groups.

In the independent catagory are those customers who own and operate one retail store. The chain category consists of those customers who own more than one retail outlet. Voluntary groups are organizations comprised of a number of independently owned stores who band together for purposes of buying merchandise and advertising.

With regard to said chain and voluntary group customers it is respondent's normal practice to make deliveries to each separate store or outlet belonging to the chain or voluntary group.

PAR. 5. In the course and conduct of its said business in commerce, respondent Schulze and Burch Biscuit Co. has discriminated in price in the sale of its biscuit products by selling such products of like grade and quality at different prices to different and competing purchasers.

Illustrative of such sales at discriminatory prices are the following practices of said respondent:

Respondent is now using, and for several years last past has used, the following discount schedule in pricing its biscuit products of like grade and quality which it sells to its retail food dealer customers, many of whom compete with each other, based upon the monthly volume of purchases of such customer:

Monthly purchases	*Percent of discount*
Under $20.00	0
$20.00 to $39.99	2
$40.00 to $74.99	3½
$75.00 and over	4½

Respondent makes the above stated discount schedule available to all its retail food dealer customers, however in the case of all its chain category customers and certain of its voluntary group category customers respondent permits the purchases of all the stores or retail outlets comprising such chain or voluntary group to be combined for the purpose of computing the percentage bracket of the above stated schedule that such customers are to be granted. As a result each of these chain or voluntary group customers is consistently granted the maximum discount of the above stated schedule even though in many instances the purchases of individual stores or retail outlets belonging to such chain or voluntary group customers standing alone would not be sufficiently large to qualify for that percentage bracket.

PAR. 6. The effect of said discrimination in price by respondent in the sale of biscuit products has been or may be substantially to lessen, injure, destroy or prevent competition:

(a) Between retail food dealer purchasers of respondent's products who receive discounts computed under the above stated schedule and competing retail food dealer purchasers who receive none;

(b) Between retail food dealer purchasers of respondent's products who receive discounts computed under the higher brackets of respondent's above stated discount schedule and competing retail food dealer purchasers who receive discounts computed under the lower brackets of respondent's same discount schedule.

PAR. 7. The discriminations in price herein alleged are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

Charging a violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended, the Commission alleges:

PAR. 8. Paragraphs One through Four inclusive of Count I of this complaint are hereby set forth by reference and made a part of this count as fully and with the same effect as if quoted here verbatim.

PAR. 9. In the course and conduct of its business in commerce as aforesaid, respondent Schulze and Burch Biscuit Co. has paid or authorized payment of money, goods or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such customers in connection with the handling, sale or offering for sale of respondent's biscuit products and respondent has not made or offered to make such payments, allowances or consideration available on proportionally equal terms to all of its other customers competing with the customers so favored in the sale and distribution of its biscuit products.

PAR. 10. Illustrative of the conduct alleged in Paragraph 9, above, are the following acts and practices of respondent:

(1) Respondent is now paying and for several years last past has paid advertising allowances to certain of its customers in accordance with the terms of an advertising plan it has devised, but respondent has neglected to make the terms of this plan known to many of its smaller competing customers, and consequently many of these smaller customers have not received and are not now receiving anything in the way of advertising allowances from respondent.

(2) In addition to the advertising plan mentioned in subparagraph (1) above, respondent is now paying, and for several years last past has paid, special advertising allowances to a certain select group of its customers, consisting primarily of large chain and large voluntary group customers, but has not paid or offered to pay such special advertising allowances to other customers many of whom are in competition with the customers so favored. These special adver-

tising allowances are generally the result of individual negotiations with each of the customers so favored.

PAR. 11. Respondent's acts and practices as alleged in Paragraphs 9 and 10, above, are in violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended.

Brown, Fox & Blumberg, by *Mr. Nathan S. Blumberg*, Chicago, Ill., for respondent.

Mr. James R. Fruchterman for the Commission.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated March 25, 1959, the respondent is charged with violating the provisions of subsections (a) and (d) of Section 2 of the Clayton Act, as amended.

On November 7, 1960, the respondent and its attorney entered into an agreement with counsel in support of the complaint for a consent order.

Under the foregoing agreement, the respondent admits the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondent of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondent that it has violated the law as alleged in the complaint.

The hearing examiner finds the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

The agreement is entered into subject to the condition that the effective date of the initial decision based hereon shall be stayed by the Commission and shall not become the decision of the Commission in this matter until the cases of *Robert A. Johnston Company*, Docket 7739, [p. 581 herein], and *United Biscuit Company of America*, Docket 7817 [p. 586 herein], have been litigated and decisions on the merits thereof have been issued by the Commission or said cases have been disposed of by means of consent settlements.

The agreement further recites that the right of the Commission to enter a cease and desist order based on the agreement is in no way conditioned on the issuance of similar cease and desist orders by the Commission in the cases referred to above.

The hearing examiner being of the opinion that the agreement and the proposed order provide an appropriate basis for disposition of this proceeding as to all of the parties, the agreement is hereby accepted and it is ordered that the agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission. The following juridictional findings are made and the following order issued.

1. Respondent Schulze & Burch Biscuit Co. is a corporation existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 1133 West 35th Street, in the city of Chicago, State of Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent Schulze & Burch Biscuit Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of its biscuit products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser competing in fact with such unfavored purchaser in the resale and distribution of such products.

It is further ordered, That respondent Schulze & Burch Biscuit Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of its biscuit products in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or any other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of respondent's products, unless such payment is in fact made available on proportionally equal terms to all other customers competing in the distribution of such products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on November 25, 1960, having filed his initial decision in this proceeding accepting an agreement containing a consent order to cease and desist theretofore executed by respondent and counsel supporting the complaint, which agreement is subject to the condition that said initial decision is not to become the decision of of the Commission "until the cases of *Robert A. Johnston Company*, Docket 7739 [p. 581 herein] and *United Biscuit Company of America*. Docket 7817 [p. 586 herein], have been litigated and decisions on the merits thereof have been issued by the Commission or said cases have been disposed of by means of consent settlements"; and

The Commission, on the 5th day of February 1964, having issued its decisions in the aforesaid matters:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, Schulze & Burch Biscuit Co., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Commissioner Elman concurring in the result and Commissioner Reilly not participating.

IN THE MATTER OF

THE BORDEN COMPANY

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(a) OF THE CLAYTON ACT

Docket 7474. Complaint, Apr. 13, 1959—Decision, Feb. 7, 1964

Order requiring a corporation engaged in purchasing, processing and distributing fluid milk and other dairy products throughout the United States, to cease discriminating in the price of its milk among competing resellers and between purchasers at the same level of trade located in different trade areas, in violation of Sec. 2(a) 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 subsection (a) of Section 2 of the Clayton Act (U.S.C.A., Title 15, Sec. 13), as amended by the Robinson-Patman Act approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent named herein is The Borden Company. Respondent is a corporation organized and existing under and by virtue of the laws of the State of New Jersey. Respondent's principal office and place of business is located at 350 Madison Avenue, New York 17, New York.

PAR. 2. Respondent is extensively engaged in the business of purchasing, processing, manufacturing, distributing, and selling fluid milk and other dairy products throughout the United States, and in the District of Columbia. Respondent's net sales for 1957 were $931,220,662.

PAR. 3. Respondent sells fluid milk and other dairy products of like grade and quality to a large number of purchasers located throughout the United States and in the District of Columbia for use, consumption, or resale therein.

Respondent owns, maintains, and operates a large number of receiving stations, processing, and manufacturing plants, and distribution depots located in various states of the United States from which it sells and distributes its said products to purchasers.

PAR. 4. In the course and conduct of its business respondent is now, and for many years past has been, transporting fluid milk and other dairy products, or causing the same to be transported from dairy farms and other points of origin to respondent's receiving stations, processing and manufacturing plants and distribution depots located in other states of the United States and in other places under the jurisdiction of the United States.

Respondent is now, and for many years past has been, transporting fluid milk and other dairy products, or causing the same to be transported from the state or states where such products are processed, manufactured, or stored in anticipation of sale or shipment, to purchasers located in other states of the United States and in other places under the jurisdiction of the United States, including the District of Columbia.

Respondent also sells and distributes its said fluid milk and other dairy products to purchasers located in the same states where such products are processed, manufactured, or stored in anticipation of sale.

All of the matters and things, including the acts, practices, sales, and distribution by respondent of its said fluid milk and other dairy products, as hereinbefore alleged, were performed and done in a constant current of commerce as "commerce" is defined in the Clayton Act.

PAR. 5. Respondent sells its fluid milk and other dairy products to distributors, retailers, and consumers.

Respondent's distributors resell to retailers and consumers to the extent that such purchasers do not buy directly from respondent. In many instances respondent's distributors act as its agent in making deliveries to some of respondent's retailer-purchasers. Respondent's retailer-purchasers resell to consumers. Many of respondent's distributor and retailer-purchasers are respectively in competition with other distributor and retailer-purchasers of respondent.

Respondent, in the sale of its fluid milk and other dairy products to distributors, retailers, and consumers is in substantial competition with other manufacturers, processors, distributors, and sellers of said products.

PAR. 6. In the course and conduct of its business in commerce, respondent has discriminated in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

Included in, but not limited to, the discriminations in price as above alleged, respondent's distributor in Walkerton, Indiana, was charged by respondent substantially lower prices for respondent's said products than respondent charged its distributors located in Plymouth and La Porte, Indiana, and Niles, Michigan. In South Bend and Valparaiso, Indiana, where respondent's own branches distribute fluid milk and other dairy products to A & P and Kroger Food Stores, and also to independent grocers, there is a systematic discrimination in price by respondent in favor of A & P and Kroger. Respondent has discriminated in price in the sale of its said products to retailers located in Elkhart and Goshen, Indiana, and to retailers located in Sturgis, Michigan, and has discriminated in price between favored retailers located in each of said cities and unfavored retailers located in the other.

Respondent has discriminated in price in the sale of its said products to retailers located in Dallas, Waco, Fort Worth, Houston, Corpus Christi, Kingsville, and in other cities, towns, and places in the State of Texas, and between favored retailers located in each of said cities, towns, and places, and unfavored retailers located in each of the others.

Respondent has further discriminated in price in the sale of its said products to consumers located in Dallas, Waco, Fort Worth, Houston, Corpus Christi, Kingsville, and other cities, towns, and places in the State of Texas, and between favored consumers located in each of said cities, towns, and places and unfavored consumers located in each of the others.

PAR. 7. The effect of such discriminations in price by respondent in the sale of fluid milk and other dairy products has been or may be substantially to lessen, injure, destroy, or prevent competition:

(1) Between respondent and its competitors in the processing, manufacture, sale, and distribution of such products.

(2) Between respondent's distributors paying higher prices and competing distributors paying lower prices for respondent's said products.

(3) Between retailers paying higher prices and competing retailers paying lower prices for respondent's said products.

PAR. 8. The discriminations in price as herein alleged are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. William H. Smith supporting the complaint.

Mr. Stuart S. Ball, *Mr. Joseph A. Greaves*, *Mr. H. Blair White*, and *Sidley, Austin, Burgess & Smith*, Chicago, Ill., for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

OCTOBER 8, 1962

The Federal Trade Commission issued its complaint against the respondent on April 13, 1959, charging that respondent has violated subsection (a) of Section 2 of the Clayton Act, as amended, by discriminating in price between purchasers located in different areas and between purchasers located in the same areas. Respondent's answer denied the charges and plead certain of the satutory defenses, including the defense that its lower prices were made in good faith to meet equally low prices of competitors.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint and oral argument thereon. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered

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the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

1. Respondent herein is The Borden Company which is a New Jersey corporation with its principal office and place of business located at 350 Madison Avenue, New York 17, New York.

2. Respondent purchases raw milk which it processes into fluid milk and other dairy products which are packaged by respondent and sold to a large number of purchasers located in thirty states of the United States for use, consumption, or resale therein. Respondent owns, maintains, and operates receiving stations, processing and manufacturing plants, and distribution depots located in various states of the United States from which it sells and distributes its said products to purchasers. Its net sales for all products amounted to $931,220,662 in 1957; $915,024,172 in 1958; and $941,326,495 in 1959.

3. Respondent is engaged in interstate commerce in the purchase and sale of milk and other dairy products.

4. Respondent sells its milk and other dairy products to distributors, retailers, and consumers. Distributors who purchase from it resell to retailers and consumers. Some distributors who purchase from respondent act as its agent in making delivery to some of respondent's retailer-customers. Most of respondent's retailer-customers resell to consumers. In the sale of its milk and other dairy products to its various types of customers, respondent is in competition with other sellers of such products. Many of respondent's retailer-customers are in competition with other of its retailer-customers, and in some instances with respondent's distributor-customers.

5. Although the complaint charged price discriminations between purchasers at the same level of trade, including customers in certain named localities, it was agreed between counsel at the close of the presentation of evidence in support of the charges of the complaint that the charges of the complaint relied upon by counsel supporting the complaint are in substance the following: (a) Respondent violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by selling homogenized milk in half-gallon and gallon containers to grocery store customers in different communities at differing prices which had the effect of injuring respondent's competitors in one or more of those communities. The communities involved in this area-price discrimination charge are Dallas, San Antonio and Corpus Christi, Texas; La Union, New Mexico; Texarkana, Arkansas; Vivian, Louisiana; South Bend, Elkhart and Walkerton, Indiana; Sturgis, Michigan; Portsmouth, New Boston

and Ironton, Ohio; and Greenup, King's Addition, South Shore and Russell, Kentucky. Respondent's sales involved in this charge in the above-named communities in Texas, New Mexico, Arkansas, Louisiana, Indiana and Michigan were made during the period January 1, 1957, through September 30, 1959, and in the above-named communities in Ohio and Kentucky were made during the period January 1, 1959, through December 31, 1960; and (b) during January 1, 1959, through December 31, 1960, respondent violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by selling homogenized milk in half-gallon containers to grocery store customers in Portsmouth and New Boston, Ohio, at differing prices which had the effect of injuring respondent's grocery store customers in those communities.

The discriminations considered in this decision are limited to the communities and periods of time specfied in this agreement.

6. With respect to the discriminations to purchasers located in Dallas, San Antonio, and Corpus Christi, Texas; La Union, New Mexico; Texarkana, Arkansas; and Vivian, Louisiana, it is only contended by counsel supporting the complaint that the discriminatory low prices in the Dallas, Texas, market adversely affected competition. Since it is not contended that the facts relating to sales in San Antonio and Corpus Christi, Texas; La Union, New Mexico; Texarkana, Arkansas; and Vivian, Louisiana, prove violations of the statute in these areas, as charged in the complaint, it is considered that these sales are not in issue and specific findings of fact regarding these sales are not made.

Discriminations in Dallas, Texas

7. From November 29, 1957, through January 21, 1958, respondent made interstate sales of milk and sold milk which was in interstate commerce at substantially higher prices than it sold milk in Dallas, Texas.

8. Respondent maintained a milk processing plant in Dallas, at which it processed and packaged the milk it sold to store customers in Dallas. This plant processed and sold milk in half-gallon paper cartons during the entire period of January 1957 through September 1959; it did not, however, commence processing and selling milk in gallon jugs until April 26, 1958. The raw milk used by respondent's Dallas plant was produced in Texas, purchased by respondent in Texas, and sold in Texas.

9. Respondent's competitors in the sale of milk to stores in Dallas included Beverly Hills Dairy, Boswell Dairy, Cabell's Inc., Fore-

most Dairies, Inc., Jere Dairy, Inc., Jersey Dairies, Inc., Lamar Creamery, Metzger Dairies, Oak Farms Dairies, Schepps Dairy, Triangle Dairy, and Vandervoort Dairy (herein called Beverly Hills, Boswell, Cabell, Foremost, Jere, Jersey, Lamar, Metzger, Oak Farms, Schepps, Triangle, and Vandervoort).

10. Cabell owned and operated approximately 40 drive-in grocery stores known as Cabell Minit Markets in the Dallas area which sold only Cabell brand milk.

11. Oak Farms owned and operated approximately 80 drive-in grocery stores known as 7-Eleven Stores in the Dallas area which sold only Oak Farms brand milk.

12. Safeway Stores, Incorporated operated 22 to 28 grocery stores in the Dallas area which were supplied fluid milk and related products exclusively by its processing plant in Fort Worth, Texas.

13. Wyatt operated about 22 stores in the Dallas area.

14. During July through November 27, 1957, the prevailing wholesale price for a half gallon of homogenized milk was 44 cents less a 10 percent discount, and the prevailing out-of-store price was 43 cents to 45 cents.

15. During July through November 27, 1957, Beverly Hills and Jere were the only dairies selling milk in gallon jugs. Beverly Hills wholesale price on gallons ranged from 65 cents to 70 cents, and Jere's wholesale price ranged from 64.98 cents to 68.4 cents. In July 1957 the Wyatt stores commenced buying Jere's gallons; Wyatt had been buying Cabell's half gallons for at least six months prior to that time. During July through November 27, 1957, Wyatt stores maintained an out-of-store price of 75 cents for Jere's gallons and 43 cents for Cabell's half gallons. Subsequent to July, Wyatt reduced its purchases of Cabell's half gallons.

16. In September 1957 Cabell ordered the necessary equipment to package milk in gallon jugs, which was installed by November 25. On November 27, Cabell announced that it would commence selling gallons of homogenized milk November 29 and did so at the wholesale price of 59 cents and at the out-of-store price of 69 cents through its Cabell Minit Markets.

17. On November 27, 1957, Oak Farms' 7-Eleven Stores announced a reduction of the out-of-store price of half gallons of homogenized milk. This announcement was reported in a newspaper. The new price, effective November 29, was 38 cents. On November 28, 1957, Jere reduced its wholesale price of gallons of homogenized milk to 59.85 cents. On November 29, 1957, Oak Farms, Metzger, and Foremost reduced the wholesale price of half gallons of homogenized

milk to 32 cents net. As a result of this action other dairies, including respondent and Schepps, made a similar price reduction.

18. Prior to November 29, 1957, respondent had received information indicating that Oak Farms would reduce its wholesale price of homogenized milk in half gallons to 32 cents net. On November 29, 1957, when respondent's wholesale routemen left the Dallas plant between 3:30 a.m. and 6:00 a.m., its wholesale price for a half gallon of homogenized milk was 44 cents less a 10 percent discount. At 5:30 a.m. respondent's routemen commenced telephoning respondent's Dallas plant, advising that Metzger, Oak Farms, and Foremost had reduced their wholesale price of the half gallon to 32 cents net. These reports were based on information the routemen had received from stores and from employees of Metzger, Oak Farms, and Foremost. In some instances the routemen saw sales tickets of these dairies showing sales at this price. Respondent, however, did not reduce its wholesale price to 32 cents net until 8:00 a.m., and in most instances it was unable to infrom its wholesale routemen of this change for some time after 8:00 a.m. Respondent made some sales to store customers at the wholesale price of 44 cents less 10 percent on November 29, 1957.

19. The wholesale price lists of Metzger, Oak Farms, and Foremost show that these dairies did reduce their wholesale price to 32 cents net on November 29, 1957, as reported by respondent's wholesale routemen.

20. On November 29, 1957, Jere reduced its wholesale price of homogenized milk in the gallon jug to 54.72 cents. Later that same day Oak Farms announced that effective the following morning its wholesale price of half gallons of homogenized milk would be 30 cents net. Following the Oak Farms announcement, Foremost and Metzger announced the same wholesale price reduction effective November 30, 1957. As a result of the action of Oak Farms, followed by Foremost and Metzger, other dairies, including respondent and Schepps, made a similar price reduction on November 30, 1957.

21. During the afternoon of November 29, 1957, a buyer for a store customer which purchased milk from Oak Farms, Foremost, Metzger, and respondent, advised respondent that Oak Farms had announced that its wholesale price of homogenized milk in the half-gallon paper carton would be 30 cents net on November 30, and later advised respondent that Foremost and Metzger had announced the same wholesale price reduction effective on November 30. Respondent then reduced its wholesale price on this item to 30 cents net effective November 30.

22. The wholesale price lists of Oak Farms, Foremost, and Metzger show that these dairies did reduce their wholesale price to 30 cents net on November 30, as reported by the buyer for the store customer, and when respondent's wholesale routemen commenced delivery on the morning of November 30, they found that Cabell, Oak Farms, Foremost, and Metzger were charging a wholesale price of 30 cents.

23. On November 30, 1957, the 7-Eleven Stores commenced selling Oak Farms' half gallons at the out-of-store price of 35 cents.

24. On December 2, 1957, Wyatt and at least one other store sold Jere's homogenized milk in the gallon jug at 63 cents, and on the same day Cabell reduced its wholesale price of gallons to 53 cents and reduced Cabell Minit Market's out-of-store price on this item to 63 cents.

25. On December 4, 1957, Oak Farms reduced its wholesale price on a half gallon of homogenized milk to 26 cents net. Schepps, Metzger, Foremost, and Cabell then reduced their wholesale price to 26 cents net. As a result of the action of Oak Farms, followed by Schepps, Metzger, Foremost, and Cabell, other dairies, including respondent, made a similar price reduction.

26. On December 4, 1957, respondent's wholesale routemen commenced making deliveries to store customers at the wholesale price of 30 cents net for homogenized milk in the half-gallon paper carton. At 6:30 a.m. one of the wholesale routemen secured a copy of an Oak Farms' wholesale price list which showed a wholesale price on this item of 26 cents. This Oak Farms wholesale price list was delivered to the manager of respondent's Dallas plant. At 8:00 a.m. other wholesale routemen of respondent commenced telephoning its Dallas plant, advising that Schepps, Metzger, Foremost, Oak Farms, and Cabell had reduced their wholesale price on this item to 26 cents net. These reports by routemen were based on information they received from store customers and employees of Schepps, Metzger, Foremost, Oak Farms, and Cabell. In some instances they saw sales tickets of these dairies showing sales at this price.

27. Respondent, however, did not reduce its wholesale price to 26 cents net until 8:40 a.m. and in most instances it was unable to inform its wholesale routemen of this change for some time after 8:40 a.m. Respondent made some sales to store customers in Dallas at the wholesale price of 30 cents net on December 4, 1957.

28. The wholesale price lists of Oak Farms, Schepps, Metzger, Foremost, and Cabell show that these dairies did reduce their wholesale price to 26 cents net on December 4, 1957, as reported by respondent's wholesale routemen.

29. On December 5, 1957, Jere reduced its wholesale price of homogenized milk in the gallon jug to 46.17 cents, and Cabell reduced its wholesale price on this item to 50 cents. On December 9, 1957, Cabell further reduced its wholesale price to 45 cents. Respondent did not change its wholesale price of homogenized milk during the period December 5 through 16, 1957.

30. On December 17, 1957, respondent, Cabell, and Foremost increased their wholesale prices of homogenized milk in the half-gallon paper carton to 32 cents net. Schepps and Metzger followed on December 18. Oak Farms raised its wholesale price on December 19.

31. On December 19, 1957, Foremost announced that on December 23 it would increase its wholesale price of homogenized milk in the half-gallon paper carton to 36 cents net, which it in fact did on that day. Respondent, Cabell, and Schepps also raised their wholesale prices to 36 cents net on December 23. Oak Farms followed on December 24, and Metzger raised its wholesale price on December 25.

32. On January 20, 1958, Foremost, Oak Farms, and Schepps increased their wholesale prices of homogenized milk in the half-gallon paper carton to 46 cents less a 10 percent discount. Respondent increased its wholesale price on this item to the same level on January 21, 1958.

33. It is concluded and found that respondent has shown that its lower prices in Dallas, Texas, were made in good faith to meet an equally low price of a competitor. Since respondent has established a defense to the charge of price discrimination in this market it appears unnecessary to make further findings regarding this market.

Ohio and Kentucky Communities

34. There is no evidence and it is not contended that discriminations between the communities in Ohio and Kentucky or between any of these communities and any other area may have had an adverse effect on competition in Ohio or Kentucky.

35. The evidence shows price discriminations between competing customers in Portsmouth and New Boston, Ohio, from January 1959 through December 1960. Several of respondent's larger customers received a 12 percent discount from list price. One customer, Schaefer Supermarkets with three stores in Portsmouth, who received a 10 percent discount from January 1959 through March 1960 and a 12 percent discount from April 1960 through December 1960, was shown to compete with other stores who received either no discount, a 5 percent discount, or an 8 percent discount.

36. The evidence shows that milk is a low-profit item in the grocery stores in Portsmouth and carries about a 10 percent gross profit

above list price. One dealer testified that his profit on milk would not cover his overhead, and others testified that their net profit on milk was 1 percent or ½ percent.

37. The milk sold in the stores in Portsmouth and New Boston, Ohio, was produced, processed, and sold in Ohio, and no interstate commerce was involved in the transactions. Under the terms of the agreement limiting contentions of counsel supporting the complaint, referred to in Finding 5, the only discriminations between competitors which are involved in this proceeding are those in Portsmouth and New Boston, Ohio.

38. It is concluded and found that the discriminations in price between competing customers in Portsmouth and New Boston, Ohio, were not made in interstate commerce, did not involve milk which was in interstate commerce, and were not violations of the statute as charged in the complaint.

Discriminations Between South Bend, Walkerton, and Elkhart, Indiana, Sturgis, Michigan, and other areas

39. In the course and conduct of its business in interstate commerce, respondent engaged in area price discrimination in the sale of milk of like grade and quality by selling such milk at different prices to different wholesale purchasers located in South Bend, Walkerton, and Elkhart, Indiana, and in Sturgis, Michigan, as more specifically found hereinbelow.

During the period January 10 through January 16, 1958, respondent sold milk in half-gallon containers to the A & P store at Walkerton, Indiana, for 22.2 cents and to other grocery stores located in South Bend, Indiana for 35 cents.

During the period January 16 through January 23, 1958, respondent sold milk in half-gallon containers to the A & P store at Walkerton, Indiana, for 9.2 cents (which price was substantially below respondent's cost of raw milk) and to other grocery stores in South Bend, Indiana, for 35 cents.

During the period June 26 through June 28, 1958, respondent sold milk in half-gallon containers to the Kroger store at Sturgis, Michigan, for 30 cents to grocery stores in South Bend, Indiana, for 39 cents and to A & P stores at South Bend for 35.1 cents.

During the period June 30 through July 9, 1958, respondent sold milk in its half-gallon containers to the A & P and Kroger stores at Sturgis, Michigan, for 30 cents, to grocery stores in South Bend, Indiana, for 39 cents, and to A & P stores at South Bend for 35.1 cents.

During the period July 16 through July 23, 1958, respondent sold milk in its half-gallon containers to the A & P and Kroger stores at Sturgis, Michigan, for 26.3 cents, to the A & P stores in South Bend at 35.1 cents and 29.6 cents, and to other grocery stores in South Bend for 39 cents.

During the period August 20 through August 22, 1958, respondent sold milk in its half-gallon containers to the A & P and Kroger stores at Sturgis, Michigan, for 32.9 cents, to the A & P stores at South Bend for 24.9 cents, and to other grocery stores at South Bend for 28 cents.

During the period August 22 through September 3, 1958, respondent sold milk in its half-gallon containers to the A & P and Kroger Stores at Sturgis, Michigan, for 32.9 cents, to the A & P stores at Elkhart, Indiana, for 32.3 cents, to the A & P stores at South Bend for 22.2 cents, and to other grocery stores at South Bend for 25 cents.

During all of the times listed in this paragraph respondent's prices of milk from its Hammond, Indiana, plant to some grocery stores in states other than those named were substantially higher than the prices referred to above.

40. Respondent's discriminations in price, as set forth in Finding 39 herein, involved sales made in interstate commerce to customers A & P and Kroger and were sales of milk that was in interstate commerce as more specifically found hereinbelow.

41. The milk sold by respondent and its distributors in South Bend, Walkerton, and Elkhart, Indiana, and in Sturgis, Michigan, was processed at respondent's Hammond, Indiana, plant. Respondent maintains a sales branch at South Bend to which point respondent's milk is transported via tractor-trailer from Hammond and reloaded into refrigerated wholesale trucks. The A & P stores at South Bend, Walkerton, and Elkhart, Indiana, and the A & P and Kroger stores at Sturgis, Michigan, are the customers of respondent. All A & P and other of respondent's customers in the South Bend area are served by respondent's own wholesale trucks. The Walkerton A & P store was served by Quality Dairy acting as respondent's agent. The A & P store at Elkhart was served by M & M Dairy Service, as respondent's agent; and the A & P and Kroger stores at Sturgis, Michigan, were served by respondent's distributor at Niles, Michigan, acting as respondent's agent. All milk loaded on a distributor's or agent's truck destined for A & P and Kroger stores remained the property of respondent until delivered to the A & P and Kroger stores. Distributors haul milk on contract with respondent which is

to be delivered to A & P and Kroger stores and are compensated by respondent for this service.

42. A & P and Kroger stores to which respondent's milk is delivered by respondent's own wholesale trucks and by its agent-distributors do not pay for respondent's milk and milk products delivered to them. Bills are computed weekly by respondent's Hammond office and sent to A & P and Kroger headquarters for payment. Milk products delivered to all A & P stores located in South Bend, Walkerton, and Elkhart, Indiana, are billed weekly by respondent's Hammond, Indiana, plant to the A & P central office in Chicago, Illinois, for payment. Statements for milk products delivered by respondent to the A & P store in Sturgis, Michigan, are sent by respondent's Hammond, Indiana, plant to the A & P office at Grand Rapids, Michigan, and to Toledo, Ohio, for payment. All bills for a store that is within the jurisdiction of the A & P office are sent to that A & P office on a central billing arrangement. Since no negotiations or sales contracts, whether relating to price or otherwise were made with individual A & P and Kroger stores, the conclusion is impelled that all sales arrangements with both A & P and Kroger were made by respondent with out-of-state sales offices of the A & P and Kroger organizations; and, therefore, such sales and purchases were in interstate commerce.

43. Respondent's central division headquarters in Chicago, Illinois, has jurisdiction over all of respondent's milk processing and distribution facilities located in the States of Wisconsin, Iowa, Indiana, Illinois, and Michigan. Respondent's Hammond, Indiana, processing plant receives daily about 40 percent of its raw milk requirements from the Pure Milk Assn. in Chicago, Illinois, which is processed daily, five days a week, and then loaded into trucks for delivery. During January 1958 respondent's Hammond, Indiana, plant caused a substantial amount of raw milk to be transported to it from Pontiac, Illinois.

Effect of Discriminations in Indiana and Michigan

44. The primary question for determination is the effect of respondent's discriminations in these communities in Indiana and Michigan. Were the circumstances such as to make it reasonably likely that competition would be lessened or injured by such discriminations? The statute declares discriminations to be unlawful which may adversely affect competition in a substantial manner and does not require proof that competition has actually been lessened or injured as a result of the discriminations. Respondent contends that the evidence does not show injury to competition and that at most

the evidence of loss of sales and loss of profit by certain competitors in these communities shows only an effect upon competitors.

The record shows that a few of respondent's competitors lost volume of business and lost profits during the periods of respondent's price cuts. It also shows that factors other than respondent's prices contributed to these losses, but it is concluded that respondent's prices contributed in a material way to these losses.

It is not essential that intent of a discriminator be shown, but, as the court said in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d, "a predatory intent might tend to render injury probable." The most drastic price cut shown here was in Walkerton where respondent's price was cut to 9.2 cents and 10 cents per half gallon, of which 7 cents was paid to its distributor-agent. It is apparent that respondent was willing and able to get business regardless of its losses.

It is correct that the record only shows effects on certain competitors, but in each of these communities there were only a few and an effect on even one competitor would be reflected in the strength of competition generally.

45. The discriminations found above were not of long duration, and respondent contends that sporadic discriminations of short duration do not have the potential for causing adverse effects on competition and points out that in most of the litigated primary line cases in which adverse effects were found there were prolonged periods of discrimination. It is true that prolonged discriminations produce results that can be more readily ascertained, however, it is not essential that the evidence show actual effects of discriminations but merely that circumstances be shown from which it can be reasonably concluded that a continuance of the discriminations would be likely to lessen competition. Any other construction of the statute renders meaningless the phrase "may be" in the effects clause of the statute. If it can be said that it is unlikely that discriminations will be repeated, then past, occasional discriminations may not be a threat to competition, but when they are resorted to from time to time to suit the purposes of a seller, their continued use, even intermittently, does constitute a danger to competition. Since the function of the Federal Trade Commission is to prevent future uses of discriminations which may lessen competition, it seems appropriate that discriminations which, by their nature and amount, weaken the competitive strength of local dairies should be prohibited. If the law were otherwise a seller, such as this respondent, marketing over large areas could punish local competitors at intervals and gradually reduce their resources until these competitors disappear from the local markets. Counsel supporting the complaint contends that the

diversion of business to the retail stores, occasioned by respondent's low prices, from dairies selling and delivering to the homes of consumers should also be considered. Respondent, however, avers that since it had no retail routes in these localities it did not compete for this business and the loss of such business by its competitors who were so engaged cannot be attributed to its lower prices. Respondent further contends that even if it be true that sales were diverted from home delivery by lower prices in the stores that this is a condition caused by a series of price cuts by many dairies and cannot be attributed to respondent. It is correct that this diversion in these communities cannot be attributed solely to respondent's prices, but respondent's prices were responsible for some material, although unmeasurable, portion. The effect of respondent's prices upon this diversion was especially evident in Walkerton. The demand for milk is relatively inelastic yet during the week of the low prices in Walkerton respondent's volume increased from 2,000 half gallons to 11,000 half gallons.

It is believed that low prices of respondent in these communities did have or may have the effect of diverting business from those competitors which were also engaged in retail delivery and that such diversion had or may have substantial effect upon the ability of those competitors to continue to compete with respondent.

46. It is concluded that the effect of respondent's discriminations in price between different wholesale purchasers located in different areas of the States of Indiana and Michigan, as set forth herein, have been or may be substantially to lessen competition and to injure, destroy, and prevent competition between respondent and its competitors.

Meeting Competition Defense in Indiana and Michigan

47. Respondent contends that it has established the statutory defense of meeting competition in South Bend, Elkhart, and Walkerton, Indiana, and in Sturgis, Michigan.

Respondent has shown that there were many price reductions by competitors in South Bend during the times in question. It has not shown that any of these competitors offered to sell at these reduced prices or at any price to any of its customers. On at least one occasion respondent's price to one customer was lower than any price of any competitor to any customer.

Respondent has shown that some of its competitors reduced prices to their customers in Elkhart, Indiana, at or about the same times respondent reduced its prices to its one customer in Elkhart, but it has not shown that any competitor offered to sell to respondent's customer. On at least one occasion respondent's price was lower than any price of any competitor.

In Sturgis, Michigan, there had been some price reductions by retailers prior to respondent's entry into the market, but after this entry there were occasions when respondent's price to its customer was below any of the prices of its competitors.

In Walkerton, Indiana, which has a population of 2,500 and four grocery stores, respondent, during the week of January 16-23, 1958, sold to its customer at 9.2 cents per half gallon which was far below its cost of raw milk, and required its distributor to resell to other stores in Walkerton at 10 cents per half gallon. Respondent's cost of delivery of this milk amounted to 7 cents for each half gallon which respondent paid Quality Dairy who was its agent in delivering to respondent's customer at the 9.2 cent price and who sold for its own account at the 10 cent price. This unusually low price was caused, at least in part, by an offer of respondent's customer's competitor to sell half gallons of milk for 10 cents with each $5 purchase of groceries by the consumer. This price by respondent enabled its customer to sell milk at an out-of-store price of 10 cents to all consumers, which price was not comparable to the offer of this customer's competitor to sell milk as a premium. There is no showing that respondent's competitors offered any comparable price to any of their customers or that any competitor offered to sell to respondent's customer at any price.

48. Because of the foregoing facts it is concluded that respondent has failed to establish that the price discriminations herein found in South Bend, Elkhart, and Walkerton, Indiana, and in Sturgis, Michigan, were made in good faith to meet an equally low price of a competitor.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

The aforesaid acts and practices of the respondent of granting price discriminations in Indiana and Michigan, as herein found, constituted violations of subsection (a) of Section 2 of the Clayton Act.

ORDER

It is ordered, That respondent, The Borden Company, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale or distribution of milk in commerce, as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of milk of like grade and quality, by selling milk to any purchaser at a price which is lower than the price charged any other purchaser engaged in the same level of trade; provided, however, that the foregoing shall not be construed to prevent respondent from defending any alleged violation of this order by establishing any of the statutory defenses contained in Section 2 of the Clayton Act.

Opinion

FEBRUARY 7, 1964

By DIXON, *Commissioner:*

The complaint in this matter charges respondent, The Borden Company, with discriminating in price in its sale of fluid milk and other dairy products, in violation of Section 2(a) of the Clayton Act, as amended. It is alleged that respondent sells to distributors, retailers and consumers and that its price discriminations between purchasers at the same level of trade in different communities resulted in injury to competition between respondent and its competitors. The complaint further charges that respondent's price discriminations between distributors and retailers, respectively, in the same community, resulted in injury to competition between the favored and unfavored purchasers at the same level of trade.

At the close of the case-in-chief in support of the complaint, counsel entered into an agreement [1] (hereinafter referred to as a specification of charges) wherein it is recited that as a result of respondent's informal request, counsel advised the hearing examiner that in order to avoid unnecessary extension of the record, and to serve as a guide to the further presentation of the case, they would attempt to clarify the issues raised by the charges in the complaint in light of the evidence received during the presentation of the case in chief. After a series of informal conferences, complaint counsel specified the charges in the complaint upon which he relies to establish a violation. These charges, as set forth in the initial decision, are as follows:

> * * * (a) Respondent violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by selling homogenized milk in half gallon and gallon containers to grocery store customers in different communities at differing prices which had the effect of injuring respondent's competitors in one or more of those communities. The communities involved in this area-price discrimination charge are Dallas, San Antonio and Corpus Christi, Texas; La Union, New Mexico; Texarkana, Arkansas; Vivian, Louisiana; South Bend, Elkhart and Walkerton, Indiana; Sturgis, Michigan; Portsmouth, New Boston and Ironton, Ohio; and Greenup, King's Addition, South Shore and Russell,

[1] "Specification Of The Charges Relied On By Counsel Supporting The Complaint," RX 702.

Kentucky. Respondent's sales involved in this charge in the above-named communities in Texas, New Mexico, Arkansas, Louisiana, Indiana and Michigan were made during the period January 1, 1957, through September 30, 1959, and in the above-named communities in Ohio and Kentucky were made during the period January 1, 1959, through December 31, 1960; and (b) during January 1, 1959, through December 31, 1960, respondent violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by selling homogenized milk in half-gallon containers to grocery store customers in Portsmouth and New Boston, Ohio, at differing prices which had the effect of injuring respondent's grocery store customers in those communities.

The hearing examiner in his initial decision limited his consideration of respondent's pricing practices to the communities and periods of time specified by counsel. However, with the exception of Dallas, Texas, he made no findings of fact as to discriminations in the communities in the States of Texas, New Mexico, Arkansas and Louisiana on the grounds that sales in these areas were not in issue since there was no contention by complaint counsel that respondent's pricing practices in those areas adversely affected competition. Although finding that respondent sold milk at lower prices in Dallas than in other areas, the examiner further found that these lower prices were made in good faith to meet an equally low price of a competitor. Having found that respondent had sustained its burden of proof under Section 2(b),[2] the examiner concluded that the lower Dallas prices did not violate Section 2(a). Counsel supporting the complaint has not appealed from these findings.

As to Portsmouth and New Boston, Ohio, the examiner found that respondent had discriminated in price between competing grocery store customers. However, he found that the milk sold by respondent to stores in these Ohio communities was produced, processed and sold in Ohio. He concluded that the sales in these communities were not made in interstate commerce and therefore a violation of Section 2(a) had not been established.

The examiner further found that respondent had engaged in area price discrimination by selling milk at different prices to grocery store customers located in the areas of South Bend, Walkerton and Elkhart, Indiana, and in Sturgis, Michigan. He held that the purchases involved in these discriminations were in commerce and that the probable effect of the discriminations was to substantially lessen competition between respondent and its competitors in these areas.

[2] Section 2(b) of the Clayton Act, as amended, provides, in part, "That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

He further ruled that respondent had failed to establish the Section 2(b) defense as to these discriminations and issued his order requiring respondent to cease this pricing practice.

The case is before us on a cross-appeals. Complaint counsel has limited his appeal to the examiner's dismissal of the charge that respondent's differing prices to competing grocery store customers in Portsmouth and New Boston, Ohio, violated Section 2(a). Respondent has appealed from the examiner's ruling sustaining the charges of area price discriminations in Indiana and Michigan.

We turn first to a consideration of the appeal of counsel supporting the complaint from the examiner's holding that the alleged discriminations between respondent's competing grocery store customers in the adjoining communities of Portsmouth and New Boston, Ohio, were not made in interstate commerce. At the outset, it is to be noted that complaint counsel does not take issue with the examiner's finding that milk which is sold by respondent to grocery stores physically located in these communities is produced in Ohio and is processed in and delivered from respondent's Portsmouth plant.

The facts upon which complaint counsel rests his argument are as follows. Schaefer Supermarkets, a chain store organization, has three stores located in Portsmouth and one in Jackson, Ohio, served by Borden's Portsmouth plant. In addition, this chain has one store in Hillsboro and one in Ironton, both communities located in Ohio. There is testimony that both of these latter stores handle "Borden products." However, the evidence further establishes that one of these two stores, not identified, sells Borden milk and ice cream while the other handles only Borden ice cream, a product not covered in complaint counsel's agreed specification of charges. With further reference to the Schaefer stores in Ironton and Hillsboro, there is testimony that one of these stores is served by Borden's Huntington, West Virginia, plant.

Respondent concedes that Schaefer Supermarkets was granted a discount ranging from 10% to 12% from the prices established and published by the Borden Portsmouth plant for sales to grocery store customers from that plant. This discount applied to all six Schaefer stores and was higher than the discounts granted by respondent to its other grocery store customers in Portsmouth and New Boston.

The specification of charges relied upon by complaint counsel provides, in part, that "Respondent discriminated in price in its sales to grocery store customers in Portsmouth, Ohio, and New Boston, Ohio, by its Portsmouth, Ohio, plant as between such grocery store customers." It is complaint counsel's contention that the examiner erred in restricting his findings to the three Schaefer stores located in Portsmouth. He argues that Schaefer Supermarkets, as an organization embracing all six stores, is a grocery store customer within the meaning of the specified charge. Moreover, it is his contention that the evidence supports a finding that a sales agreement was entered into between the Schaefer representative in Portsmouth and the manager of Borden's Portsmouth plant which established the prices to be paid for milk by all six Schaefer stores. It is his position that the sales agreement "insofar as it involved the transportation of respondent's products from Huntington, West Virginia, to the Schaefer store at Ironton or Jackson, Ohio, were sales to a grocery store customer in Portsmouth, Ohio, made in the course of interstate commerce." [3]

Complaint counsel's argument fails for several reasons. Although the Schaefer representative testified unqualifiedly that Schaefer dealt directly with respondent's Portsmouth plant with respect to "discounts or prices," he denied on cross examination that Schaefer dealt with respondent's Portsmouth plant with respect to prices paid at Hillsboro and Ironton. This is the only witness who testified as to prices and discounts applicable to the Schaefer stores. The over-all effect of his testimony does not support the finding urged by complaint counsel that a sales agreement with the Schaefer store served by respondent's West Virginia plant was negotiated by the Portsmouth plant. Moreover, although the record contains Borden's Portsmouth plant milk price lists for sales to its grocery store customers, there is no evidence as to prices charged grocery store customers by the Huntington, West Virginia, plant. Thus, even assuming that the Schaefer store in Hillsboro or Ironton obtained milk from the Huntington plant, a fact which is not clearly established, the net price paid by that store is unknown.

Under the circumstances, complaint counsel's argument must be rejected. We find, however, that the examiner was in error in ruling that Borden's sales from its Portsmouth, Ohio, plant were not in interstate commerce within the meaning of Section 2(a).

Although concluding that the varying prices charged different competing retail store customers in the adjoining Portsmouth and New Boston, Ohio, communities did not constitute a violation of the statute for the reason that the product involved was not shipped across state lines, the examiner made certain findings which are sufficient to establish probable injury to certain of respondent's grocery store customers in these communities as a result of such price differences. The examiner's findings, however, relate to discounts granted

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[3] Appeal brief of counsel supporting the complaint, p. 5.

to only one of Borden's customers in Portsmouth, Schaefer Supermarkets, and do not reflect the full extent of respondent's discriminatory pricing between competing customers in this area.

Borden's Portsmouth plant publishes price lists which specify the prices at which it sells its products to grocery store customers. These prices are designated as "wholesale" prices and will hereinafter be referred to in that manner. Each time there is a price change, Borden issues a new price list. The record contains the price lists issued by the Portsmouth plant for the years 1959 and 1960, the period covered by the specification of charges. These price lists disclose that during the two-year period, the wholesale price of Borden's homogenized milk in half-gallon quantities ranged from 42 cents to 46 cents.

Four of Borden's largest wholesale customers in Portsmouth are chain store organizations. They are Schaefer Supermarkets, the A & P Tea Company, the Kroger Company and Albers Super Market. The Portsmouth plant serves three Schaefer stores, two Kroger stores, one A & P store and one Albers store, all located in Portsmouth. With the exception of Schaefers, each of these stores was granted a 12% discount from respondent's list prices on its purchases of fluid milk for the years 1959 and 1960. The three Schaefer stores received a 10% discount from January 1959 through March 1960. This discount was increased to 12% from April through December, 1960.

Applying the discount granted to these chain store customers to Borden's published wholesale prices, it can be seen that these stores purchased Borden milk in half-gallon quantities at about five cents less than the wholesale price, or at prices ranging from about 37 cents to 41 cents per half gallon.

Six owners of local, independent grocery stores located in Portsmouth, testified in support of the complaint. The stores of several of these witnesses are within two or three blocks of a Schaefer store and all six named Schaefer as a competitor. One of these owners who paid Borden's full wholesale prices in this two-year period, specifically named the four favored chain store customers as his competitors. In our view, this latter testimony accurately reflects the competitive situation and we conclude that all grocery stores selling in the Portsmouth city limits are in competition.[4]

Four of the six independent owners received a 5% discount, amounting to about two cents per half gallon, on their purchases of

[4] A representative of the Schaefer stores testified to that effect (Tr. 1124). A dealer receiving only a 5% discount from Borden stated that people "don't pay much attention to distance" and that people coming into his store tell him what the Albers stores, which, together with Kroger is located about ½ mile away, are charging (Tr. 1175).

Borden milk. Thus the price they paid for Borden milk in half-gallon quantities during this period ranged from 40 cents to 44 cents. The remaining two owners received no discount.

The testimony of these six witnesses establishes that milk carries about a 10% gross profit margin above list price. Therefore, the gross amount which these owners realized on the sale at retail of a half gallon of Borden milk averaged only a little more than four cents.

Two nonfavored purchasers testified that their net profit on milk was about 1½% which amounts to less than one-half cent per half gallon. In commenting on the importance of a discount, one nonfavored customer stated that without a discount milk was not a profitable item and that the 5% discount from Borden's wholesale price which he began receiving in September 1959 "puts me just about out to my overhead level."[5] Another testified that there isn't any profit in the sale of milk at retail and that in fact he sells it at a loss "if you figure refrigeration, the produce rack, what it costs to start with."[6] Another grocery store owner who received a 5% discount on his purchase of Borden milk stated, in answer to a question as to whether there would be any competitive advantage to an additional 5% discount:

> As I told you, we net one and a half percent; and if you got five percent discount on everything, that would increase your net automatically five percent if you sold at a regular going price. And it would be reflected in your selling price, which you could put into your net or you could put into advertising or various other expense items.[7]

In this market characterized by such low profit margins on milk, the retail price at which the favored chain store customers receiving the 12% discount regularly sold milk to the public was two cents less per half gallon than the retail price of Borden's other grocery store customers. The competitive advantage thus accruing as a result of this discriminatory discount is vividly reflected in the testimony of one of Borden's grocery store customers who receives no discount when, in answer to a question as to whether he competes with any of the chain stores, stated "No, we don't—we couldn't, don't try to." A store in the Schaefer chain receiving the 12% discount is located just two blocks from this owner. Upon further questioning, this owner stated that he is in competition in the sense that Schaefer is selling the same merchandise in the same area. We think it clear that the purport of this owner's testimony is that Borden's discriminatory

[5] William A. Wedebrook, Tr. 1153.
[6] Louis De Lotell, Tr. 1160.
[7] Glenwood Sparks, Tr. 1100.

discount effectively prevented him from competing with the favored customer in the sale of milk.

The testimony of the non-favored grocery store owners establishes that although milk is not regarded as a profitable item, it is an item which they must carry to remain in business. Moreover, three of these owners testified to the effect that it was necessary for them to carry *Borden* milk since their customers were used to it.

The evidence in this record establishes that for at least two years, the period of time covered by the specification of charges, respondent had continuously discriminated in price in its sale of milk to competing grocery store customers in Portsmouth. The unfavored purchasers operated on extremely small profit margins and price differentials of small amounts were important to their business. The discriminatory discounts granted by respondent to the favored chain store customers exceeded the gross profit margin of competing customers who received no discounts. Moreover, the price differences resulting from the substantial disparity in discounts granted by respondent enabled the favored purchasers to undersell their less favored competitors by an amount which represented about half of their gross profit margin. In at least one instance, this price difference effectively prevented competition between a favored and an unfavored purchaser. We find on these facts that the reasonable probability of a substantial adverse effect on competition required by Section 2(a) has been clearly established.[8] Of particular significance with respect to the difference in retail prices resulting from the discriminatory discounts is the holding of the Supreme Court in the *Morton Salt* case.[9] In that case, respondent sold its table salt to wholesalers and large retailers under a quantity discount system. The price difference as between carload and less than carload purchasers was ten cents per case. In answer to respondent's argument that the evidence was inadequate to support the Commission's findings of injury to competition, the Court stated:

> That respondent's quantity discounts did result in price differentials between competing purchasers sufficient to influence their resale price of salt was shown by evidence. This showing in itself is adequate to support the Commission's appropriate findings that the effect of such price discriminations "may be substantially to lessen competition * * * and to injure, destroy and prevent competition." *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 47 (1948).

In the view we hold, these price discriminations are those of the corporate respondent, The Borden Company, in the course of its

[8] *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956); *Mueller Co.* v. *Federal Trade Commission*, 323 F. 2d 44 (7th Cir. 1963).

[9] *Federal Trade Commission* v. *Morton Salt Co.* 334 U.S. 37 (1948).

interstate business in the sale of fluid milk. To require a showing of product movement across a state line to reach this respondent, as did the hearing examiner, evidences a technical approach to the jurisdictional requirements of Section 2(a) which ignores realities. It adds a jurisdictional requirement not provided by the statute which defines "commerce" simply as meaning "trade or commerce among the several states and with foreign nations * * *." In our opinion, sales by the Portsmouth plant as well as all other plants of The Borden Company come within the scope of this commerce requirement of the statute without regard to the question of whether or not milk processed in one of its local plants was shipped from one state to another. We turn, therefore, to a consideration of respondent's business activities as reflected in this record.

As found by the examiner, respondent is a New Jersey corporation, with its principal office located in New York City. It purchases raw milk which it processes into fluid milk and other dairy products which it sells to distributors, some of whom act as its agents in making deliveries, and to retailers and consumers. Its net sales for all products amounted to $931,220,662 in 1957; $915,024,172 in 1958; and $941,326,495 in 1959.

The present business organization of respondent company took place pursuant to a resolution of its board of directors in 1935. Thereunder, the president created supervisory units, referred to as districts, in various States. As of 1957–1958 nine such districts were in existence, the offices of which were strategically located throughout the country in the following cities: San Francisco, California, Chicago, Illinois, New York City, Tampa, Florida, Columbus, Ohio, Newark, New Jersey, Troy, New York, High Point, North Carolina, and Houston, Texas. Fluid milk processing or distribution points were located in twenty-nine States and in metropolitan New York City.

Some of the details of the operation of this interstate complex are stipulated in this record.[10] In summary, the chairman of each district reports to a vice president of the company who is located in the principal office in New York City. This vice president acts as liaison between the district chairmen and the president of the company. He counsels with the chairmen concerning policy problems and advises the president concerning the developments and progress of the various districts.

As further recited in the stipulation, the basic policy underlying Borden's operation of its fluid milk business is that "its management

[10] CX 220.

must be as decentralized as possible, leaving to each Chairman primary responsibility for the conduct of the business in his District. This includes matters pertaining to the day by day operations of the business, *i.e.* prices, products, production, distribution, employment, labor costs and the like." In this regard, it is stipulated that district chairmen delegate broad managerial responsibility to managers in charge of processing and distributing locations, including primary responsibility for prices, although "District offices have participated in negotiations concerning discounts for certain customers."

Each district pays its own operating expenses and is expected to make a profit and cover its expenses by its sales. Capital budgets, covering needs for new equipment, replacement of equipment and building improvements, are prepared by district offices and must be approved by the home office. Moreover, it is stipulated that "The manner in which District bank accounts and funds are handled is decided by the respective District offices. * * * The Districts make their own collections and make their deposits and disburse their funds. Each District has adopted and is following those procedures considered appropriate to most effectively utilize the funds which are required by them for their Districts operation. Funds in excess of the amount necessary for the operation of the Districts are transferred to the New York Office of the Company."

Respondent's position is, in effect, that its Portsmouth plant was merely one of several wholly local competitors engaged, with somewhat similar odds, in a purely intrastate struggle for market.

In determining the validity of this argument, we first consider the characteristics of a purely local transaction. Necessarily, they include supreme authority and responsibility of the plant manager (in his name or in the name of the stockholders of that particular plant) for decisions relevant to pricing and distribution of the product in question; the use of a wholly local war chest and advertising account, rather than the use of interstate resources for those purposes; the purveying of products under brand names of local derivation rather than products linked through a nationally known brand name to a giant interstate organization; and, perhaps, an element of risk connected with the survival of that plant in its competitive arena.

But the operations of Borden's Portsmouth plant do not include any of those characteristics. On the contrary, the Portsmouth plant manager, Mr. Dickson, is accountable to district and national officers of The Borden Company in his pricing decisions. From Mr. Dickson's testimony, we observe his superior, the sales manager of Borden's Midwest district—comprising part or all of eight States—negotiating between Dickson and the favored customers,[11] carrying with him the full weight and reputation of The Borden Company itself. Indeed, the inference is clear that discounts received by two national chains, A & P and Kroger, were determined on the basis of over-all interstate business operations of Borden's Midwest district. In our view, Mr. Dickson's negotiations were "autonomous" only to the extent that they coincided with policies arrived at in Borden's national and district offices, and transmitted through their district representative.

We see throughout the record an established practice in Borden's nationwide operations of reassignment from plant to plant and state to state of plant supervisory personnel.[12] Thus was the interstate homogeneity of Borden's practices and policies reinforced, and the integral relationship of the various Borden plants to the national office maintained. The Portsmouth plant could not have escaped this homogenizing influence; one can hardly imagine Mr. Dickson retaining his appointment very long, had he traveled a different road from that of the Borden central office, and the other Borden plant managers.

We find in Borden's Portsmouth operations a well-established practice of selling concurrently under the same label milk and related milk products—many of which, such as cottage cheese and butter, customarily were produced and transported in a vast interstate network—such that the latter supplemented and enhanced the sales of the former.[13] Such distribution of nationally known brand name milk products would be especially valuable in helping to subsidize large price concessions for milk, as would be necessary in order to undercut and drive out competition from truly local milk producers.

The Portsmouth plant distributed products under nationally advertised brand names, such as "Borden" and "Elsie,"[14] for which advertising expenses were covered in whole or in part by district or national treasury. Throughout the two-year period of the price discriminations involved in this case, the Portsmouth plant distributed some of its milk across State lines into Kentucky—where, inciden-

[11] Mr. Dickson's reply concerning negotiations resulting in the 12% discount granted A & P indicate his minimal role:

"Q. You yourself took part in arriving at this discount which was allowed A and P on its fluid milk purchases; is that correct?

"A. To some extent."

[12] For example, the General Manager of the San Antonio plant was previously assigned to Borden plants in Corpus Christi, Oklahoma City, Biloxi, Waco, and Baton Rouge. Tr. 302. The Assistant General Manager of the Hammond, Indiana, plant was previously assigned to a Borden plant in Danville, Illinois, and before that in Hammond. Tr. 607.

[13] For example, cottage cheese produced in Chicago and butter produced in Iowa moved into plants located in other states within the Midwest district, which also supervised the Portsmouth plant. Tr. 610.

[14] Tr. 1016.

tally, prices remained higher than those paid by the plant's favored customers in Ohio,[15] thus adding to the treasury of profits from six other States which enabled Mr. Dickson and his district manager to grant the especially large discounts (on an already low-profit item) in favor of certain large chains and in prejudice of less powerful customers.

Finally, the Portsmouth plant was in a position of financial security far superior to the resources of the plant itself, capable of drawing upon the interstate credits of The Borden Company to sustain itself over a period of loss sufficient to break strictly local competition.

None of these elements of commerce would have been available, over the sustained period of the Portsmouth plant's discounts, to a truly autonomous operation, one independent of an interstate network. It was *because* of, not in spite of, the Portsmouth plant's filial relationship to the family of Borden establishments that Mr. Dickson and his district supervisor were able to negotiate on an interstate basis with A & P and Kroger, and it was because of this relationship that the plant was able to underwrite the exceptional concessions advanced to their five favored customers in order to gain advantage in those chains.

> 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. * * * 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. *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 119 (1954).

This is the way price wars are fought nowadays. This is how a company, through one of its plants, gains leverage with large and powerful chain stores such as A & P and Kroger. This is how concentration is built. We find here precisely the sort of commercial warfare which the Supreme Court condemned in the *Moore* case.

It is precisely this sort of commercial warfare which, indeed, the Robinson-Patman Act was designed to prevent. When that Bill was before the House, its intended prohibition against the very sort of price discrimination which this case now brings before us was described by its floor manager, Representative Utterback:

> Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other;

[15] CX 210–213.

he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. The Federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the State, and to protect interstate commerce itself from injury by influences within the State. 80 *Cong. Rec.* 9417.

Respondent's apparent belief that the Portsmouth plant ought not be considered an integral part of a vast interstate system of distribution responsible ultimately to one central office, management, and group of stockholders, simply because one of the products it delivers to five of its many customers was not delivered to them across state lines is entirely unrealistic, based upon a technical interpretation—or misinterpretation—out of phase with the realities of modern enterprise.

The courts have indicated that the words "in commerce" should not be so limited by construction as to defeat the purpose of Congress, but should be interpreted in a manner consistent with their practical meaning and effect in the particular situation.[16] In our opinion, respondent would indeed defeat the purpose of Congress with its apparent view that an establishment of an interstate corporation which is horizontally integrated somehow accumulates thereby a degree of independence further than or different from that possessed by an establishment of an interstate corporation which is vertically integrated. The fact is that neither structure of integration necessarily achieves greater autonomy for its units than the other. The choice of structure is largely a function of the type of product handled, rather than the degree of independence desired.

Where the cost of transporting raw materials is a significant element of finished product cost, and especially where perishability is a considerable factor, food processors often find horizontal integration—*i.e.*, widely spread, small, full processing plants servicing relatively confined areas—to be the most economical means of production and distribution. Such a system requires somewhat greater responsibility on the part of the unit managers, in view of the wider range of production functions and of local considerations involved. But this does not imply any greater detachment of such an operating unit from the parent corporation.

[16] "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business * * *." *Swift and Co.* v. *United States,* 196 U.S. 375 (1905).

As far back as 1824, Chief Justice Marshall, in rejecting an argument that commerce is limited to "buying and selling or the interchange of commodities" stated: "Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons* v. *Ogden,* 22 U.S. 1 (1824).

Cf. Federal Trade Commission v. *Cement Institute,* 333 U.S. 683, 696 (1948).

When The Borden Company decided in 1935 to process and distribute milk on a decentralized basis, it did so out of the necessities imposed by the nature of the product upon managerial flexibility and efficiency and the means of achieving it. To do otherwise in such a product situation would be to foreclose the possibility of a giant multistate enterprise in the field of milk processing. Obviously, however, the company did not intend thereby to delegate essential attributes of control, finance, policy, and product identification. On the contrary, since that time each individual plant has striven alongside the others and alongside the head office to create in the public mind an image of one particular group of products, traveling under a nationally promoted brand name; products which, as far as members of the public are concerned, look the same and taste the same in Wampum, Pennsylvania, and Eureka, California, as they do in Portsmouth, Ohio. Together they have sought and they have succeeded in achieving an identity between the Borden products, distributed coast to coast, and each plant of the Borden matrix which produces them. These are not the products of each individual plant, but the products of the entire enterprise.

To become preoccupied with the physical aspects of a single series of transactions within such a large and powerful organization as The Borden Company is to miss the point entirely.[17] Recognition of the economic characteristics of the large, modern enterprise requires reorientation of our views concerning the commerce question. The attributes of the modern corporation are imparted to the products sold by it. In modern markets a product may become inseparable from the firm producing it.

As we have already seen, The Borden Company's organizational structure is similar to that of many large, multistate enterprises. Decentralization of decision making authority may be an imperative of successful large-scale business. To do otherwise is to invite managerial inflexibility and inefficiency. But such decentralization does not change the fundamental fact that ultimate decision making authority rests with top management, that decisions of particular units must conform or be consistent with the broad policy objectives of central management, that a particular unit's financial, managerial, technological, advertising, and other merchandising activities and capabilities are expanded or constrained by its affiliation with an organization composed of a large number of units. Simply put, each product sold by such a company takes on added market dimensions

[17] "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." *United States v. Southeastern Underwriters Assn.*, 322 U.S. 533 (1944).

because it is an integral part of the whole company. As a result, products sold by the large concern are truly products of the entire enterprise, not just the product of each local plant which happens to manufacture and distribute it. These economic characteristics of the large, modern, multistate corporation make archaic reliance on purely physical concepts when determining whether a product is in commerce. A product is in commerce when the forces establishing its price structure or distributional policy cross state lines. Since it is impossible to divorce The Borden Company and its products, if The Borden Company is in commerce so must be all of its products. Recognizing these facts of modern economic life makes it unrealistic to rely on a purely physical conception of commerce.

Applying these principles to the facts before us, we hold that sales of fluid milk by the Portsmouth plant to competing grocery store customers in Portsmouth were sales by The Borden Company in interstate commerce within the meaning of Section 2(a) of the Clayton Act, as amended. Accordingly, the hearing examiner's ruling on this issue will be set aside. Our order will prohibit respondent from the future use of discriminatory pricing practices in its sales to competing purchasers.

In reaching this decision, we are not unmindful of the decision by the court of appeals in the *Willard Dairy* case.[18] However, from a close scrutiny of the court's opinion in that case, we find no indication that the court in reaching its decision had before it such information as is present in this record, including, among other things, the details of the organizational structure of the corporate respondent and the fact that the discriminatory discounts were not the result of independent action by the manager of a local plant but were determined through negotiations with the chairman of an eight state region who had primary responsibility for pricing.[19]

[18] *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934. In this case, petitioner with a local plant in Ohio sued for treble damages under Section 2(a), charging that respondent cut the price of milk in petitioner's area in sales from Shelby, Ohio, while not cutting prices elsewhere in Ohio. The District Court's action in sustaining respondent's motion for summary judgment was affirmed by the Circuit Court on the grounds that respondent's sales from its Shelby plant "were purely intrastate transactions, not interstate in character, as is necessary to impose liability under the Robinson-Patman Act."

[19] Aside from these differences, we do not regard the Supreme Court's denial of certiorari in the *Willard Dairy* case as having any substantive significance. As stated in a memorandum of Mr. Justice Frankfurter, joined in by Mr. Justice Harlan, in *Elgin, Joliet & Eastern Railway Co.* v. *Gibson*, 355 U.S. 897 (1957):

"Although the Court has definitively decided that a denial of a petition for certiorari carries no legal significance, *Brown* v. *Allen*, 344 U.S. 433, 489–497, the bar, in briefs, and lower courts, in their opinions, continue to note such denials by way of reinforcing the authority of cited lower court decisions. It has therefore seemed to me appropriate from time to time to emphasize through concrete illustrations that a denial of certiorari does not imply approval of the decision for which review is sought or of its supporting opinion."

We next consider respondent's appeal from the examiner's ruling that it had engaged in area price discriminations as among grocery store customers in four communities in Indiana and Michigan, resulting in injury to competition between respondent and its competitors. Respondent's principal arguments are that the price differentials found by the examiner did not have the required anticompetitive effect and that it reduced its prices in three of these communities (South Bend and Elkhart, Indiana and Sturgis, Michigan) in good faith to meet the equally low prices of its competitors.

We agree with respondent that the evidence is not sufficient to support the examiner's finding that the effect of its lower prices in South Bend, Elkhart and Sturgis may be substantially to lessen competition and to injure, destroy or prevent competition between respondent and its competitors in those areas.

The examiner's finding of a violation is based on respondent's lower prices in sales to grocery store customers for periods of two, seven and nine days in Sturgis, fourteen days in South Bend and twelve days in Elkhart, all occurring in the year 1958. The evidence in support of the alleged anticompetitive effect of these lower prices consists principally of the profit and loss statements of two of respondent's competitors in South Bend, two in Sturgis and one competitor in Elkhart, for the year in which these lower prices occurred. These statements show losses in 1958 for the two competitors in South Bend and the two in Sturgis and a profit for the competitor in Elkhart.

It is established in this record that price wars occurred in the sale of milk at wholesale throughout 1958 in all three of these communities. In Sturgis, these price wars were taking place prior to respondent's entry into the market in June 1958. Respondent's competitors in these communities, including those whose profit and loss statements were introduced, had all participated in these price wars, raising and lowering their wholesale prices as the market changed. The examiner, after finding that factors other than respondent's prices contributed to the losses of the competitors who testified, concluded that respondent's prices contributed in a material way to these losses. On this basis, he ruled that a violation had been established. We cannot agree. The losses of these competitors took place over an extended period of time whereas respondent's lower prices were for only a few days' duration. We agree with the examiner that circumstances may be shown from which it can be reasonably concluded that sporadic price discriminations of short duration would be likely to lessen competition. However, the circumstances of losses of profit by a few competitors for a year in which respondent's discriminations lasted only a few days is not sufficient basis to predicate a finding of probable substantial injury to competition required by the statute.

Although we reject the examiner's finding of a violation as a result of Borden's discrimination in prices as in favor of grocery store customers located in South Bend, Sturgis and Elkhart, we are of the opinion that the proof fully supports his finding of a violation as a result of respondent's lower prices in the Walkerton area.

The examiner found that respondent sold milk in half-gallon containers from its Hammond, Indiana, plant to the A & P store in Walkerton during the period January 10 through January 16, 1958, for 22.2 cents and that its price to this customer was 9.2 cents per half gallon for the period January 16 through January 23, 1958. With respect to these sales, he found that the Hammond plant billed the A & P central office in Chicago, Illinois, for payment. Since no negotiations or sales contracts were entered into between the local Walkerton A & P store and respondent, the examiner concluded that all sales arrangements were made with the out-of-state sales office of A & P. He found therefore, that sales and purchases between respondent and the Walkerton A & P store were in interstate commerce. Respondent raises no objection to this finding in its appeal.[20]

The facts with reference to respondent's price discriminations in Walkerton are as follows. Quality Dairy, located in Walkerton, was owned by Samuel Frame and his son. They did no processing but purchased fluid milk from Borden's Hammond plant and from Reliable Dairy of South Bend, Indiana. The milk purchased from Reliable Dairy was packaged under the "Quality" label. Quality Dairy resold both Borden and "Quality" brand milk at wholesale to grocery stores and at retail to home delivery customers at prices which it established. In addition, Quality Dairy acted as respondent's agent in delivering milk to the A & P store in Walkerton, for which service it was paid by respondent.

On January 9, 1958, Nick's Super Market, a large locally owned and independent grocery store in Walkerton, reduced its price on "Dean" and "Quality" brands of milk from 29 cents to 25 cents per

[20] With further reference to the jurisdictional issue, the examiner also correctly found that respondent's Hammond plant receives daily about 40% of its raw milk from the Pure Milk Assn. in Chicago, Illinois, and that, during January 1958, it also obtained a substantial amount of raw milk from Pontiac, Illinois. This milk is processed daily and then delivered to customers. Although the examiner reached no conclusion with respect to these findings, we hold that these facts alone are sufficient to establish that sales by the Hammond plant were in commerce within the meaning of the Robinson-Patman Act. *Foremost Dairies, Inc.*, Docket No. 7475, 1963 [62 F.T.C. 1344].

half gallon, this price to be effective until January 15. At this same time, Quality Dairy was selling its "Quality" brand to Nick's at 37 cents per half gallon. Thus, Nick's was receiving no price support from Quality Dairy in reducing the price of "Quality" brand milk to the public. Samuel Frame testified that it was his duty to notify Borden's Hammond plant when there was a change in the out-of-store price of milk in Walkerton. He notified the Hammond plant of Nick's price reduction to 25 cents and on January 10, 1958, Borden reduced its price to the A & P store in Walkerton from 32.3 cents to 22.2 cents per half gallon.

On January 16, 1958, Nick's advertised half gallons of milk at 10 cents with each $5 purchase of groceries. Frame again notified the Hammond plant. This time, he was visited by three representatives from the plant. Frame testified that he was told by these representatives that "they [Borden] had to keep the A & P competitive" and that the Hammond plant would sell to the A & P store at a price which would permit A & P to sell at 10 cents per half gallon. Moreover, these Borden representatives told Frame that he would have to resell half gallons of Borden milk at a price of 10 cents to his own grocery store customers. The Frames objected to these prices on the grounds that "we had retail routes and we had other wholesale routes outside of town a few miles that would have been affected by that. We didn't like to tear up our retail routes because we knew if we lost customers that we would never get them back." [21] The Borden representatives met this objection by telling Frame that if Quality Dairy would not resell Borden milk to its grocery store customers at the 10 cent price, Borden itself would sell to Quality's customers at that price. Frame then agreed to and did sell Borden milk to all of his grocery store customers except Nick's at a price of 10 cents per half gallon. Frame testified that Nick's had previously purchased Borden milk from him but had discontinued because "of the way that A & P was manipulating the price."

On January 16, 1958, when Nick's first offered half gallons of "Quality" brand milk to the public at 10 cents and Quality Dairy began selling Borden half gallons to its grocery store customers at that price, respondent reduced its 22.2 cents per half-gallon price to the Walkerton A & P store to 9.2 cents. This 9.2 cent price lasted for seven days and was concededly below respondent's cost. During this seven day period, respondent paid Quality Dairy, as its agent, 7 cents per half gallon for delivering Borden milk to the A & P store.

[21] Tr. 981.

Throughout the period from January 9, 1958, to January 23, 1958, Borden's Hammond plant which was selling half gallons of milk to the Walkerton A & P store at prices of 22.2 cents and 9.2 cents, was selling half gallons to independent grocery store customers in South Bend, Indiana, at 33.5 cents. [22] At no time in this period did Quality Dairy reduce its one half-gallon price of 37 cents on "Quality" brand milk to its grocery store customers in Walkerton, including Nick's Supermarket, which was thus unaided in its special sales offers.

These facts clearly establish that respondent discriminated in price in its sales of milk to the A & P store in Walkerton. The issue, however, as presented by respondent, is whether the hearing examiner erred in his conclusion that this discrimination had the required adverse effect on competition between respondent and its competitors.

Frame testified that in the weeks previous to January 16, 1958, Quality Dairy had been averaging 2,000 half gallons per week of its "Quality" brand and Borden's milk. During the week of the 10 cent price, Quality Dairy's sales increased to 11,000 half gallons. All of these sales were of Borden's milk, Frame testifying that he sold none of his "Quality" brand during that time. The week prior to its 22.2 cent price to the Walkerton A & P store, respondent sold that customer 392 half gallons of Borden milk. This increased to 1,691 half gallons during the period of the 22.2 cent price and to 2,196 half gallons during the week of the below cost price of 9.2 cents.

As noted, for the week of respondent's below cost price, Quality Dairy lost its entire wholesale business in the sale of "Quality" milk. At the time of the hearing, in August 1960, Quality Dairy had no wholesale business. In response to a question as to whether there was any connection between the fact that he no longer sold to grocery store customers and the price war in January 1958, Frame stated

> Well, people became so price conscious and stores thought that they had to have specials all of the time and they put pressure on the wholesalers to keep the price down. We could not compete with the prevalent wholesale prices there in town and make any money.[23]

In addition to losing his wholesale business, Frame stated that during the week of Borden's 9.2 cent price, Quality Dairy lost about one-third of its door-to-door customers. He stated that some of these home delivery customers became "price conscious," started buying at stores and "never came back."

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[22] CX 181 (*in camera*).

[23] Tr. 986. Respondent contends that purchasers become price conscious only as a result of general competitive conditions over a long period of time. This is directly contrary to the testimony of Frame who related this price consciousness to the January prices. Moreover the evidence is not sufficient to determine competitive conditions in the sale of milk in Walkerton prior to January 1958.

In support of its contention that its pricing practices in Walkerton did not have the anticompetitive effect required by the statute, respondent argues that there is no evidence to suggest a permanent increase in respondent's market share or a decrease in the market shares of its competitors whom it names as Quality Dairy, Glen Cook who was a distributor for Dean Milk Company, and New Paris Creamery, Inc. This latter concern was owned by an individual who also owned a number of dairy stores under the name of Burger Dairy Stores, one of which opened in Walkerton in November 1957. The only customer of New Paris Creamery in Walkerton was the Burger Dairy Store.

As previously set forth herein, the evidence clearly establishes a total loss in Quality Dairy's wholesale market share in the sale of milk in Walkerton as a result of respondent's below cost price supported by its requirement that Quality Dairy resell Borden milk in half-gallon quantities for 10 cents. Also, as will be discussed in more detail, it appears that the Dean Milk Company's distributor lost practically his entire wholesale business during this period. Respondent's contention, however, that a market share loss must be permanent to establish anticompetitive effects contemplated by the statute is rejected. As we pointed out in answer to a similar argument by the respondent in *Forster Mfg. Co., Inc.*,[24] such a test "would necessarily look only to results that have already come to pass, and thus could never be satisfied until the damage had already been done." That evidence of such permanent injury to competition is not required to establish a violation of Section 2(a) was made clear by the Supreme Court in its holding in the *Corn Products* case [25] that:

> It is to be observed that § 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations "in their incipiency," before the harm to competition is effected. It is enough that they "may" have the prescribed effect.

A continuation of the price discrimination here present, involving sales below cost, most assuredly would effect a permanent decrease in the market shares of respondent's competitors.

Respondent next argues that losses of sales or profits by particular competitors do not establish the prohibited injury to competition. In support thereof it cites the court's statement in *Atlas Building Products Co.* that "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise." [26]

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[24] *Forster Mfg. Co., Inc.*, Docket No. 7207, January 3, 1963 [62 F.T.C. 852, 888].

[25] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 766 (1945).

[26] *Atlas Building Products Co.* v. *Diamond Block and Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959).

The facts establish that, in addition to New Paris Creamery which sold only to the Burger Dairy Store, respondent had two principal competitors in the sale of fluid milk to grocery stores in Walkerton, namely, Quality Dairy and Dean Milk Co. (through its distributor, Cook). Particularly appropriate to this market, therefore, is the examiner's conclusion that where there are a few competitors, an effect on one would be reflected in the strength of competition generally. Such a market condition falls squarely within the further language of the court in the *Atlas* case when it commented "For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor."

We have previously noted that Quality Dairy sold none of its "Quality" brand milk during the week of respondent's 9.2 cent price. With respect to this week, Frame testified that Dean Milk Company did not change its price and did not sell any milk. Although raising no objection to this testimony at the time it was given, respondent contends that this was hearsay testimony, with nothing to indicate any factual basis for the statements. However, in a market of this size, with four grocery stores and a dairy store, we believe that it can reasonably be inferred that any dairy would have knowledge of its competitors' activities. Moreover, Quality Dairy's sales to grocery stores increased from about 2,000 half gallons to 11,000 half gallons of Borden's milk exclusively in this one week. In a town with a population of about 2,500 there is little doubt that the only other competitor serving these stores, if not completely shut off, certainly suffered a tremendous decrease in sales. In our view, Frame's testimony supports a finding of a substantial diversion of sales of Dean Milk Company as a result of respondent's discriminatory price.[27]

Respondent also contends that sporadic and temporary price reductions cannot cause the type of injury to competition which Section 2(a) seeks to prevent. The short answer to this is that the effect of respondent's price discrimination in Walkerton went beyond the requirements of the Act and resulted in actual injury to competition. Quality Dairy, one of only three competitors (including New Paris Creamery) had not recovered any of its wholesale business two years after respondent's discriminatory prices. Moreover, Frame's fears, voiced to respondent's representatives, that Quality Dairy would lose

[27] "In proceedings before the [National Labor Relations] Board, such hearsay testimony, where it is the kind 'on which reasonable men are accustomed to rely in serious affairs,' is admissible and may be the basis of valid findings and valid orders made by the Board; for 'it is only convincing, not lawyers' evidence which is required,' evidence 'such as a reasonable mind might accept, though other like minds might not do so.'" *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F. 2d 919, 930 (2d Cir. 1942).

home delivery customers as a result of respondent's lower price were realized. One-third of these customers were lost permanently.

Even disregarding this actual injury, we find respondent's argument to be without merit. Respondent's price of 9.2 cents per half gallon was below its cost of raw milk and was specifically intended "to keep the A & P competitive." This price was determined as a result of an offer by a local grocery store, below its cost, of milk at 10 cents a half gallon tied in with the purchase of groceries. Moreover, we think the evidence supports a conclusion that respondent's price was determined with complete disregard for the prices of its competitors. Thus, as we have previously noted, upon being advised by Frame of Nick's 10 cent price, three representatives of Borden's Hammond plant called on Frame. Frame objected to selling Borden milk at the 10 cent price because of the possible effect on his business, until these representatives stated that they would handle it at this price themselves. At that time, Frame's price of its "Quality" brand milk to Nick's and to his other wholesale customers was 37 cents per half gallon. It is inconceivable that Frame, in objecting to Borden's proposal, did not inform Borden's representatives of his price, that he would maintain this price, and that Nick's was receiving no support from him in its special one week offer.

Although the evidence does not support a finding that respondent lowered its price with the intention of putting its competitors out of business, the conclusion is inescapable that respondent's price reduction was made with full knowledge that its competitors would not and, in fact, could not meet that price and remain in business. Coupled with this knowledge is the fact that respondent's discriminatory price cannot be regarded as an isolated instance. Frame was advised by the Borden representatives that it was their intention to keep the A & P in Walkerton competitive with other grocery stores. Obviously to accomplish this purpose, it was Frame's duty to report any change in the out-of-store price of milk in Walkerton to Borden's Hammond plant. In both instances of record in which Frame reported such changes, *i.e.*, Nick's Supermarket's reductions to 25 cents and 10 cents per half gallon, respondent promptly reduced its wholesale price to A & P to 22.2 cents and 9.2 cents, respectively. In our view, these facts evidence a continuing policy on the part of respondent to cut its prices in Walkerton at any time Borden milk was undersold by a competitor of a customer. We fully agree with the examiner's conclusion that "when they [price discriminations] are resorted to from time to time to suit the purposes of a seller, their continued use, even intermittently, does constitute a danger to competition."

Moreover, we think the following language of the Supreme Court in *Sun Oil* [28] with respect to competitive effect applies with equal force to the "struggle" between competing sellers here involved:

> To allow a supplier to intervene and grant discriminatory price concessions designed to enable its customer to meet the lower price of a retail competitor who is unaided by his supplier would discourage rather than promote competition. So long as the price cutter does not receive a price "break" from his own supplier, his lawful reductions in price are presumably a function of his own superior merit and efficiency. To permit a competitor's supplier to bring his often superior economic power to bear narrowly and discriminatorily to deprive the otherwise resourceful retailer of the very fruits of his efficiency and convert the normal competitive struggle between retailers into an unequal contest between one retailer and the combination of another retailer and his supplier is hardly an element of reasonable and fair competition.

In contrast to the operations of Quality Dairy, which were limited to the local Walkerton area respondent's Hammond plant serviced parts of three States. Its low Walkerton prices were backed not only by proceeds from sales in other areas by the Hammond plant but also by District funds and the corporate treasury. With this economic power, it is obvious that respondent could maintain its low prices for a period of time far beyond that of its local competitors. The effect of this power was recognized by the court in *Atlas Building Products Co., supra*, in its comment that "And, we know that market power is a ready means toward competitive injury." See also *Moore v. Mead's Fine Bread Co., supra.*

The court in *Anheuser-Busch, Inc.*,[29] cited by respondent in support of its argument that temporary price reductions cannot have the required adverse competitive effect, held that the application of the incipiency doctrine [30] required a projection to ascertain the future effect of that company's price reductions. In substance, the court found that Anheuser-Busch was "using its competitive power fairly in the market place and respecting the rights of others" and thus concluded that no forecast of future adverse effects on competition was valid. The facts in this case establish that Borden, through its below cost price, was using its competitive power unfairly and doing so in utter disregard of the rights of others. The forecast is obvious. We are in full accord with the hearing examiner's statement that "Since the function of the Federal Trade Commission is to prevent future uses of discriminations which may lessen competition, it seems appropriate that discriminations which, by their nature and amount,

[28] *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505 (1963).
[29] *Anheuser-Busch, Inc. v. Federal Trade Commission*, 289 F. 2d 835 (7th Cir. 1961).
[30] *Corn Products Refining Co. v. Federal Trade Commission, supra.*

weaken the competitive strength of local dairies should be prohibited."

Respondent also objects to the scope of the order entered by the examiner, contending in particular that the order should be limited to the operations of the offending plant. We considered this same situation in the *Foremost* case,[31] where the violation found resulted from the pricing practices of Foremost in Albuquerque, New Mexico. In extending our order in that case to cover all geographic markets, we pointed out that the record revealed nothing peculiar or unique about Foremost's operations or competitive conditions in Albuquerque which would justify limiting the order to that area. This record is likewise devoid of such evidence as to respondent's operations. In fact, the Hammond plant is but one of a number of plants in respondent's multi-state Central Division. This Division is but a supervisory unit of The Borden Company. To limit the order to the operation of the offending plant under these conditions would be completely unrealistic.

As we stated in Transogram Company, Inc.,[32] in commenting on the purpose of an order to cease and desist: "It does mean that our objective in drafting orders must be to restrain unlawful acts and practices 'whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past.' " From this record, it appears that The Borden Company grants price concessions whenever it has deemed it expedient to do so during a price disturbance. On the evidence before us, it appears probable that respondent would react in any geographical area in the same manner as it did in Walkerton if informed of a price cut by a competitor of its customers.

In our view, the entry of an order preventing injury to competition as between respondent and its competitors in all geographical markets served by respondent is required to fully protect the public interest.[33] However, we believe that certain modifications are required in the hearing examiner's order to more clearly delineate the prac-

[31] *Foremost Dairies, Inc.*, Docket No. 7475, May 23, 1963 [62 F.T.C. 1344].

[32] *Transogram Company, Inc.*, Docket No. 7978, September 19, 1962 [61 F.T.C. 629].

[33] The order prohibiting injury to competition as between respondent's customers will also extend to all of respondent's geographic markets. *Foremost Dairies, Inc., supra.* In this connection, it is to be noted that respondent's price discriminations in favor of chain store customers were not confined to the Portsmouth area. As an example, the price at which respondent was selling in South Bend at the time of its low prices in Walkerton was its price to independent wholesale customers (CX 181–A). Although there is no evidence of competitive injury as a result thereof, the documentary evidence etablishes the existence of a lower price to a chain store customer, A & P, in South Bend at the same time (CX 149–B).

tices proscribed. Thus, our order on this issue will modify the examiner's order so as to relate only to price concessions to purchasers for resale in different trading areas. There is no evidence whatsoever with respect to respondent's pricing practices in its sale of fluid milk on home delivery routes. This method of distribution differs substantially from sales to purchasers for resale and, in our view, inclusion thereof in an order to cease and desist is not warranted on this record.

In framing the order, we are aware of the possibility that in a particular area, respondent's competitors may be selling fluid milk of a grade and quality similar to that of respondent's at prices which are lower than respondent is charging its customers in other areas. In order for respondent to be competitive, it must be allowed to sell at prices comparable to that of its competitors in the lower price area. Recognizing this, our order will contain a specific provision under which it will be made clear that respondent will not be prohibited from selling fluid milk to its grocery store customers in any area at a price which is not less than the regularly established prices of its competitors to their grocery store customers in that area.

As to periods of "price disturbances" where competitors vary from their regular prices, there is implicit in our order the Section 2(b) defense. This, of course, will permit respondent to reduce its price to a particular customer when done in good faith to meet the equally low price of a competitor's offer to respondent's customer.

On the basis of the foregoing, the appeal of counsel supporting the complaint is granted and respondent's appeal is granted in part and denied in part. An appropriate order will be entered.

Commissioner Anderson concurred in the result; Commissioner Elman dissented and has filed a dissenting opinion; Commissioner MacIntyre did not participate; and Commissioner Reilly did not participate for the reason that he did not hear oral argument.

Dissenting Opinion

FEBRUARY 7, 1964

By Elman, *Commissioner*, dissenting:

The Commission bases its finding of unlawfulness on only two of the charges made in the complaint. The first involves alleged secondary-line injury resulting from discriminatory sales from respondent's Portsmouth, Ohio, plant; the second involves alleged primary-line injury resulting from discriminatory sales in the town of Walkerton, Indiana. The other charges in the complaint are dismissed. Since I disagree that the Portsmouth and Walkerton charges have sustained, and agree that the complaint must be dismissed on the remaining grounds, I am constrained to dissent from entry of a cease and desist order against respondent.

I

With respect to the Portsmouth charge, there is an insuperable jurisdictional objection to entry of an order against respondent. Section 2(a) of the Clayton Act, as amended, states the jurisdictional requirement respecting "commerce" in three separate ways, and each of these variants of the commerce requirement must be satisfied. First, respondent must be "engaged in commerce"; second, the unlawful discrimination must occur "in the course of such commerce"; third, "either or any of the purchases involved in such discriminations" must be "in commerce". See, e.g., *Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 287 F. 2d 265 (7th Cir. 1961). (The second of these three requirements appears to add nothing to the first and third, and I shall not discuss it further.) Respondent is, without doubt, "engaged in commerce" within the meaning of the statute. As the Commission's opinion explains, respondent is a vast, sprawling, multi-state concern. It is not a series of discrete local concerns under common ownership, but an integrated, interstate corporation; and it makes interstate sales. However, unless the third commerce requirement of Section 2(a) is to be given no effect whatever, the Commission's burden of establishing jurisdiction cannot be discharged merely by a showing that respondent is an interstate concern or that it makes interstate sales not involved in the challenged discrimination.

It would similarly nullify the third requirement to hold that every sale made by a firm engaged in commerce is, for that reason alone, a sale in commerce. The language and scheme of Section 2(a) make plain that not all transactions by interstate businesses are subject to the statute, and what legislative history there is on the question supports this view.[1]

This does not mean that an interstate business may with impunity destroy its local rivals in piecemeal fashion through the "local" operations of its branches or divisions. That is the point made by the

[1] See H.R. Rep. No. 2951, 74th Cong., 2d Sess. 6 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936).

Commission in its opinion. However, while the point is a sound one, it is out of place in this case.

The authorities principally relied on by the Commission in its discussion of the commerce problem [2] are concerned with a classic instance of territorial price discrimination: that of the powerful seller who cuts prices in one locality while maintaining higher prices elsewhere, in order to coerce or destroy his rivals in the particular locality. In such a case, the essence of the unlawful conduct is the interstate seller's subsidizing his destructively low prices in one locality with profits obtained from the higher prices he is able to maintain elsewhere. Since his price cutting is sustained—"fed"—by his interstate business, it is proper to regard all of his interstate sales as "purchases involved in such discrimination". See Austin, Price Discrimination 17 (2d ed. 1959). Thus, if the Portsmouth charge involved injury at the seller's level, I would be inclined to agree with the Commission that *Willard Dairy Corp.* v. *National Dairy Products Corp.*, 309 F. 2d 943 (6th Cir. 1962), was distinguishable,[3] since the court in *Willard* did not direct its attention to whether the defendant's intrastate sales were being supported by its interstate business.

The Portsmouth charge involves, however, not injury to the seller's rivals through territorial discriminations, but injury to customers of the seller. In such a case, there is not the same nexus between sales made by a particular local division of the seller and the totality of his interstate business, and so no justification for interpreting the "any purchases" language to embrace such interstate business. While the focus in a primary-line case is on the aggrandizing tactics of the seller, in a secondary-line case it is on powerful buyers' demands for discriminatory price concessions; the seller's liability is based on his yielding to such demands. In a secondary-line case, then, it is in large measure immaterial to the basic purposes of the statute whether the seller is or is not a multi-state concern. The competitive injury is the same whether the seller's activities are predominantly local or predominantly interstate in character. There is accordingly no basis for interpreting "any purchases", in such a case, as including interstate sales not directly involved in the discrimination.

In short, the special character of a primary-line case warrants an expansive reading of the "any purchases" commerce requirement of

[2] *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115; 80 Cong. Rec. 9417 (1936) (remarks of Congressman Utterback).

[3] See p. 563 of the Commission's opinion; see also opinion of Mr. Justice Black, dissenting from denial of certiorari in *Willard*, 373 U.S. 934–36.

Section 2(a), so as to confer jurisdiction in circumstances where a seller uses his interstate business to support and make possible the infliction of injury on local rivals. In a secondary-line case, however, I find no justification for such a reading.

The results required by the foregoing analysis are not inconsistent with the policies behind the Robinson-Patman Act. On the one hand, interstate businesses were to be restrained from driving out their small local competitors by means of discriminatory pricing; this objective will rarely be thwarted by the commerce requirements of Section 2(a), since, as I have tried to show, the "any purchases" language may properly be read broadly in such a case. On the other hand, local sellers were to be exempt from Section 2(a) altogether, which, as a practical matter, means exempt from liability for secondary-line discriminations, since a local seller would rarely be powerful enough to inflict serious primary-line injury. Such "partial" insulation of the intrastate seller should tend to protect and foster small local businesses that must fight for their share of the market against established and dominant national concerns." *Sunshine Biscuits, Inc.*, F.T.C. Docket 7708 (decided Sept. 25, 1961), p. 9 (dissenting opinion) [59 F.T.C. 674,688], rev'd on other grounds, 306 F. 2d 48 (7th Cir. 1962). Congress may well have felt that decentralized interstate concerns, organized in units which sell wholly locally and not interstate, should similarly be exempt: hence the "any purchases" language of 2(a), which, as applied to secondary-line situations, exempts a multi-state concern such as the present respondent.

To be sure, determination of whether a particular sale of a multistate enterprise should be deemed local or interstate may involve close questions of judgment. In the present case, however, the discriminatory sales from respondent's Portsmouth, Ohio, plant seem clearly local in nature and without significant interstate incidents. The sales were negotiated in Ohio, and the product involved—milk—was produced, processed and delivered in Ohio for resale in Ohio.[4] To be sure, the manager of respondent's Portsmouth plant was acting pursuant to company policy in negotiating these sales, and respondent's regional manager may have played a part in these negotiations. But to conclude that such remote and tenuous interstate incidents suffice to establish jurisdiction under Section 2(a) would be tantamount to holding that all of the sales of a concern engaged in commerce are, therefore, in commerce—an indefensible result.

[4] Compare, e.g., *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 237–38; *Quality Bakers of America v. F.T.C.*, 114 F. 2d 393 (1st Cir. 1940); *Foremost Dairies, Inc.*, F.T.C. Docket 7475 (decided May 23, 1963), pp. 2–3, fn. 2 [62 F.T.C. 1344, 1360].

To sum up my views on the jurisdictional issue, the Commission demonstrates in its opinion that respondent is a large, multi-state concern engaged in, and making sales that are in, interstate commerce, and such a showing might well be sufficient to confer jurisdiction of primary-line allegations. The allegations at issue, however, involve the secondary line, and, consequently, the Commission's failure to demonstrate that other than predominantly local sales were directly involved in the unlawful discrimination is decisive.

II

I turn now to the question of whether the Commission has established that respondent's price discrimination in the Walkerton, Indiana, area caused competitive injury within the meaning of Section 2(a). In my opinion, there is a failure of proof on this issue.

Neither *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37, nor any other decision permits the Commission to dispense with proof of competitive injury. The contributions of *Morton Salt*, as I read the Supreme Court's opinion in that case, is that proof of competitive injury for Section 2(a) purposes depends not on the size of the challenged price discrimination (*i.e.*, price differential), but on its character. In *Morton* a relatively small discrimination was granted on a systematic and continuing basis to the detriment of small buyers. It was plain that if the size alone of the discrimination was to be decisive, Section 2(a) would be unworkable, since competition at the buyer's level could be destroyed by the cumulation of continuous, small discriminations on the part of the sellers. Safeguarding competition at that level, the Court recognized, meant protecting the long-run health of competition from the debilitating effects of prolonged price discrimination.

If the size of the discrimination is not decisive, neither is the fact that sales are diverted as a result of it. The concern of Section 2(a) is not to freeze the competitive *status quo* and require complete pricing rigidity, but to preserve the capacity to compete. Price discriminations are therefore unlawful only if they impair that capacity. Neither the size of the discrimination nor its immediate impact upon the sales of the affected firms will ordinarily provide a sufficient answer to the questions of whether their capacity to compete vigorously and effectively has been injured as the result of the discrimination.

The principle applies with equal force in primary-line as in secondary-line situations: it is the character of the challenged discrimination that should control. In determining such character in a primary-line context, a number of factors—going far beyond questions of the dollar amount or percentage size of the discrimination, or its immediate impact on sales—are relevant.[5]

If the proper focus of the competitive-injury requirement of Section 2(a) is as I have described it, then the evidence bearing on the Walkerton incident is clearly insufficient to support a finding of unlawfulness. For a period of one week, respondent, in response to a radical cut in the price of competing milk, to below-cost levels, by the largest grocery store in Walkerton, sold its milk to Walkerton retailers at a substantially reduced—indeed, below-cost—price. At the end of the week, prices returned to normal. It is difficult to see how such a temporary price cut, given in response to the "loss leader" conduct of a retailer selling a rival brand, seriously threatens the kind of long-run injury to the capacity to compete that Section 2(a) is designed to prevent. There is no suggestion that respondent was attempting to destroy or intimidate its rivals or, indeed, was doing anything more than reacting to the fluctuations of the market, and thus engaging in just such competitive conduct that federal antitrust policy seeks to foster. Standing alone, respondent's week of below-cost selling surely does not indicate a course of conduct calculated to injure rivals and harm competition generally.

This becomes clear if we consider the impact of such below-cost selling on respondent's competitors. The only evidence of any injury

[5] "Several indicia appear in the cases to *dispel* the existence of adverse competitive effects attributed to the seller's prices:

(a) Decline in the seller's own percentage share of the market, notwithstanding his price differentials.

(b) Minor over-all market position of the seller.

(c) Growth of the seller's competitors, in terms of their market shares, their absolute sales volume, or simply by their sales to full capacity.

(d) Prevalence of comparable price variations on the part of competitors.

(e) Inroads by sellers on each other's customers and/or customer switches among sellers.

(f) Ease of entry by competing sellers into the pertinent market.

(g) Keenness of competition among the sellers, or over-all dynamism in the market.

(h) Competition by seller against strongly entrenched regional competitors.

(i) Aim by seller to improve his deteriorating market position, or temporary price experimentation to this end.

"Conversely, key indicia to *confirm* the existence of probable competitive impairment are:

(a) Monopoly or overpowering position of the seller in wider markets.

(b) Aggressive objectives toward smaller and weaker rivals.

(c) Deep, sustained undercutting of rivals' prices, or elimination of an *established* price spread between a 'premium' and a lesser product.

(d) Persistent sales below the seller's 'cost.'

(e) Actual or impending demise of a seller's sole rival in a particular market."

Rowe, Price Discrimination Under the Robinson-Patman Act 160–62 (1962).

to a competitor involves a single one of respondent's rivals, Quality Dairy, owned by the Frames.[6] Quality was not a milk producer like respondent, but a wholesale distributor, and it distributed respondent's milk as well as the milk of one of respondent's competitors, Reliable Dairy. During the week of respondent's price cutting, Quality sold only respondent's milk; it sold none of Reliable's milk. I find it difficult to see how a distributor is injured by a diversion of sales from one to another of the products it carries. If Quality sold no milk purchased from Reliable during the week in question, it sold much more milk overall than in a normal week's selling, and its profits for the week were apparently greater than normal. Respondent's price-cutting activity stimulated sales of respondent's milk, and thereby benefited Quality Dairy because Quality was a distributor of respondent's milk.

As to the ultimate fate of Quality Dairy subsequent to the week of respondent's below-cost selling, we know very little that is pertinent to the question of competitive injury. We do not know whether Quality went back to selling milk produced by Reliable. We do know that Quality eventually sold its wholesale business to respondent; but the reason that Quality's owner gave for the alleged decline of his wholesale business—that his customers became "price conscious" —does not, by itself, suggest that Quality's capacity to compete was impaired by respondent's conduct. There is some indication, perhaps, that respondent dealt unfairly or oppressively with Quality in Quality's capacity as a Borden distributor. But Section 2(a) is not designed for the protection of distributors from their suppliers, but of sellers (or buyers) from their competitors.

There is, in short, a dearth of evidence that respondent's price-cutting conduct affected the vigor, health or viability of any competitor. What the record should, but does not, contain is evidence respecting the consequences of respondent's price cutting on Reliable and other competing dairies. The Commission is obliged to rely entirely on evidence concerning Quality Dairy, which was not a dairy but a distributor, and was in the peculiar position of being a distributor for respondent as well as for respondent's competitors. As I have suggested, the evidence bearing on Quality's wholesaling activities falls short of demonstrating competitive injury.

[6] There was also some testimony that another competitor of respondent, Dean Milk Company, sold no milk during the week in question, but this testimony was far too nebulous and sketchy to support any inference as to the nature and extent of the injury, if any, caused to Dean's business by respondent's price cutting (see p. 569) of the Commission's opinion).

Final Order

This matter having been heard by the Commission upon cross-appeals from the hearing examiner's initial decision and upon briefs and oral argument; and

The Commission having determined, for the reasons appearing in the accompanying opinion, that the appeal of counsel supporting the complaint should be granted, that respondent's appeal should be granted in part and denied in part, and that certain of the hearing examiner's findings as to the facts, conclusions and order should be modified to conform to the views expressed in said opinion:

It is ordered, That the hearing examiner's initial decision be modified by striking the findings and conclusions beginning with paragraph 34 on page 543 and ending on page 549 and substituting therefor the findings and conclusions embodied in the accompanying opinion beginning on page 554 with the words "Borden's Portsmouth plant" and ending on page 572 with the words "should be prohibited."

It is further ordered, That the initial decision be modified by striking the order to cease and desist beginning on page 549 and substituting therefor the following:

> *It is ordered*, That respondent, The Borden Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate device, do forthwith cease and desist from discriminating, directly or indirectly, in the price of fluid milk of like grade and quality:
>
> 1. By selling such milk to any purchaser at a net price lower than the net price charged any other purchaser who competes in the resale of such milk with the purchaser paying the lower price.
>
> 2. By selling such milk to any purchaser in any trading area where respondent is in competition with another seller, at a price which is lower than the price charged any purchaser at the same level of trade in another trading area; *Provided, however*, That this shall not prohibit respondent from selling fluid milk in any trading area at a price which is not less than the regularly established price of any competitor in that area for fluid milk of comparable grade and quality.

It is further ordered, That the hearing examiner's initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, The Borden Company, a corporation, shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist set forth herein.

Commissioner Anderson concurring in the result, Commissioner Elman dissenting, Commissioner McIntyre not participating, and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

ROBERT A. JOHNSTON COMPANY

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

Docket 7739. Complaint, Jan. 12, 1960—Decision, Feb. 7, 1964

Consent order requiring Milwaukee manufacturers of biscuit products to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by use of a discount schedule based on the classification of its retailer customers into three categories: (1) independents operating one retail outlet, (2) chains, and (3) voluntary groups of independent stores banded together for buying and advertising, and permitting the purchases of all stores of a group to be combined for the purpose of computing the percentage bracket of the schedule to be granted; and by granting to chain stores taking delivery at their own warehouses a discount of 16 percent below the prices they charged other retailer purchasers receiving no discounts.

COMPLAINT

The Federal Trade Commission, having reason to believe that Robert A. Johnston Company, a corporation, has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Robert A. Johnston Company, hereinafter sometimes referred to as respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its headquarters and principal place of business located at 4023 National Avenue, Milwaukee, 1, Wisconsin.

PAR. 2. Respondent is now, and for many years last past has been, a manufacturer, seller and distributor of food products including biscuit products. Respondent's biscuit products which consist for the most part of cookies and crackers are manufactured at its plant in Milwaukee, Wisconsin.

PAR. 3. Respondent sells and distributes its biscuit products of like grade and quality to a large number of purchasers located throughout many States of the United States, for use, consumption and resale therein.

In the course and conduct of its said business, respondent is now, and for many years last past has been, shipping its biscuit products from the state in which they are manufactured to purchasers located in other states, in a constant current of commerce, as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent sells the vast bulk of its biscuit products to retail food dealers who, in turn, resell these products to the consuming public. Respondent classifies its retail food dealer purchasers into three categories. These categories are independents, chains and voluntary groups.

In the independent dealer category are those purchasers who own and operate one retail outlet. The chain category consists of those purchasers who own and operate more than one retail outlet. Voluntary groups are organizations comprised of a number of independently owned stores who band together for purposes of buying merchandise and advertising.

With regard to said chain and voluntary group purchasers, respondent in many instances makes deliveries in its own trucks directly to each separate store or outlet belonging to the chain or voluntary group. In other instances, respondent delivers its biscuit products to warehouses owned and operated by its chain category purchasers.

PAR. 5. In the course and conduct of its said business in commerce, respondent is now discriminating, and for several years last past has discriminated, in price in the sale of its biscuit products, in selling such products of like grade and quality to different and competing purchasers.

Illustrative of such sales at discriminatory prices are the following practices of said respondent:

(1) In those instances wherein respondent delivers its biscuit products directly to the stores or outlets of its retail food dealer purchasers, respondent is now using, and for several years last past has used, the following discount schedule in pricing its biscuit products of like grade and quality to such purchasers based on the quarterly volume of purchases of each such purchaser:

Quarterly purchases	*Percent of discount*
Less than $60	0
$60 to $104.99	2
$105 to $224.99	3
$225 to $299.99	4
$300 and over	5

Respondent makes the above stated discount schedule available to each category of its retail food dealer purchasers. However, in the case of its chain and voluntary group category purchasers respondent permits the purchases of all stores or retail outlets comprising such chain or voluntary group to be combined for the purpose of computing the percentage bracket of the above stated schedule that such purchasers are to be granted. As a result each of these chain and voluntary group purchasers is consistently granted the maximum discount of the above stated schedule even though in many instances the purchases of individual stores or retail outlets belonging to such chain or voluntary group standing alone would not be sufficiently large to qualify for that percentage bracket.

(2) In those instances wherein respondent delivers its biscuit products or causes its biscuit products to be delivered to warehouses belonging to retail food dealers within its chain category, respondent does not employ the discount schedule set out above but is now granting, and at least for one year last past has granted, such purchasers a discount of approximately 16 percent below the prices paid by its retail food dealer purchasers receiving no discounts on their purchases of respondent's biscuit products.

PAR. 6. Competition in the resale at retail of respondent's biscuit products now exists, and for several years last past has existed, between retail food dealer purchasers of respondent's biscuit products receiving no quarterly discounts from respondent and other retail food dealer purchasers receiving such discounts.

Competition in the resale at retail of respondent's biscuit products now exists, and for several years last past has existed, between retail food dealer purchasers of respondent's biscuit products receiving quarterly discounts from respondent computed under the higher brackets of respondents above stated discount schedule and retail food dealer purchasers receiving quarterly discounts computed under the lower brackets of respondent's same discount schedule.

Competition in the resale at retail of respondent's biscuit products now exists, and for at least one year last past has existed, between chain category purchasers of respondent's biscuit products receiving warehouse delivery of respondent's biscuit products and other retail food dealer purchasers of respondent's biscuit products receiving delivery of respondent's biscuit products at such purchasers' stores.

PAR. 7. The effect of the said discrimination in price by respondent in the sale of its biscuit products has been or may be substantially to lessen, injure, destroy or prevent competition:

(a) Between retail food dealer purchasers of respondent's products who receive discounts computed under the above stated schedule and competing retail food dealer purchasers who receive no discount;

(b) Between retail food dealer purchasers of respondent's products who receive discounts computed under the higher brackets of respondent's above stated discount schedule and competing retail food dealer purchasers who receive discounts computed under the lower brackets of respondent's same discount schedule;

(c) Between chain category purchasers receiving delivery of respondent's biscuit products at such purchasers' warehouses and competing retail food dealer purchasers receiving delivery of respondent's biscuit products at such purchasers' stores.

PAR. 8. The discriminations in price herein alleged are in violation of subsection (a) of Section 2 of the aforesaid Clayton Act.

Mr. Ernest D. Oakland supporting the complaint.

Mr. Edwin P. Wiley, and *Mr. David E. Beckwith* of Milwaukee, Wis., for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above named respondent on January 12, 1960, charging price discrimination in violation of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

On August 24, 1961, the parties filed with the Secretary of the Commission a notice advising him that they wished to avail themselves of the privilege of disposing of this proceeding by a consent order.

An agreement dated September 15, 1961, duly executed by the respondent, its counsel, and counsel supporting the complaint was, on October 2, 1961, referred to the undersigned because of proceedings in the matter theretofore had before him. Said agreement provides for the entry without further notice of a consent order and was duly approved by the Director of the Bureau of Restraint of Trade and by the Chief of the Robinson-Patman Act Division.

The hearing examiner finds that said agreement includes all of the provisions required by Section 3.25(b) of the Rules of the Commission, that is:

A. An admission by the respondent of jurisdictional facts;

B. Provisions that:

1) The complaint may be used in construing the terms of the order;

2) The order shall have the same force and effect as if entered after a full hearing;

3) The agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission;

4) The entire record on which any cease and desist order may be based shall consist solely of the complaint and the agreement;

5) The order may be altered, modified, or set aside in the manner provided by statute for other orders;

C. Waivers of:

1) The requirement that the decision must contain a statement of findings of fact and conclusions of law;

2) Further procedural steps before the Hearing Examiner and the Commission;

3) Any right to challenge or contest the validity of the order entered in accordance with the agreement.

D. In addition the agreement contains the following provision: A statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

Having considered said agreement, including the proposed order, and being of the opinion that it provides an appropriate basis for settlement and disposition of this proceeding; the Hearing Examiner hereby accepts the agreement but orders that it shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

The following jurisdictional findings are made and the following order issued:

1. Respondent Robert A. Johnston Company is a corporation existing and doing business under and by virtue of the laws of the State of Wisconsin, with its headquarters and principal place of business located at 4023 National Avenue, Milwaukee 1, Wisconsin.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

It is ordered, That respondent, Robert A. Johnston Company, a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of biscuit products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Discriminating, directly or indirectly in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who in fact competes with such unfavored purchaser in the resale and distribution of such products. "Net price" as used in this order shall mean the ultimate net cost to the purchaser.

Decision of the Commission and Order to File Report of Compliance

The Commission, on December 7, 1961, having stayed the effective date of the initial decision filed by the hearing examiner in this proceeding on October 19, 1961, which decision was based upon an agreement containing a consent order to cease and desist executed by respondent and counsel supporting the complaint pursuant to the Commission's Rules of Practice published May 6, 1955, as amended, and the Commission now having determined that the aforesaid decision should become the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner, filed October 19, 1961, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, Robert A. Johnston Company, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Commissioner Elman concurring in the result and Commissioner Reilly not participating.

In the Matter of

UNITED BISCUIT COMPANY OF AMERICA

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

Docket 7817. Complaint, Mar. 10, 1960—Decision, Feb. 7, 1964

Order requiring a manufacturer of biscuit products with headquarters in Melrose Park, Ill., to cease violating Sec. 2(a) of the Clayton Act by selling its products to some purchasers at higher net prices, arrived at through the use of volume discount schedules, than it charged others competing in the resale of the products with those so favored; and

Simultaneous consent order requiring said manufacturer to cease violating Sec. 2(d) of the Clayton Act by making payments to certain customers for advertising and promotional activities in connection with the handling of its products unless such payments were offered on proportionally equal terms to all other customers competing in the distribution or resale of the products.

COMPLAINT

The Federal Trade Commission, having reason to believe that United Biscuit Company of America, a corporation, has violated and is now violating the provisions of subsection (a) and subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

Charging a violation of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended, the Federal Trade Commission alleges:

PARAGRAPH 1. United Biscuit Company of America, hereinafter sometimes referred to as respondent, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 25th and West North Avenue, Melrose Park, Illinois.

PAR. 2. Respondent is, and for the last several years has been, engaged in the manufacture, sale and distribution of cookies and crackers (hereinafter referred to as biscuit products). It sells its biscuit products under its own brand name through its various divisions, one of which is the Sawyer Biscuit Company, located in Melrose Park, Illinois. Respondent does not employ jobbers or distributors but sells and distributes its products through its own sales force. Respondent delivers its biscuit products directly to the stores of its retail grocery customers in its own trucks.

Respondent classifies its retail grocery customers into four categories. These categories are corporate chain concerns, supermarket concerns, voluntary chain concerns, and independent grocery concerns. The corporate chain category includes those retail grocery concerns wherein there is central buying and control. The voluntary chain category includes those individually owned retail grocery concerns which utilize central buying facilities without control of the individual stores. The supermarket category includes those individually owned retail grocery concerns which operate more than one retail grocery store. The independent grocery category includes those individually owned retail grocery concerns which usually operate only one retail grocery store.

Respondent's net sales for 1958 were in excess of $135,000,000. A substantial part of that business consisted of sales of biscuit products.

Respondent manufactures, sells and distributes its biscuit products to retail grocery concerns and restaurants located throughout most of the United States, including Indiana and Wisconsin.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent is, and for the last several years has been, distributing and selling its biscuit products to buyers located in the several States of the United States, and has transported or caused such products, when sold, to be transported from its place of business, or warehouses, to buyers located in various other states. There is, and has been at all times mentioned herein, a continuous course of trade in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, in said biscuit products across state boundaries between respondent and buyers of said products. Said biscuit products are, and were, sold for use, consumption, or resale within the United States.

PAR. 4. In the course and conduct of its business, as aforesaid, respondent has, since July 1, 1958, and continuing to the present, discriminated in price between different purchasers of its biscuit products of like grade and quality by selling said products to some of its customers at lower prices than to other of its customers. The aforesaid discriminations in price have been effectuated through the use of respondent's cumulative volume discount systems based on the dollar volume of the customer's monthly purchases.

More particularly, during the period July 1, 1958, to June 30, 1959, the following cumulative volume discount schedule was utilized:

Monthly purchases	*Discount (percent)*
0 to $24.99	No discount
$25 to $39.99	2
$40 to $69.99	3
$70 to $99.99	4
$100 to $124.99	5
$125 and over	6

The cumulative volume discount schedule utilized from July 1, 1959, to the present is as follows:

Monthly purchases	*Discount (percent)*
0 to $24.99	0
$25 to $44.99	1½
$45 to $59.99	2
$60 to $74.99	2½
$75 to $89.99	3
$90 to $109.99	3½
$110 to $129.99	4
$130 to $149.99	5
$150 and over	6

These discounts or rebates are usually distributed by respondent to those customers qualifying therefor on a quarterly basis. However, some of respondent's major customers receive discount payments on a monthly basis.

In determining the amount of discount or rebate the customer is to receive, respondent allows corporate chain concerns and supermarket concerns to combine the purchases of their various outlets. As a result of this practice many of the individual stores of the chains and supermarkets receive larger discounts for their monthly purchases than they would otherwise receive if they were not allowed to aggregate their purchases with their other outlets.

In many instances respondent's independent grocery or voluntary chain customers, whose individual purchases from respondent are greater than the purchases of the individual outlet of the chain or supermarket with whom they compete, get no discount at all, or at best less than six percent, depending on their volume of purchases. These independent or voluntary chain customers purchase the same grade and quality products from respondent as do the chain and supermarket customers. In many instances the individual corporate chain store or supermarket store and the independently owned or voluntary chain store are located within a few blocks of each other, and are in active competition with each other for the consumer trade.

PAR. 5. In allowing and paying these discounts or rebates by means of its cumulative volume discount system, as hereinabove outlined and described, respondent has been for the past several years, and is now, discriminating in price between favored and non-favored purchasers of its biscuit products of like grade and quality, in commerce. The effects of such discriminations, as set forth herein, may be substantially to lessen competition in the lines of commerce in which the purchasers are engaged, or to injure, destroy or prevent competition between purchasers receiving the benefit of such discriminatory discounts and the purchasers not so benefited.

PAR. 6. The aforesaid discriminations in price by respondent by means of its cumulative quantity discounts or rebates, as hereinabove alleged and described, constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act, as amended.

COUNT II

Charging a violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended, the Commission alleges:

PAR. 7. The allegations set forth in Paragraphs One through Three, inclusive, of Count I of this complaint are hereby incorporated by reference and made a part of this Count as fully and with the same effect as if quoted here verbatim.

PAR. 8. In the course and conduct of its business in commerce, as aforesaid, respondent, during the period from July 1, 1958, to the present, has paid or authorized payment of money, goods or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such customers in connection with the processing, handling, offering for sale or sale of respondent's biscuit products and respondent has not made or offered to make such payments, allowances or consideration available on proportionally equal terms to all of its other customers competing with the customers so favored in the sale or distribution of said products.

PAR. 9. Illustrative of and included among the conduct alleged in Paragraph Eight, above, are the following acts and practices of the respondent:

(1) In accordance with the terms of an advertising plan put into effect by it, respondent has paid to some of its customers advertising allowances in the amount of 1% of the monthly dollar volume of sales to such customers. Under the terms of aforesaid advertising plan a customer must purchase a monthly minimum in the amount of $500 in order to qualify for any such advertising allowance.

Respondent has many non-preferred customers who compete in the distribution of respondent's biscuit products with customers of respondent who receive preferential payments, or the benefits of such payments, under the terms of aforesaid advertising plan. In many instances respondent has failed to make the terms of its advertising plan known to such non-preferred customers. Additionally, many such non-preferred customers purchase such products in monthly amounts of less than $500.

(2) In accordance with the terms of a sales promotion plan put into effect by it, respondent has paid to some of its customers promotional allowances in the amount of 1% of the monthly dollar volume of sales to such customers. Under the terms of aforesaid sales promotional plan a customer must purchase a monthly minimum in the amount of $150 in order to qualify for any such promotional allowance.

Respondent has many non-preferred customers who compete in the distribution of respondent's biscuit products with customers of respondent who receive preferential payments, or the benefits of such payments, under the terms of aforesaid sales promotion plan. In many instances respondent has failed to make the terms of its sales promotion plan known to such non-preferred customers. Additionally, many such non-preferred customers purchase such products in monthly amounts of less than $150.

PAR. 10. Respondent's acts and practices, as alleged in Paragraphs Seven, Eight and Nine, above, are in violation of subsection (d) of Section 2 of the aforesaid Clayton Act, as amended.

Ross, McGowan & O'Keefe, by *Mr. Roland D. Whitman* of Chicago, Ill., for respondent.

Mr. Cecil G. Miles, *Mr. Brockman Horne* and *Mr. Charles D. Gerlinger* supporting the complaint.

INITIAL DECISION AS TO COUNT I BY LEON R. GROSS, HEARING EXAMINER

FILED JULY 26, 1961

The hearing examiner hereby sustains respondent's motion of April 28, 1961, at the close of the Commission's case-in-chief to dismiss Count I of the complaint.[1] That motion is sustained for failure of the evidence to prove the competitive injury required to be shown under §2(a) of the Clayton Act, as amended (15 U.S.C. §13(a)). The hearing examiner is by separate order of even date disposing of respondent's motion of April 28, 1961, and letter dated July 19, 1961, regarding the possible disposition of the allegations in Count II of the complaint.

Commission counsel completed their case-in-chief on March 7, 1961. On May 19, 1961, respondent filed a brief in support of its motion to dismiss Count I. On June 16, 1961, Commission counsel filed their answering brief, and on July 17, 1961, respondent filed its reply to the Commission's brief. Introduction of evidence in support of the complaint has been completed, but findings of fact and conclusions of law have not been filed. Inasmuch as Count I of the complaint is being dismissed after the conclusion of the Commission's evidence, and respondent has, by its motion of April 28, 1961, and letter of July 19, 1961, indicated its willingness to negotiate a consent cease and desist order as to the practices complained of in Count II, no findings or conclusions other than those in this opinion need be filed by the parties.

The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding, and this proceeding is in the public interest. The complaint filed herein stated a good cause of action against respondent but the evidence adduced in support of the allegations of Count I has failed to prove that the effect of respond-

[1] A late Commission decision setting forth the basis for evaluating the evidence at this stage of the proceeding is in Docket 7000, Consolidated Foods Corporation, Opinion of Commission on Interlocutory Appeal, *CCH Trade Reg. Rep.*, par. 28,821.

ent's discount schedules "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition * * *" as alleged in the complaint.

Respondent, United Biscuit Company, a Delaware corporation, whose principal office and place of business is at 25th and West North Street, Melrose Park, Illinois, is engaged on a nationwide basis in the manufacture and sale of cookies, crackers, and biscuit products. Its operations are conducted through eight divisions in various geographical areas covering most of the United States. With minor exceptions, each division is exclusively responsible for the manufacture and sale of biscuit products within its respective area. Each division has its own discount policy and sets policies which vary from division to division. For the year ending December 31, 1959, respondent's gross sales were approximately $138 million, and the sales of its Sawyer Division accounted for approximately $12 million. The evidence adduced by Commission counsel, with immaterial exceptions, related solely to respondent's Sawyer Division. Different discount schedules were utilized by different divisions. From July 1, 1958, to June 30, 1959, respondent's Sawyer Division granted its customers cumulative volume discounts on their purchases as follows:

Monthly purchases	*Discount (percent)*
0 to $24.99	0
$25 to $39.99	2
$40 to $69.99	3
$70 to $99.99	4
$100 to $124.99	5
$125 and over	6

From July 1, 1959 to March 10, 1960 (date of issuance of complaint), it granted discounts as follows:

Monthly purchases	*Discount (percent)*
0 to $24.99	0
$25 to $44.99	1½
$45 to $59.99	2
$60 to $74.99	2½
$75 to $89.99	3
$90 to $109.99	3½
$110 to $129.99	4
$130 to $149.99	5
$150 and over	6

In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more without regard to the amount of said customer's own monthly purchases (Tr. 20, as corrected). Corporate chains such as the Kroger Company and the Great Atlantic & Pacific Tea Company, which operate multiple units but have one common corporate ownership, have their purchases aggregated by area, and the discount is paid to the corporate chain's headquarters, which operationally conducts that chain's business in a particular area.

Respondent's Sawyer Division operates generally in an area composed of the States of Illinois, and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan. Within the division there are in excess of 20,000 retail grocery customers.

Even though the operational practices and policies may vary from division to division, the corporate respondent, United Biscuit Company, is legally responsible for the pricing practices and policies of each and all of its divisions. If a violation of §2(a) of the Clayton Act had been proven with reference to any of the divisions, the cease and desist order which would issue would as a matter of law have to bind the corporate respondent. Respondent's divisions are not separate legal entities.

Commission counsel called as witnesses officials of respondent who explained its general corporate structure and operations, and explained certain exhibits prepared for the Commission by respondent upon the Commission's request. In addition, the owners of "Ma and Pa" grocery stores (individually owned grocery stores which were not a member of a buying group nor the unit of a corporate chain) in Burlington, Wisconsin, and South Bend and Gary, Indiana, testified concerning the general operations of their stores with particular reference to their business relationships and practices with respondent. Such store owners were: in Burlington, Wisconsin, Donald Rehberg, Paul Spiegelhoff, John Knutowski, and Robert C. Grossman; in Gary, Indiana, Walter Pall, Jack Landsman, Oscar Noak, and Irving Tobe; and in South Bend, Indiana, Dennis Horvath, Earl Walter Plack, Marion Nowicki, and Vincent A. Koziatek. Annual sales for some of these stores were: $1 million, $500,000, $417,000, $360,000, $320,000, $240,000, $125,000, and $120,000.

The retail sales of respondent's biscuit products constitute a fractional percentage of the over-all gross sales of these stores. If the retail sales of respondent's biscuit products were deducted from these stores' gross sales, it would not materially reduce the over-all sales figure or lower the net profit to the store owners by any material amount. The profit margin is small for the stores whose owners testified. The net profit margin in the retail grocery business as an industry is generally understood to be low in relation to gross sales.

The Commission witnesses, the above-named independent grocers, testified that they strived to keep their biscuit products priced at approximately the same level as their competitors'; that chain stores provide strong competition for them; but that uniformly the retail grocery business is highly competitive. The independent owners are unable to match the over-all lower prices of the chains and particularly the special sales prices of these chains. The independents are unable to meet the indirect price reductions implicit in the use and issuance of trading stamps. They cannot advertise as extensively as the chains, and several of them do no advertising except by papers and posters on their premises. Their stores are unable to match the chain's expensive physical plants, air conditioning, parking lots, larger and more attractive display areas, and other physical features which cause the corporate chain stores to be more attractive to customers and to provide more comfortable places to shop. If the chain stores stay open for the same number of hours as the independents, the traditional advantage which staying open longer hours formerly gave the independents clearly disappears. It is obvious from these recitals that there are many complex factors which enter into the ability of the independents to compete successfully. A few dollars per annum difference in the cost of respondent's biscuit products is a relatively remote and unimportant factor. Moreover, the hearing examiner received the distinct impression from the testimony of the store owners that in every instance except one or two their businesses are growing and their annual sales are increasing. If, therefore, these independent owners were produced as examples of businessmen who had been competitively injured by respondent's discount schedules, they failed to demonstrate or to prove any such injury or the possibility thereof. Moreover, one of them testified he featured meats as the means of enticing customers and another store owner that he used fresh green vegetables as a "drawing card" because he was located in a neighborhood where his customers made fresh greens a substantial part of their diet.

The only injury claimed by Commission counsel is to secondary line competition. Commission counsel have neither proffered nor adduced any evidence, nor claimed that United's discount schedules have the capacity to injure competitively other business concerns who compete with United. Counsel supporting the complaint have not made it quite clear whether the competitive injury claim is for the independents vis-a-vis independents, or the independents vis-a-vis the corporate chains. If it is the independent vis-a-vis the corporate chain where the competitive injury is supposed to have occurred, this record is almost completely lacking in evidence of such injury due to respondent's discount schedules.

The hearing examiner rejects respondent's argument that the Commission's proof is too limited in time or geographical area to support a finding of the competitive injury required by §2(a). Had actual proof of such competitive injury been adduced, it would have supported the cease and desist order against respondent generally.

Of the witnesses who were asked whether their business would be substantially affected or injured by receiving a lesser discount than a competitor on the same amount of purchases of respondent's products, six replied in the negative. One testified that he would be injured only if competitors substantially cut their prices; the answers of three others were inconclusive. One answered in the affirmative.

Respondent's discount schedules may constitute a price discrimination under §2(a) of the Clayton Act according to *Anheuser-Busch* v. *FTC*, 363 U.S. 536, because a price discrimination within the meaning of §2(a) is merely a price difference. However, at page 550, the Supreme Court pointed out that the statute itself spells out the conditions which make a price difference legal or illegal. The Court remanded *Anheuser-Busch* to the Seventh Circuit for that court to make a determination whether the record would support a finding of the requisite competitive injury. The Seventh Circuit, under date of January 25, 1951, held that the *Anheuser-Busch* record would not support a finding of competitive injury and set aside the cease and desist order, 289 F. 2d 835. The time for filing certiorari to the Supreme Court from the Seventh Circuit's last opinion has expired and such opinion (reported in 289 F. 2d 835) must be deemed to be the ruling law at this time. Although *Anheuser-Busch* involved territorial price discrimination and primary line competition, some of the language of the Seventh Circuit in its last opinion is appropriate to this case in view of this examiner's finding that the evidence in this record will not support a finding of the competitive injury required by the statute. The Seventh Circuit, inter alia, said:

> It is true that the effects of AB's [Anheuser-Busch's] acts on competition might have been different from what they actually were and that nevertheless it could be held to account under Section 2(a) for what actually happened as well as the reasonable possible effects thereof. But, to prove the *acts* themselves, the Commission was required to adduce evidence of what AB *did* and a finding of a violation cannot rest upon a conjecture as to what it *might do*. Potentiality to commit an act cannot be used as a substitute for proof of the act itself. (Emphasis in original.)

In *General Foods Corp.*, Docket 5675, 50 F.T.C. 885 (1954), in affirming the examiner's decision dismissing a complaint charging violation of §2(a) for failure of proof of a lessening of competition, the Commission stated (p. 889):

> The burden of proof to establish injury to competition is on counsel supporting the complaint. In *A. E. Staley Manufacturing Co.* v. *Federal Trade Commission*, 135 F. 2d 453, the court held that proof of discrimination in price is not sufficient; that in addition "there must be evidence to support a finding and there must be a finding based on that evidence to show wherein competition is substantially lessened and a monopoly fostered."

While the *General Foods* case involved primary line rather than secondary line discrimination, the Commission expressly disapproved the view expressed by the examiner that the test differed as between those two situations (50 FTC at 887).

Price differentials *per se* are not prohibited by §2(a) of the Act, but only those price differentials having an actual or probable effect on competition. The statute requires, moreover, that this effect be substantial. As the court stated in *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253 (C.A. 7th 1956), at page 256:

> Congress has not outlawed price differentials *per se*, unjustified though they may be. The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial. * * * If the amount of the discrimination is inconsequential or if the size of the discriminator is such that it strains credulity to find the requisite adverse effect on competition, the Commission is powerless under the Act to prohibit such discriminations whether first or second line competition be involved.

The Commission's cease and desist order was affirmed by the court in Whitaker.

A cumulative quantity discount was also involved in *Yale and Towne Mfg. Co.*, Docket 6232, 52 F.T.C. 1580 (1956), where the Commission affirmed the examiner's decision dismissing the complaint at the close of the case-in-chief. Although primary line competition was involved, the considerations on which the decision was based are pertinent here. In that case, which involved the sale of industrial trucks, it was not disputed that the discounts granted were substantial and that they resulted in lower net acquisition costs to some of respondent's customers. The Commission concluded, however, that the evidence was insufficient to show that price was a paramount factor in influencing sales. And in reply to the contention of the appellant that the Act does not require actual injury to competition, but only a reasonable probability of such injury, the Commission stated (52 F.T.C. at 1604):

> This latter concept, which is sound, does not support the proposition, however, that conclusive inferences may be drawn from isolated evidentiary facts of the case without consideration of those which may be drawn from the entire record. If the particular circumstances attending the discriminations

refute conclusions that the proscribed adverse effects may result, the statutory requirements of proof of injury have not been met. The proponent of the complaint has the burden of meeting these standards in proving competitive injury; and, where the burden has not been sustained in the course of the case-in-chief by counsel supporting the complaint, the proceeding should be dismissed.

In the Matter of *Fred Bronner Corporation*, Docket 7068, the Federal Trade Commission, on September 29, 1960, sustained the hearing examiner's dismissal of a complaint under §2(a). In *Bronner* the Commission gives a definitive opinion of the implications of *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948); and *Whitaker*, holding, as to *Morton Salt*:

* * * The court ruled that this competitive handicap could not be minimized by reason of the fact that salt is only a small item in the non-favored purchasers' businesses. In effect, the court held that it was not necessary for the Commission to consider sales in other merchandise categories in determining injury to the purchaser victimized by respondent's price differential. *The contention of counsel supporting the complaint that we project the discount to other merchandise purchased by the favored customers is clearly beyond the holding in the Morton Salt case and must be rejected.* (Emphasis supplied.)

This hearing examiner's finding in this proceeding of no competitive injury by United's discount schedules is not premised solely on the fact that crackers are "only a small item in the non-favored purchasers' businesses." The finding is based upon consideration of all material facts in this record, including the total absence of *proof* of actual or probable competitive injury to any of the independent store owners who testified as the Commission's witnesses.

In *Bronner* the Commission cited with approval the quotation reproduced (page 7) from *Whitaker*. The Commission also held:

Regardless of whether the court in the *Whitaker* case meant the dollar amount or the percentage rate of the discount, it is our view that neither of these factors can be considered separate and apart from the other circumstances of record in determining whether a price discrimination has the proscribed adverse effects. As stated by the court in the *Whitaker* case, "Congress has not outlawed price differentials *per se*, unjustified though they may be." Either of the aforementioned factors must be viewed in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal. It is clear that this was done by the court in both the *Whitaker* and *Edelmann* [E. Edelmann & Co. v. FTC, 239 F.2d 152 (C.A. 7th 1956)] cases. * * *

In view of the finding by this examiner that counsel supporting the complaint has not, in this record, sustained the burden of proof imposed upon him,

It is ordered, That Count I of the complaint against respondent United Biscuit Company of America, a corporation, be and it hereby is dismissed.

The hearing examiner is, by separate order of even date, acting upon respondent's motion of April 28, 1961, and letter dated July 19, 1961, proposing a manner of disposing of the allegations in Count II of the complaint.

INITIAL DECISION AS TO COUNT I BY LEON R. GROSS, HEARING EXAMINER

FILED NOVEMBER 13, 1961

This complaint, issued on March 10, 1960, charged respondent in Count I with violation of § 2(a) of the Clayton Act, as amended, and in Count II with violation of § 2(d) of the Act. On August 30, 1961, the Federal Trade Commission vacated and remanded an initial decision of July 20, 1961, which dismissed the charges in Count I of the complaint.

The Commission vacated the aforesaid decision because the hearing examiner had not made a finding under § 3.8(e) of the Commission's Rules that granting respondent's motion to dismiss Count I terminated the proceeding before him. That decision of July 20, 1961, did not terminate the proceedings before the examiner because Count II, which charged a violation of § 2(d) of the Act, was then undisposed. Counsel had agreed prior to July 20, 1961, to attempt to dispose of Count II under §§ 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, published May 6, 1955, as amended, and the decision so stated.

The hearing examiner is now reissuing this decision as to Count I and is simultaneously issuing a separate decision as to Count II. That disposition of Count II is being made pursuant to §§ 3.21 and 3.25 of the Commission's Rules and pursuant to notice of intention filed by the parties prior to September 1, 1961. The initial decision as to Count II contains a cease-and-desist order which is subject to review and approval by the Federal Trade Commission before it becomes final and effective. However, the issuance of the initial decision as to Count II makes it possible to find, and the examiner hereby finds, that there is nothing further pending before him either as to Count I or as to Count II of this complaint.

Having made such findings, the examiner hereby reissues his initial decision as to Count I of the complaint, with certain minor changes, as follows:

The hearing examiner hereby sustains respondent's motion of April 28, 1961, at the close of the Commission's case-in-chief to dismiss

Count I of the complaint.[1] That motion is sustained for failure of the evidence to prove the competitive injury required to be shown under § 2(a) of the Clayton Act, as amended (15 U.S.C. § 13(a)).

Commission counsel completed their case-in-chief on March 7, 1961. On May 19, 1961, respondent filed a brief in support of its motion to dismiss Count I. On June 16, 1961, Commission counsel filed his answering brief, and on July 17, 1961, respondent filed its reply to the Commission's brief. Introduction of evidence in support of the complaint has been completed, but findings of fact and conclusions of law have not been either ordered or filed.

The hearing examiner finds and concludes from all the evidence:

1. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding, and this proceeding is in the public interest. The complaint filed herein stated a good cause of action against respondent but the evidence adduced in support of the allegations of Count I of the complaint has failed to prove that the effect of respondent's discount schedules "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition" as alleged in the complaint.

2. Respondent, United Biscuit Company of America, a Delaware corporation, whose principal office and place of business is at 25th and West North Avenue, in the city of Melrose Park, State of Illinois, is engaged on a nationwide basis in the manufacture and sale of cookies, crackers, and biscuit products. Its operations are conducted through eight divisions in various geographical areas covering most of the United States. With minor exceptions, each division is exclusively responsible for the manufacture and sale of biscuit products within its respective area. Each division has its own discount policy and sets policies which vary from division to division.

3. For the year ending December 31, 1959, respondent's gross sales were approximately $138 million, and the sales of its Sawyer Division accounted for approximately $12 million.

4. The evidence adduced by Commission counsel, with immaterial exceptions, related solely to respondent's Sawyer Division. Different discount schedules were utilized by different divisions. From July 1,

[1] A late Commission decision setting forth the basis for evaluating the evidence at this stage of the proceeding is in Docket 7000, Consolidated Foods Corporation, Opinion of Commission on Interlocutory Appeal [56 F.T.C. 1663], *CCH Trade Reg. Rep.*, par. 28,821.

1958, to June 30, 1959, respondent's Sawyer Division granted its customers cumulative volume discounts on their purchases as follows:

Monthly purchases	*Discount (percent)*
0 to $24.99	0
$25 to $39.99	2
$40 to $69.99	3
$70 to $99.99	4
$100 to $124.99	5
$125 and over	6

From July 1, 1959 to March 10, 1960 (date of issuance of complaint), it is granted discounts as follows:

Monthly purchases	*Discount (percent)*
0 to $24.99	0
$25 to $44.99	1½
$45 to $59.99	2
$60 to $74.99	2½
$75 to $89.99	3
$90 to $109.99	3½
$110 to $129.99	4
$130 to $149.99	5
$150 and over	6

In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more without regard to the amount of said customer's own monthly purchases (Tr. 20, as corrected). Corporate chains such as the Kroger Company and the Great Atlantic & Pacific Tea Company, which operate multiple units but have one common corporate ownership, have their purchases aggregated by area, and the discount is paid to the corporate chain's headquarters, which operationally conducts that chain's business in a particular area.

5. Respondent's Sawyer Division operates generally in an area composed of the States of Illinois, and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan. Within the division there are in excess of 20,000 retail grocery customers.

6. Even though the operational practices and policies may vary from division to division, the corporate respondent United Biscuit Company, is legally responsible for the pricing practices and policies of each and all of its divisions. If a violation of § 2(a) of the Clayton Act had been proven with reference to any of the divisions, the cease and desist order which would issue would as a matter of law have to bind the corporate respondent. Respondent's divisions are not separate legal entities.

7. Commission counsel called as witnesses officials of respondent who explained its general corporate structure and operations, and explained certain exhibits prepared for the Commission by respondent upon the Commission's request. In addition, the owners of "Ma and Pa" grocery stores (individually owned grocery stores which were not a member of the buying group nor the unit of a corporate chain) in Burlington, Wisconsin, and South Bend and Gary, Indiana, testified concerning the general operations of their stores with particular reference to their business relationships and practices with respondent. Such store owners were: in Burlington, Wisconsin, Donald Rehberg, Paul Spiegelhoff, John Knutowski, and Robert C. Grossman; in Gary, Indiana, Walter Pall, Jack Landsman, Oscar Noak, and Irving Tobe; and in South Bend, Indiana, Dennis Horvath, Earl Walter Plack, Marion Nowicki, and Vincent A. Koziatek. Annual sales for some of these stores were: $1 million, $500,000, $417,000, $360,000 $320,000, $240,000, $125,000, and $120,000.

8. The retail sales of respondent's biscuit products constitute a fractional percentage of the over-all gross sales of these stores. If the retail sales of respondent's biscuit products were deducted from these stores' gross sales, it would not materially reduce the over-all sales figure or lower the net profit to the store owners by any material amount. The profit margin is small for the stores whose owners testified. The net profit margin in the retail grocery business as an industry is generally understood to be low in relation to gross sales. The Commission witnesses, the above-named independent grocers, testified that they endeavored to keep their biscuit products priced at approximately the same level as their competitors'; that chain stores provide strong competition for them; but that uniformly the retail grocery business is highly competitive.

9. The independent owners are unable to match the over-all lower prices of the chains and particularly the special sales prices of the chains. The independents are unable to meet the indirect price reductions implicit in the use and issuance of trading stamps. They cannot advertise as extensively as the chains, and several of them do no advertising except by papers and posters on their premises. Their stores are unable to match the chain's expensive physical plants, air conditioning, parking lots, larger and more attractive display areas, and other physical features which cause the corporate chain stores to be more attractive to customers and to provide more comfortable places to shop. If the chain stores stay open for the same number of hours as the independents, the traditional advantage which staying open longer hours formerly gave the independents clearly disappears.

There are many complex factors which enter into the ability of the independent grocery store operator to compete successfully with the corporate chains and with the members of the buying groups. A few dollars per annum difference in the cost of respondent's biscuit products is a relatively remote and unimportant factor. Moreover, the hearing examiner received the distinct impression from the testimony of the store owners that, except for one or two, their businesses are growing and their annual sales are increasing. If, therefore, these independent owners were produced as examples of businessmen who had been competitively injured by respondent's discount schedules, they failed to prove such injury or the possibility thereof.

10. The competitive injury asserted by Commission counsel is to secondary line competition. Commission counsel have neither proffered nor adduced any evidence, nor claimed that United's discount schedules have the capacity to injure competitively other business concerns who compete with United. It is not clear whether the competitive injury is asserted as having been inflicted upon the independents vis-a-vis independents, or the independents vis-a-vis the corporate chains. If it is the independent vis-a-vis the corporate chain where the competitive injury is supposed to have occured, this record lacks any evidence of such injury due to respondent's discount schedules.

11. The witnesses were asked whether their business would be substantially affected or injured by receiving a lesser discount than a competitor on the same amount of purchases of respondent's products. Six replied in the negative. One testified that he would be injured only if competitors substantially cut their prices; the answers of three others were inconclusive. One answered in the affirmative.

12. The hearing examiner rejects respondent's argument that the Commission's proof is too limited in time or geographical area to support a finding of the competitive injury required by § 2(a). Had actual proof of such competitive injury been adduced, it would have supported a cease and desist order against respondent generally.

Respondent's discount schedules may constitute a price discrimination under § 2(a) of the Clayton Act according to *Anheuser-Busch* v. *FTC*, 363 U.S. 536, because a price discrimination within the meaning of § 2(a) is merely a price difference. However, at page 550 in *Anheuser-Busch*, the Supreme Court pointed out that the statute itself spells out the conditions which make a price difference legal or illegal. The Court remanded *Anheuser-Busch* to the Seventh Circuit for that court to make a determination whether the record would support a finding of the requisite competitive injury. The

Seventh Circuit, under date of January 25, 1961, held that the *Anheuser-Busch* record would not support a finding of competitive injury and set aside the cease and desist order, 289 F. 2d 835. The time for filing certiorari to the Supreme Court from the Seventh Circuit's last opinion has expired and such opinion (reported in 289 F. 2d 835) must be deemed to be the ruling law at this time. Although *Anheuser-Busch* involved territorial price discrimination and primary line competition, some of the language of the Seventh Circuit in its last opinion is appropriate to this case in view of this examiner's finding that the evidence in this record will not support a finding of the competitive injury required by the statute. The Seventh Circuit, *inter alia*, said:

> It is true that the effects of AB's [Anheuser-Busch's] acts on competition might have been different from what they actually were and that nevertheless it could be held to account under Section 2(a) for what actually happened as well as the reasonable possible effects thereof. But, to prove the acts themselves, the Commission was required to adduce evidence of what AB *did* and a finding of a violation cannot rest upon a conjecture as to what it *might do*. Potentiality to commit an act cannot be used as a substitute for proof of the act itself. (Emphasis in original.)

In *General Foods Corp.*, Docket 5675, 50 F.T.C. 885 (1954), in affirming the examiner's decision dismissing a complaint charging violation of § 2(a) for failure of proof of a lessening of competition, the Commission stated (p. 889):

> The burden of proof to establish injury to competition is on counsel supporting the complaint. In *A. E. Staley Manufacturing Co.* v. *Federal Trade Commission*, 135 F.2d 453, the court held that proof of discrimination in price is not sufficient; that in addition "there must be evidence to support a finding and there must be a finding based on that evidence to show wherein competition is substantially lessened and a monopoly fostered."

The evidence in this record does not show "wherein competition is substantially lessened and a monopoly fostered" by United's discount schedules. While the *General Foods* case involved primary line rather than secondary line discrimination, the Commission expressly disapproved the view expressed by the examiner that the test differed as between those two situations (50 F.T.C. at 887).

Price differentials per se are not prohibited by § 2(a) of the Clayton Act, but only those price differentials having an actual or probable effect on competition. There is a highly respectable and commanding line of opinion to the effect that *Corn Products Refining Company* v. *FTC*, 324 U.S. 726 (1945); *Morton Salt Company* v. *FTC*, 334 U.S. 437 (1948); and *P. Sorenson Mfg. Co.*, 52 F.T.C. 1659, *aff'd per curiam*, *P. Sorenson Mfg. Co.* v. *FTC*, 246 F. 2d 687

(D.C. Cir. 1957) lead but to one conclusion, namely, that price discrimination among competing customers of the seller carries with it a conclusion of competitive injury per se (See Docket No. 7225, *Tri-Valley Packing Assn.*, [60 F.T.C. 1134] opinion dated August 1, 1961, page 18 [1151]) and that this per se principle is especially applicable in a highly competitive business such as the grocery business here involved. With all due respect to this high authority, this examiner respectfully suggests that if the Congress had intended price discrimination among competing customers of the seller to constitute per se violation under § 2(a) it would have phrased § 2(a) accordingly to give effect to that intent. In a footnote in *Sun Oil Co.* v. *FTC*, 294 F. 2d 465, 476 30 L.W. 2060, 8/1/61 (July 24, 1961, C.A. 5), the court quotes authorities to the effect that the virtue of the Robinson-Patman Act may, like Roman law, "lay in its being neither too plain nor too obscure, but expressed in a sort of middling obscurity." The Seventh Circuit's Second Opinion in *Anheuser-Busch*, *supra*, quoted, negates the notion that proof of competitive injury under § 2(a) may be found in such "middling obscurity." It cannot be based upon speculation and conjecture.

Section 2(a) requires that the effect on competition be substantial. As the court stated in *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253 (C.A. 7th 1956), at 256:

> Congress has not outlawed price differentials *per se*, unjustified though they may be. The Act was not intended to reach every remote, adverse effect on competition. The effect must be substantial. * * * If the amount of the discrimination is inconsequential or if the size of the discriminator is such that it strains credulity to find the requisite adverse effect on competition, the Commission is powerless under the Act to prohibit such discriminations whether first or second line competition be involved.

The Commission's cease and desist order was affirmed by the court in *Whitaker*.

A cumulative quantity discount was also involved in *Yale & Towne Mfg. Co.*, Docket No. 6232, 52 F.T.C. 1580 (1956), where the Commission affirmed the examiner's decision dismissing the complaint at the close of the case-in-chief. Although primary line competition was involved, the considerations on which the decision was based are pertinent here. In that case, which involved the sale of industrial trucks, it was not disputed that the discounts granted were substantial and that they resulted in lower net acquisition costs to some of respondent's customers. The Commission concluded, however, that the evidence was insufficient to show that price was a paramount factor in influencing sales. And in reply to the contention of the appellant that the Act does not require actual injury to competition, but only a reasonable probability of such injury, the Commission stated (52 F.T.C. at 1604):

> This latter concept, which is sound, does not support the proposition, however, that conclusive inferences may be drawn from isolated evidentiary facets of the case without consideration of those which may be drawn from the entire record. If the particular circumstances attending the discriminations refute conclusions that the proscribed adverse effects may result, the statutory requirements of proof of injury have not been met. The proponent of the complaint has the burden of meeting these standards in proving competitive injury; and, where the burden has not been sustained in the course of the case-in-chief by counsel supporting the complaint, the proceeding should be dismissed.

In the Matter of Fred Bronner Corporation, Docket 7068, the Federal Trade Commission, on September 29, 1960 [57 F.T.C. 771], sustained the hearing examiner's dismissal of a complaint under § 2(a). In *Bronner* the Commission gives a definitive opinion of the implications of *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948); and *Whitaker*, holding, as to *Morton Salt*:

> * * * The court ruled that this competitive handicap could not be minimized by reason of the fact that salt is only a small item in the non-favored purchasers' businesses. In effect, the court held that it was not necessary for the Commission to consider sales in other merchandise categories in determining injury to the purchaser victimized by respondent's price differential. *The contention of counsel supporting the complaint that we project the discount to other merchandise purchased by the favored customers is clearly beyond the holding in the Morton Salt case and must be rejected.* (Emphasis supplied.)

This hearing examiner's finding in this proceeding of no competitive injury by United's discount schedules is not premised solely on the fact that respondent's products are "only a small item in the non-favored purchasers' businesses." The finding is based upon consideration of all material facts in this record, including the total absence of *proof* of actual or probable competitive injury to any of the independent store owners who testified as the Commission's witnesses.

In *Bronner* the Commission cited with approval the quotation reproduced (page 8) from *Whitaker*. The Commission also held:

> Regardless of whether the court in the *Whitaker* case meant the dollar amount or the percentage rate of the discount, it is our view that neither of these factors can be considered separate and apart from the other circumstances of record in determining whether a price discrimination has the proscribed adverse effects. As stated by the court in the *Whitaker* case, "Congress has not outlawed price differentials *per se*, unjustified though they may be." Either of the aforementioned factors must be viewed in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal. It is clear that this was done by the court in both the *Whitaker*

and *Edelmann* [E. Edelmann & Co. v. FTC, 239 F.2d 152 (C.A. 7th 1956)] cases * * *.

In the *Edelmann* case, the court held (page 155):

> * * * Although it has been held that there is no automatic *de minimis* exception in Section 2(a) which requires the Commission to insert a maximum permissible discrimination in its order [citing cases], it is implicit in the Act that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions. See our opinion in Whitaker Cable Co. v. Federal Trade Commission, 7 Cir., 239 F.2d 253. But it must be remembered that in enacting the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C.A. §13, Congress undertook to strengthen this phase of the Clayton Act which it thought had been too restrictive in practice by directing emphasis to individual competitive situations rather than competition in general * * *.

In view of the finding by this examiner that counsel supporting the complaint has not, in this record, sustained the burden of proof of competitive injury imposed upon him by law,

It is ordered, That Count I of the complaint against respondent United Biscuit Company of America, a corporation, be and it hereby is dismissed.

Initial Decision as to Count II by Leon R. Gross, Hearing Examiner

FILED NOVEMBER 13, 1961

The complaint, issued March 10, 1960, charges respondent in Count I with violating § 2(a) and in Count II with violation of § 2(d) of the Clayton Act, as amended. During the hearings respondent's counsel stated that respondent had abandoned the practices alleged in Count II to have constituted violation of § 2(d) of the Act, and would seek disposition of those charges in Count II, pursuant to §§ 3.21 and 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, published May 6, 1955, as amended. At the conclusion of the evidence in support of Count I, respondent moved to dismiss Count I because of a failure of proof. A separate initial decision dismissing Count I is being issued on this date.

Counsel have submitted to the undersigned an agreement dated September 18, 1961, which agreement was received on October 24, 1961, containing a consent cease and desist order, for the purpose of disposing of all of the allegations in Count II. This agreement is signed by counsel for the parties and approved by the Director of the Bureau of Restraint of Trade and the Chief, Robinson-Patman Act Division of that Bureau. Due notice dated July 14, 1961, of intention to dispose of Count II was filed pursuant to the Commission's

Rules of Practice appearing in F.R. 61–6766. The said agreement disposes of all of the proceeding as to all parties, except as to Count I of the complaint; that Count, as aforesaid, is being disposed separately by other proceeding. In the aforesaid agreement of September 18, 1961, respondent admits all the jurisdictional facts alleged in the complaint insofar as they relate to Count II thereof and agrees that the record as to Count II may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. In the said agreement respondent waives (a) any further procedural steps; (b) the requirement that the Commission's decision contains findings of fact and conclusions of law; and (c) all rights to seek judicial review or otherwise challenge or contest the validity of the order entered pursuant to said agreement.

The said agreement provides further: the record on which the decision of the Commission shall be based as to Count II of the complaint shall consist solely of the complaint and the agreement; the agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission; the agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in Count II.

The said agreement also provides that the cease and desist order set forth in the said agreement may be entered in this proceeding by the Commission without further notice to respondent and when so entered, the order shall have the same force and effect and shall become final and may be altered, modified, or set aside in the same manner and within the same time provided by the statute for other orders, and that the complaint may be used in construing the terms of the order.

The undersigned hearing examiner has examined the aforesaid agreement of September 18, 1961, and finds that it adequately disposes of this proceeding as to Count II of the complaint; that it complies with the pertinent rules of the Federal Trade Commission and that its approval and acceptance is in the public interest. Said agreement hereby is approved and accepted. The said agreement, however, shall not become a part of the public record unless and until the cease and desist order provided for therein is approved by the Commission.

The hearing examiner makes the following findings and enters the following order:

1. Respondent United Biscuit Company of America is a corporation existing and doing business under and by virtue of the laws of

the State of Delaware, with its office and principal place of business located at 25th and West North Avenue, in the city of Melrose Park, State of Illinois.

2. Pursuant to the provisions of subsections (a) and (d) of § 2 of the Clayton Act, as amended, the Federal Trade Commission, on March 10, 1960, issued its complaint in this proceeding, and a true copy was thereafter duly served on respondent. The complaint in Count I alleged a violation of subsection (a) and in Count II alleged a violation of subsection (d).

3. The Federal Trade Commission has jurisdiction over the parties and the subject matter of this proceeding and this proceeding is in the public interest.

4. Count I of the complaint is being disposed in a separate initial decision being issued simultaneously with this decision.

It is ordered, That respondent United Biscuit Company of America, a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the sale of biscuit products in commerce as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

> Paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for any advertising, promotional activities, or other services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale or distribution of respondent's products, unless such payment or consideration is offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

Initial Decision Upon Remand as to Count I by Leon R. Gross, Hearing Examiner

FILED NOVEMBER 9, 1962

PRELIMINARY STATEMENT

The complaint which issued in this proceeding on March 10, 1960, alleged in Count I that respondent had violated subsection 2(a) of the Clayton Act, as amended, and, in Count II that respondent had violated subsection 2(d) of the Act, the pertinent parts of which Act read as follows:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, * * * to discriminate in price between different

purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *

(d) That it shall be unlawful for any person engaged in commerce, * * * to pay * * * anything of value * * * to a customer of such person * * * in consideration for any services or facilities furnished by or through such customer * * * unless such payment * * * is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

While counsel supporting the complaint (hereinafter designated "complaint counsel") was introducing evidence in support of the allegations in Count I, it was represented to the hearing examiner that Count II of the complaint would probably be disposed pursuant to § 3.21 and § 3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, published May 6, 1955, as amended, by an agreement containing a consent order to cease and desist. Complaint counsel completed the introduction of evidence in support of his case-in-chief as to Count I. On April 23, 1961, respondent moved to dismiss Count I of the complaint, after complaint counsel had rested his case, on the grounds, among others, that complaint counsel's proof failed to establish the competitive injury or likelihood of competitive injury required to be shown.

On July 26, 1961, the hearing examiner issued an initial decision as to Count I granting respondent's motion to dismiss these proceedings on the grounds that the record did not at that time contain that degree of proof of competitive injury, or likelihood of competitive injury, required under the Statute.

In his July 26, 1961, initial decision as to Count I, the hearing examiner noted that counsel had informed him that they were taking steps to dispose of Count II by entering into an agreement containing a consent order to cease and desist, and the examiner directed counsel to present such agreement to the examiner as provided by § 3.21 and §3.25 of the Rules as promptly as possible.

On August 23, 1961, counsel for the parties filed with the Secretary of the Federal Trade Commission a notice of their intention to dispose of Count II of this complaint by signing an agreement containing a consent order to cease and desist.

On August 30, 1961, the Federal Trade Commission vacated and set aside the initial decision of July 26, 1961, as to Count I on procedural grounds. On November 6, 1961, this examiner issued two separate initial decisions. The initial decision as to Count I was in substantially the same language as the prior decison of July 26, and granted respondent's motion to dismiss the alleged violations of § 2(a); the initial decision as to the § 2(d) violations alleged in Count II of the complaint contained a cease and desist order.

On December 11, 1961, the Commission suspended the effective date of the initial decision as to Count II, until further order of the Commission.

On June 28, 1962, the Commission issued an order vacating the initial decision as to Count I and remanded the matter for further proceedings.

On October 1, 1962, a hearing on remand was convened in Washington, D.C., and both parties declined to introduce additional evidence at such hearing. The parties represented that they would not file proposed findings and conclusions as provided by Rule 4.17 but reserved their respective rights to present a form of appropriate order. Such suggested orders have been filed. The parties have fully reserved their respective rights of appeal from any order as may be herein entered.

The posture of the record at this time is that the parties have been accorded in all respects opportunity for a full hearing, and have completed the introduction of evidence.

Since the hearing examiner issued his November 6, 1961, decision in this case, the Federal Trade Commission has spoken authoritatively in its opinions in *Tri-Valley Packing Association*, Dockets 7225 and 7496, Commission's Opinion dated May 10, 1962 [60 F.T.C. 1134, 1168]; *Amercan Oil Company*, Docket No. 8183, Commission's Opinion dated June 27, 1962 [60 F.T.C. 1786, 1804], and its Opinion dated June 28, 1962 [60 F.T.C. 1175], remanding this case.

In *Tri-Valley*, the Commission held (p. 8) [60 F.T.C. 1175]:

> * * * In view of our holding that respondent's price discriminations may result in injury to competition regardless of whether there is actual competition in the resale and distribution of the products involved in the discriminations, we believe that the phrase "in the resale and distribution of respondent's products" unduly limits the scope of the order and should be deleted therefrom.

And on page 5 [60 F.T.C. 1171]:

> In any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent (*Federal Trade Commission* v. *Morton Salt Company, supra*); and it has been held that such an inference is permissible despite testimony by the nonfavored purchaser that he had not been injured by the discrimination. *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 (1956); *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (1956). * * *

In *American Oil*, the Commission in its opinion (p. 3) [60 F.T.C. 1786, 1806] interpreted *Morton Salt Co.* (334 U.S. 37) (1948) as holding:

* * * in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one customer a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial. * * *

And in its opinion in the instant case, the Commission, in commenting on *Tri-Valley, inter alia*, said (p. 7) [60 F.T.C. 1898]:

* * * we hold that in any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitors for goods of like grade and quality sold by the respondent and that the question of substantiality must be determined from the facts in each case. * * *

Based upon the entire record, the evidence, the exhibits, and admissions in briefs heretofore filed by the parties, the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent United Biscuit Company of America, a Delaware corporation, whose principal office and place of business is at 25th and West North Avenue, Melrose Park, Illinois, is engaged on a nationwide basis in the manufacture and sale under its own brand of cookies and crackers (hereinafter called "biscuit products"). For the year ending December 31, 1959, respondent's gross sales were approximately $138,000,000.

2. Respondent's operations are conducted through eight divisions in various geographical areas covering most of the United States. With minor exceptions each division is exclusively responsible for the sale of biscuit products within its respective area; determines its sales policy and pricing practices, and the discounts, if any, which are allowed to respondent's customers who resell at retail its biscuit products in competition with each other. Respondent does not employ jobbers or distributors, but sells directly to retailers, and delivers its products in its own trucks to the retailers.

3. Respondent's retail customers may be classified as (a) "corporate chains," (b) "voluntary buying chains," (c) "supermarkets," and (d) "independently owned grocery stores." "Corporate chains" usually include multiple-unit retail grocery stores which utilize central buying and control. A "voluntary buying chain" usually refers to individually-owned retail grocery stores which "pool" their pur-

chases in order to utilize central buying facilities without control of the day-to-day operation of the individual store members. "Supermarkets" are, roughly, individually-owned retail grocery concerns which operate more than one retail grocery store; an "independent" is an individually-owned retail grocery concern which usually operates only one retail store.

4. Although the evidence adduced by Commission counsel related chiefly to respondent's Sawyer Division, any violation of § 2(a) of the Clayton Act which is proven in this case against any of the eight divisions will sustain a cease-and-desist order against the corporate respondent. United Biscuit is legally responsible for the pricing practices and policies of each and all of its divisions. Its divisions are not separate corporate or legal entities, but are integrated parts of its overall operation.

5. Respondent manufactures, sells and distributes its biscuit products to retail grocery concerns and restaurants located throughout most of the states of the United States including specifically Indiana and Wisconsin, and transports said biscuit products across state boundaries between respondent and its customers.

6. Respondent is engaged in commerce as "commerce" is defined in the Clayton Act, and, in the course and conduct of its business in commerce respondent is, and for several years last past has been, in competition with other business concerns which manufacture and sell biscuit products in the same manner as, or in a manner similar to, that of respondent.

7. Respondent's Sawyer Division operates generally in an area composed of the States of Illinois, and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin, and Michigan. Within the division there are in excess of 20,000 retail grocery customers.

8. From July 1, 1958 to June 30, 1959, respondent's Sawyer Division granted its customers cumulative volume discounts based upon the dollar volume of the customer's monthly purchases. These schedules provided graduated discounts up to six percent for varying amounts of monthly purchases. Such schedules are:

For the Period July 1, 1958, to June 30, 1959

Monthly purchases	*Discount (percent)*
0 to $24.99	0
$25 to $39.99	2
$40 to $69.99	3
$70 to $99.99	4
$100 to $124.99	5
$125 and over	6

For the Period July 1, 1959, to Date of Issuance of Complaint March 10, 1960

Monthly purchases	*Discount Percent*
0 to $24.99	0
$25 to $44.99	1½
$45 to $59.99	2
$60 to $74.99	2½
$75 to $89.99	3
$90 to $109.99	3½
$110 to $124.99	4
$130 to $149.99	5
$150 and over	6

An independent grocery-store owner is allowed a discount based upon the total of his store or stores' purchases of respondent's biscuit products for a particular month. In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more, without regard to the amount of the customer's own monthly purchases. Corporate chains such as the Kroger Company and the Great Atlantic & Pacific Tea Company, which operate multiple units but have one common corporate ownership, have their purchases aggregated by area, and the discount is paid to the corporate chain's headquarters which operationally conducts that chain's business in a particular area.

9. Sawyer Division's net sales for 1959 amounted to $12,215,665. In January of that year Sawyer sold to 21,773 customers operating 23,664 outlets. The number of customers and outlets, of course, varies from month to month. During January, 1959, 8,057 Sawyer Division customers earned a volume discount; i.e., the amount was credited to them, and they received the discount either at that time or later. In that period, 13,716 Sawyer customers neither earned nor received such a discount. Of the customers receiving volume discounts, many received less than 6%.

10. In January, 1959, retail grocery customers of respondent earned, and, either then or later, received volume discount payments as follows:

	Percent
3,718 customers	2
2,287 customers	3
704 customers	4
310 customers	5
1,038 customers	6

Certain of the customers receiving no volume discount, or less than 6% discount, were in competition with one or more customers receiving the full 6% discount. The favored customers included, *inter alia* chain store organizations such as the Kroger Company, the Great Atlantic & Pacific Tea Company, and National Food Stores.

11. Most of the major retail grocery chain stores with seven or more outlets, purchasing from the Sawyer Division in 1959, and listed on CX 120–A and –B, were allowed a 6% volume discount, although the independent stores which competed with the chain stores were allowed a lesser discount.

12. Owners of individually-owned grocery stores in the cities of Burlington, Wisconsin, and South Bend and Gary, Indiana, who were not members of a buying group nor units of a corporate chain, testified concerning the general operations of their stores, with particular reference to their business relationships and practices with respondent. Such store owners were: In Burlington: Donald Rehberg, Paul Spiegelhoff, John Knutowski, and Robert C. Grossman; in Gary, Indiana; Walter Pall, Jack Landsman, Oscar Noak, and Irving Tobe; in South Bend, Indiana; Dennis Horvath, Earl Walter Plack, Marion Nowicki, and Vincent A. Koziatek. Annual sales for some of these stores were: $1 million, $500,000, $417,000, $360,000, $320,000, $240,000, $125,000, and $120,000.

13. Although the retail dollar sales of respondent's biscuit products constitute a fractional percentage of the overall gross sales of some of the stores whose owners testified, the profit margin for the stores is very small. Some of the witnesses testified, and are uncontradicted in this record, that the net profit margin in the retail grocery business as an industry is low in relation to gross sales. Some of the independent store owners testified generally that they endeavor to keep their biscuit products priced at approximately the same level as their competitors, including chain stores but such chains provide especially strong competition for them, and over-all the retail grocery business is highly competitive.

14. The independent store owners are unable to match the overall lower prices of the corporate chains on most items. The independents are unable to meet the indirect price reductions implicit in the use and issuance of trading stamps; also, they cannot afford to advertise as extensively as the chains. Several independents testified they do no advertising at all except by signs and posters on their premises. These individual store owners are unable to match the chain stores' expensive plants, air conditioned premises in some instances, ample parking lots, larger and more attractive display areas, and other features, which cause the chains to be more attractive to customers and to provide more comfortable places to shop. If the chain stores stay

open for the same number of hours as the independents, such advantages as the independents might have enjoyed by staying open longer hours also cease to exist.

15. Many complex factors enter into the ability of an independent grocery-store operator to compete successfully with the corporate chains and the members of the buying groups. One store owner testified: "We have to fight not only for pennies but for fractions." Independent store witnesses testified that the price at which they purchase their merchandise is a very important, if not the most important, factor in determining whether they are able to compete.

16. Although the dollar differences in the amount of the dollar discounts paid to the independents as against the chains and buying groups may not be substantial, the percentage differences in the amount of discount received, and, therefore, initial cost to the independent store owner, may be substantial.

17. A comparison of purchase volumes and discounts of individual chain stores with purchase volumes and discounts of independent grocery stores made by complaint counsel in Appendix A to his brief, and unchallenged by respondent, shows the following:

Comparison of purchase volumes and discounts of individual chain stores with purchase volumes and discounts of independent grocery stores

Comission exhibit No.	Purchaser	Location	Date	Purchases	Greater purchases in terms of dollar amount	Discount (percent)	Greater discounts in terms of percentage
25-K	Kroger Company 628	Gary, Ind	Jan. 1959	$43.42	----------	6.0	100.0
25-D	Wally's Fifth Avenue Mart	do	Jan. 1959	45.37	$1.95	3.0	----------
39-K	Kroger Company 628	do	Feb. 1959	47.28	4.07	6.0	100.0
39-D	Wally's Fifth Avenue Mart	do	Feb. 1959	43.21	----------	3.0	----------
99-A	A & P	do	Oct. 1959	26.28	----------	6.0	300.0
99-E	Better Foods	do	Oct. 1959	28.35	2.07	1.5	----------
99-A	A & P	do	Oct. 1959	26.28	----------	6.0	140.0
99-B	Gene's Certified Supermart	do	Oct. 1959	66.83	40.55	2.5	----------
100-A	A & P	do	Nov. 1959	50.60	----------	6.0	71.4
100-C	Tobe's Super Market	do	Nov. 1959	99.93	49.33	3.5	----------
101-A	A & P	do	Dec. 1959	57.33	----------	6.0	200.0
101-D	Wally's Fifth Avenue Mart	do	Dec. 1959	58.30	.97	2.0	----------
101-A	A & P	do	Dec. 1959	57.33	----------	6.0	71.4
101-B	Gene's Super Market	do	Dec. 1959	106.05	48.72	3.5	----------
100-H	Kroger Company 628	do	Nov. 1959	.56	----------	6.0	300.0
100-E	Better Foods	do	Nov. 1959	25.02	24.46	1.5	----------
100-H	Kroger Company 628	do	Nov. 1959	.56	----------	6.0	71.4
100-C	Tobe's Super Market	do	Nov. 1959	99.93	99.37	3.5	----------
100-H	Kroger Company 628	do	Nov. 1959	.56	----------	6.0	300.0
100-D	Wally's Fifth Avenue Mart	do	Nov. 1959	26.64	25.68	1.5	----------
101-H	Kroger Company 628	do	Dec. 1959	14.86	----------	6.0	71.4
101-B	Gene's Super Market	do	Dec. 1959	106.05	91.19	3.5	----------
101-H	Kroger Company 628	do	Dec. 1959	14.86	----------	6.0	200.0
101-D	Wally's Fifth Avenue Mart	do	Dec. 1959	58.30	43.44	2.0	----------
66-L	Kroger Store F 98	South Bend, Ind.	Jan. 1959	29.44	----------	6.0	50.0
66-B	K & F Food Market	do	Jan. 1959	72.73	43.29	4.0	----------
66-L	Kroger Store F 98	do	Jan. 1959	29.44	----------	6.0	100.0
66-B	Horvath's Self Service	do	Jan. 1959	68.50	39.06	3.0	----------
66-L	Kroger Store F 98	do	Jan. 1959	29.44	----------	6.0	100.0
66-B	Vince's Super Saver	do	Jan. 1959	56.08	26.64	3.0	----------
66-L	Kroger Store F 98	do	Jan. 1959	29.44	.26	6.0	200.0

Comission exhibit No.	Purchaser	Location	Date	Purchases	Greater purchases in terms of dollar amount	Discount (percent)	Greater discounts in terms of percentage
66-C	Food Center	South Bend, Ind.	Jan. 1959	29.18	----------	2.0	----------
66-L	Kroger Store F 105	do	Jan. 1959	22.08	6.48	6.0	----------
66-A	A & J Market	do	Jan. 1959	15.60	----------	0	----------
66-L	Kroger Store F 105	do	Jan. 1959	22.08	----------	6.0	50.0
66-B	K & F Market	do	Jan. 1959	72.73	50.65	4.0	----------
66-L	Kroger Store F 105	do	Jan. 1959	22.08	----------	6.0	100.0
66-B	Horvath's Self Service	do	Jan. 1959	68.50	46.42	3.0	----------
66-L	Kroger Store F 105	do	Jan. 1959	22.08	----------	6.0	100.0
66-B	Vince's tSuper Saver	do	Jan. 1959	56.08	34.00	3.0	----------
66-L	Kroger Sore F 105	do	Jan. 1959	22.08	----------	6.0	200.0
66-C	Food Center	do	Jan. 1959	29.18	7.10	2.0	----------
66-H	National Food Store 44	do	Jan. 1959	27.75	----------	6.0	50.0
66-B	K & F Food Market	do	Jan. 1959	72.73	44.98	4.0	----------
66-M	National Food Store 44	do	Jan. 1959	27.75	----------	6.0	100.0
66-B	Horvath's Self Service	do	Jan. 1959	68.50	40.75	3.0	----------
66-M	National Food Store 44	do	Jan. 1959	27.75	----------	6.0	100.0
66-B	Vince's Super Saver	do	Jan. 1959	56.08	28.33	3.0	----------
66-M	National Food Store 44	do	Jan. 1959	27.75	----------	6.0	200.0
66-C	Food Center	do	Jan. 1959	29.18	1.43	2.0	----------
67-L	Kroger Store F 98	do	Feb. 1959	33.36	10.70	6.0	----------
67-A	A & J Market	do	Feb. 1959	22.66	----------	----------	----------
67-L	Kroger Store F 98	do	Feb. 1959	33.36	----------	6.0	50.0
67-A	K & F Food Market	do	Feb. 1959	85.12	51.76	4.0	----------
67-L	Kroger Store F 98	do	Feb. 1959	33.36	----------	6.0	100.0
67-B	Horvath's Self Service	do	Feb. 1959	54.91	21.55	3.0	----------
67-L	Kroger Store F 98	do	Feb. 1959	33.36	----------	6.0	100.0
67-B	Vince's Super Saver	do	Feb. 1959	41.86	8.50	3.0	----------
67-L	Kroger Store F 98	do	Feb. 1959	33.36	10.52	6.0	----------
67-C	Food Center	do	Feb. 1959	22.84	----------	----------	----------
67-L	Kroger Store F 105	do	Feb. 1959	20.52	----------	6.0	----------
67-A	A & J Market	do	Feb. 1959	22.66	2.14	----------	----------
67-L	Kroger Stcre F 105	do	Feb. 1959	20.52	----------	6.0	50.0
67-A	K & F Market	do	Feb. 1959	85.12	64.60	4.0	----------
67-L	Kroger Store F 105	do	Feb. 1959	20.52	----------	6.0	100.0
67-B	Horvath's Self Service	do	Feb. 1959	54.91	34.39	3.0	----------
67-L	Kroger Store F 105	do	Feb. 1959	20.52	----------	6.0	100.0
67-B	Vince's Super Saver	do	Feb. 1959	41.86	21.34	3.0	----------
67-L	Kroger Store F 105	do	Feb. 1959	20.52	----------	6.0	----------
67-C	Food Center	do	Feb. 1959	22.84	2.32	----------	----------
67-H	National Food Store 44	do	Feb. 1959	29.11	6.45	6.0	----------
67-A	A & J Market	do	Feb. 1959	22.66	----------	----------	----------
67-M	National Food Store 44	do	Feb. 1959	29.11	----------	6.0	50.0
67-A	K & F Food Market	do	Feb. 1959	85.12	56.01	4.0	----------
67-M	National Food Store 44	do	Feb. 1959	29.11	----------	6.0	100.0
67-B	Horvath's Self Service	do	Feb. 1959	54.91	25.80	3.0	----------
67-M	National Food Store 44	do	Feb. 1959	29.11	----------	6.0	100.0
67-B	Vince's Super Saver	do	Feb. 1959	41.86	12.75	3.0	----------
67-M	National Food Store 44	do	Feb. 1959	29.11	6.27	6.0	----------
67-C	Food Center	do	Feb. 1959	22.84	----------	----------	----------
68-L	Kroger Store F 98	do	Mar. 1959	25.78	----------	6.0	100.0
68-B	Horvath's Self Service	do	Mar. 1959	56.09	30.31	3.0	----------
68-L	Kroger Store F 98	do	Mar. 1959	25.78	----------	6.0	200.0
68-B	Vince's Super Saver	do	Mar. 1959	35.41	9.63	2.0	----------
68-L	Kroger Store F 98	do	Mar. 1959	25.78	4.44	6.0	----------
68-C	Food Center	do	Mar. 1959	21.34	----------	----------	----------
68-L	Kroger Store F 105	do	Mar. 1959	30.21	----------	6.0	100.0
68-B	Horvath's Self Service	do	Mar. 1959	56.09	25.88	3.0	----------
68-L	Kroger Store F 105	do	Mar. 1959	30.21	----------	6.0	200.0
68-B	Vince's Super Saver	do	Mar. 1959	35.41	5.20	2.0	----------
68-L	Kroger Store F 105	do	Mar. 1959	30.21	8.87	6.0	----------
68-C	Food Center	do	Mar. 1959	21.34	----------	----------	----------
68-M	National Food Store 44	do	Mar. 1959	33.87	----------	6.0	100.0
68-B	Horvath's Self Service	do	Mar. 1959	56.09	22.22	3.0	----------
68-M	National Food Store 44	do	Mar. 1959	33.87	----------	6.0	200.0
68-B	Vince's Super Saver	do	Mar. 1959	35.41	1.54	2.0	----------
68-M	National Food Store 44	do	Mar. 1959	33.87	12.53	6.0	----------
68-C	Food Center	do	Mar. 1959	21.34	----------	----------	----------
106-D	Kroger Store F 98	do	Oct. 1959	49.70	3.56	6.0	200.0
106-A	K & F Food Market	do	Oct. 1959	46.14	----------	2.0	----------
106-D	Kroger Store F 98	do	Oct. 1959	49.70	----------	6.0	140.0
107-A	Horvath's Self Service	do	Oct. 1959	71.43	21.73	2.5	----------
106-D	Kroger Store F 98	do	Oct. 1959	49.70	----------	6.0	200.0
106-A	Vince's Super Saver	do	Oct. 1959	52.63	2.93	2.0	----------
106-D	Kroger Store F 105	do	Oct. 1959	47.98	1.84	6.0	200.0
106-A	K & F Food Market	do	Oct. 1959	46.14	----------	2.0	----------
106-D	Kroger Store F 105	do	Oct. 1959	47.98	----------	6.0	140.0
107-A	Horvath's Self Service	do	Oct. 1959	71.43	23.45	2.5	----------

Comission exhibit No.	Purchaser	Location	Date	Purchases	Greater purchases in terms of dollar amount	Discount (percent)	Greater discounts in terms of percentage
106–D	Kroger Store F 105	South Bend, Ind.	Oct. 1959	47.98		6.0	200.0
106–A	Vince's Super Saver	do	Oct. 1959	52.63	4.65	2.0	
106–D	National Food Store 44	do	Oct. 1959	3.00		6.0	
106–A	A & J Market	do	Oct. 1959	18.45	15.45	0	
106–D	National Food Store 44	do	Oct. 1959	3.00		6.0	200.0
106–A	K & F Food Market	do	Oct. 1959	46.14	43.14	2.0	
106–D	National Food Store 44	do	Oct. 1959	3.00		6.0	140.0
107–A	Horvath's Self Service	do	Oct. 1959	71.43	68.43	2.5	
106–D	National Food Store 44	do	Oct. 1959	3.00		6.0	200.0
106–A	Vince's Super Saver	do	Oct. 1959	52.63	49.63	2.0	
106–D	National Food Store 44	do	Oct. 1959	3.00		6.0	
106–B	Food Center	do	Oct. 1959	24.05	21.05	0	
108–D	Kroger Store F 105	do	Nov. 1959	39.00		6.0	300.0
108–A	K & F Market	do	Nov. 1959	41.09	2.09	1.5	
108–D	Kroger Store F 105	do	Nov. 1959	39.00	4.15	6.0	300.0
109–A	Horvath's Self Service	do	Nov. 1959	34.85		1.5	
108–D	Kroger Store F 105	do	Nov. 1959	39.00		6.0	200.0
108–A	Vince's Super Saver	do	Nov. 1959	58.06	19.06	2.0	
110–C	Kroger Store F 105	do	Dec. 1959	47.59		6.0	140.0
110–A	K & F Food Market	do	Dec. 1959	63.90	16.31	2.5	
110–C	Kroger Store F 105	do	Dec. 1959	47.59		6.0	140.0
111–A	Horvath's Self Service	do	Dec. 1959	67.65	20.06	2.5	
110–C	Kroger Store F 105	do	Dec. 1959	47.59		6.0	100.0
110–A	Vince's Super Saver	do	Dec. 1959	77.40	29.81	3.0	
77–A	A & P	Burlington, Wis.	Jan. 1959	79.93		6.0	50.0
77–A	Grossman Foods	do	Jan. 1959	84.43	4.50	4.0	
77–A	A & P	do	Jan. 1959	79.93		6.0	50.0
77–A	Hillside Grocery Co.	do	Jan. 1959	90.36	10.43	4.0	
86–A	A & P	do	Feb. 1959	77.31	7.64	6.0	100.0
86–A	Grossman Foods	do	Feb. 1959	69.67		3.0	
86–A	A & P	do	Feb. 1959	77.31		6.0	50.0
86–A	Hillside Grocery Co.	do	Feb. 1959	94.48	17.17	4.0	
87–A	A & P	do	Mar. 1959	79.06	28.45	6.0	100.0
87–A	Grossman Foods	do	Mar. 1959	50.61		3.0	
87–A	A & P	do	Mar. 1959	79.06		6.0	50.0
87–A	Hillside Grocery Co.	do	Mar. 1959	95.81	16.75	4.0	
88–A	A & P	do	Oct. 1959	72.06		6.0	71.4
88–A	Grossman Foods	do	Oct. 1959	100.99	28.93	3.5	
88–A	A & P	do	Oct. 1959	72.06		6.0	50.0
88–A	Hillside Grocery Co.	do	Oct. 1959	124.03	51.97	4.0	
89–A	A & P	do	Nov. 1959	75.53	7.55	6.0	140.0
89–A	Grossman Foods	do	Nov. 1959	67.98		2.5	
89–A	A & P	do	Nov. 1959	75.53	46.78	6.0	50.0
89–A	Hillside Grocery Co.	do	Nov. 1959	122.31		4.0	
89–A	A & P	do	Nov. 1959	75.53		6.0	71.4
89–A	Spiegelhoff Super Market	do	Nov. 1959	105.97	30.44	3.5	
90–A	A & P	do	Dec. 1959	67.32		6.0	71.4
90–A	Hillside Grocery Co.	do	Dec. 1959	96.99	29.67	3.5	
90–A	A & P	do	Dec. 1959	67.32		6.0	50.0
90–A	Spiegelhoff Super Market	do	Dec. 1959	111.42	44.10	4.0	

18. As a result of the respondent's volume discounts, hereinabove described, some of the respondent's customers were charged higher net prices for respondent's goods of like grade and quality than were other of respondent's customers, competing with such unfavored customers. This constitutes a price discrimination under § 2 (a) of the amended Clayton Act. (*FTC* v. *Anheuser Busch, Inc.*, 366 U.S. 536 (1960))

19. In Gary, Indiana, Wally's Fifth Avenue Mart earned, was credited with, and either then or later received, the following volume discounts in various months of 1959: 3.0% in January and February; 2.0% in March; 0% in October; 1.5% in November and 2% in Decem-

ber. Although there is no specific evidence as to the other months of 1959, Walter Pall, the store's owner, testified, in effect, that Wally's earned only lower volume discounts. Other stores in Gary receiving discounts under 6% included: Better Foods, Inc., Gene's Supermarket, and Toby's Supermarket. These stores were each competing with one or more of respondent's customers receiving 6% discount for purchases made at the same time. These favored customers included Kroger and A & P.

20. In South Bend, Indiana, in 1959, certain independent store customers of the respondent failed to earn any volume discounts or earned and received discounts of less than 6%. Such customers and the volume discounts earned in January, 1959, if any, included the following:

	Percent
Horvath's Self Service	3
Vince's Super Saver	3
Food Center	2
A & J Market	0
K & F Food Market	4

Those who earned the discounts received the payments indicated. The evidence proves discounts under 6%, or no discounts, were given in 1959 to some or all of these customers. Each competed with one or more customers of respondent receiving 6% volume discounts for purchases made at the same time. These favored customers included Kroger and National.

21. In many instances, the grocery stores receiving the smaller discounts purchased more goods from the respondent in a particular month than did the individual competing chain store outlet receiving 6%. For example, in October 1959, Gene's Supermarket in Gary, Indiana, received a 2½% volume discount on biscuit purchases from respondent of $66.63, while A & P received a 6% volume discount on smaller purchases of $26.28 delivered to one of its outlets competing with Gene's. As another example, in October 1959, Food Center in South Bend, Indiana, received no discount on biscuit purchases from respondent of $24.05, while National received a 6% discount on purchases of $3 delivered to National Store #44 competing with Food Center. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

22. As a result, *inter alia*, of the aforementioned differences in volume discounts allowed to its customers, respondent charged some of its customers a higher net price for goods of like grade and quality than it charged a competing customer or customers. Thereby the competitive ability of the non-favored customers was injured or destroyed.

23. A preponderance of the reliable, probative and substantial evidence in the record proves, and the hearing examiner hereby finds, that respondent, by engaging in the acts and practices hereinabove described and set forth, has discriminated in price between different purchasers of its commodities of like grade and quality, and the effect thereof may be substantially to lessen competition, tend to create a monopoly, and to injure, destroy and prevent competition between its customers in violation of § 2(a) of the Clayton Act, as amended.

24. The hearing examiner further finds that such price discrimination by respondent was not made in good faith to meet an equally low price of a competitor. The hearing examiner therefore reaches the following:

CONCLUSIONS

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

In the manufacture and sale of its biscuit products, respondent, United Biscuit Company of America, is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

In the manufacture and sale of its biscuit products in commerce, respondent, by means of the acts and practices hereinabove found, and by means of its discount schedules, and other acts related above, has discriminated in price between different purchasers of its products of like grade and quality by selling its said products to some of its customers at lower prices than it sells like products to other of its customers competing with the favored customers in the retail sale of such products. Such acts and practices constitute price discrimination in violation of § 2(a) of the Clayton Act, as amended.

The effect of such price discrimination may be substantially to lessen competition, tend to create a monopoly, and to injure, destroy, and prevent competition in violation of § 2(a) of the Clayton Act, as amended.

Now, therefore,

It is ordered, That United Biscuit Company of America, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their products, including cookies and crackers, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price.

OPINION OF THE COMMISSION

FEBRUARY 7, 1964

BY ANDERSON, *Commissioner:*

This matter is before us upon the exceptions of respondent to the hearing examiner's initial decision as to Count I of the complaint, filed November 9, 1962, holding respondent in violation of Section 2(a) of the Clayton Act, as amended, and ordering it to cease and desist from discriminations in price.[1]

The Commission, on June 28, 1962 [60 F.T.C. 1893], vacated a prior initial decision as to Count I, filed November 13, 1961, and remanded the matter to the hearing examiner for further proceedings in conformity with the views expressed by the Commission therein. The Commission held that on the basis of the facts in the record at that time there was sufficient evidence to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations. The Commission further held that unless such showing is rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist the discriminations in price charged in the complaint.

No further evidence was presented by either party at the time fixed for hearing on remand, October 1, 1962. The hearing examiner thereafter, on November 9, 1962, filed his initial decision upon remand as to Count I, and it is as to this decision that respondent now files its exceptions.

A brief summary of the facts in this matter follows. Respondent, United Biscuit Company of America, a Delaware coropration with its principal office at 25th and West North Avenue, Melrose Park, Illinois, is engaged on a nationwide basis in the manufacture and sale of cookies and crackers under its own brand name. Respondent's operations are conducted through eight divisions in various geo-

[1] The hearing examiner filed his initial decision as to Count II of the complaint on November 13, 1961, which is an initial decision based on an agreement containing a consent order to cease and desist. The Commission stayed the effective date of this decision on December 7, 1961. The initial decision as to Count II will be adopted as the decision of the Commission by an order to be issued simultaneously with the order disposing of this proceeding as to Count I of the complaint.

graphical areas covering most of the United States. Its net sales in the year ending December 31, 1959, were approximately $138,000,000.

Respondent, through its Sawyer Biscuit Division (Sawyer Division) during the period covered by the complaint, used discount schedules in connection with its sales which provided graduated or "volume" discounts to purchasers of up to 6 percent for varying amounts of monthly purchases. In the case of a purchaser with more than one store, such as a corporate chain with multiple retail outlets, the discount under these schedules was calculated on the basis of the aggregated purchases of all the stores operated by the purchaser.

Respondent, by reason of the use of the aforementioned discount schedules, discriminated in price between different purchasers of its biscuit products of like grade and quality. The evidence largely concerns the operations of the Sawyer Division which operates generally in the states of Illinois and portions of Indiana, Kentucky, Missouri, Iowa, Wisconsin and Michigan. Sawyer Division's net sales for 1959 amounted to $12,215,665. In January of that year it sold to 21,773 customers operating 23,664 outlets. The number of customers and outlets, however, varies from month to month. During January 1959, 8,057 Sawyer Division customers earned a volume discount, which amount was credited to them and received either at that time or later. In the same month 13,716 Sawyer Division customers neither earned nor received such a discount.

Of the customers receiving volume discounts, many received less than 6 percent. For instance, in January 1959, retail grocery customers of respondent earned and either then or later received volume discount payments as follows: 3,718 customers—2 percent, 2,287 customers — 3 percent, 704 customers — 4 percent, 310 customers — 5 percent, 1,038 customers — 6 percent. Certain of the customers receiving no volume discount or less than 6 percent were in competition with one or more customers receiving the full 6 percent. These favored customers included chain store organizations such as The Kroger Company (Kroger), The Great Atlantic & Pacific Tea Co. (A & P), and National Food Stores (National). With one exception, all of the major retail grocery chain stores with seven or more outlets purchasing from the Sawyer Division in 1959, including such stores as Kroger, A & P and National, were allowed a 6 percent volume discount.

The record shows price discriminations between and among competing customers in the trading areas of Gary, Indiana, South Bend, Indiana, and Burlington, Wisconsin. The Gary, Indiana, market will serve as an illustration. There, one customer paying a higher price for respondent's products was Wally's Fifth Avenue Mart. Wally's was credited with the following volume discounts in various months in 1959: 3.0 percent in January and February, 2.0 percent in March, 0 percent in October, 1.5 percent in November, and 2.0 percent in December. In other months that year Wally's apparently earned only low volume discounts. Other stores in Gary, Indiana, receiving discounts under 6 percent included Better Foods, Inc. (*e.g.*, 1.5 percent earned October 1959); Gene's Super Market (*e.g.*, 3.5 percent earned December 1959); and Tobe's Super Market (*e.g.*, 3.5 percent earned November 1959). These stores were each competing with one or more of respondent's customers receiving 6 percent discounts for purchases made at the same time, which favored customers included Kroger and A & P. In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving the 6 percent. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

As a result of the aforementioned differences in volume discounts, respondent charged some customers a higher price for like goods than it charged a competing customer or competing customers.

Independent store owners testified generally as to the highly competitive nature of the retail food business. Net profits are low and cash discounts and other allowances are important. One store owner witness testified "* * * we have to fight not only for pennies but for fractions." There are a number of examples of low net profits shown in the record. Certain of the independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There is also testimony from such witnesses to the effect that if they could buy cheaper they could sell for less and that customers will, in the over-all picture, buy where the prices are lower.

The examiner, in his initial decision as to Count I, filed November 9, 1962, held that, as a result of respondent's price discriminations, the competitive ability of the non-favored customers was injured or destroyed. He concluded therefore that respondent violated Section 2(a) of the Clayton Act, as amended. This initial decision as to Count I filed November 9, 1962, is the decision before us for review on the appeal of the respondent and it is the "initial decision" hereafter referred to unless otherwise indicated.

Respondent takes exception (1) to certain portions of the initial decision relating to the nature of the price discriminations, (2) to the examiner's findings and conclusions as to competitive injury, (3) to the finding that respondent's price discriminations were not made in good faith to meet the equally low price of a competitor, and, finally, (4) to the scope of the order.

To begin with, respondent objects to the numbered paragraphs 2, 3, and 9, or parts thereof, on the ground that these contain a finding that discount schedules of respondent's Sawyer Division applied to all its retail customers. We do not interpret the paragraphs cited as making any such finding, and therefore reject the exception so made. To avoid any possible question in the matter, however, we hold that the evidence does not show that the challenged discount schedules were used by any of respondent's divisions except the Sawyer Division.

Respondent next objects to asserted findings in paragraphs numbered 3, 8, and 16 of the initial decision, that customers of respondent's Sawyer Division that are members of voluntary groups pool their purchases from respondent and that they are treated like corporate chains with respect to the aggregation of purchases. Apparently, the main contention here centers around the examiner's statement, in paragraph 8, which reads, "In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more, without regard to the amount of the customer's own monthly purchases." Such payments were provided for in a schedule adopted July 1, 1960. Complaint counsel takes the position that the evidence in the record does not relate to that more recent schedule, and he urges that the finding contained in the sentence above quoted is not necessary to the decision. Considering all the factors, we conclude that such finding should be stricken. Respondent's exception will be sustained to that extent on this point.

Respondent excepts to the asserted implication, in numbered paragraph 22 and the third paragraph of the conclusions in the initial decision, that it has discriminated in price by acts and practices other than the employment of its volume discount schedules. It contests in effect the use of the term "*inter alia*" in numbered paragraph 22 and the phrase "and other acts related above" in the third paragraph of the conclusions. Complaint counsel answers that any such finding and conclusion may have had reference to the one percent payment to voluntary group headquarters referred to in the finding quoted in the prior paragraph. Such finding is to be stricken and there is no other evidence to support the broader holding which the examiner apparently has made and which respondent objects to. Accordingly, the initial decision will be modified by striking the aforementioned words.

An exception is next taken to the finding in numbered paragraph 23 and to the conclusion in the initial decision that the effect of respondent's practices may be to "tend to create a monopoly." Complaint counsel does not oppose dropping this holding from the decision, and since the evidence fails to clearly support a finding and conclusion as to a tendency to monopoly, the initial decision will be amended by striking such references.

Respondent's exception to the hearing examiner's failure to find that the price discriminations consisted only of a favoring of corporate chains against independents by permitting chains to combine purchases is disallowed. The reason is that such was not the basis for the finding of unlawful price discriminations. The combining of the purchases of chain store outlets was a contributing factor, but the real illegality here found was due to the differences in net prices as a result of using volume discount schedules. There is a violation shown with or without the evidence of the combining of chain purchases.

Respondent next objects to the findings on the likelihood of competitive injury. The hearing examiner's findings are made in accordance with the Commission's views as set forth in the decision on remand. We see no reason to disturb them. See also the recent decision in *Mueller Co.* v. *Federal Trade Commission*, 323 F. 2d 44 (7th Cir. 1963).

Respondent further excepts to the omission by the examiner of certain findings, namely, those in numbered paragraphs 8, 9, and 11 of his initial decision as to Count I, filed November 13, 1961, asserting that these negate his present conclusion. In these paragraphs the examiner found, for instance, that sales of respondent's products are a fractional percentage of the gross sales of an independent store, that some of the independent stores might be growing in volume, and that witnesses for some of the independent stores testified they were not injured. Not all of the findings in such paragraphs, including the examples given, would be inconsistent with the holding of a likelihood of competitive injury. Nevertheless, after the examiner had reconsidered the issues in the light of the views expressed by the Commission, he saw fit not to make certain of the same findings appearing in his prior initial decision. We believe that the findings and conclusions he has made in the initial decision now before us are correct except as noted herein and therefore reject respondent's exceptions made on this question.

The examiner finds in numbered paragraph 24 in the initial decision that respondent's price discriminations were not made in good faith to meet an equally low price of a competitor. To this, respondent takes exception claiming that it did not tender evidence in proof of this defense and that the finding therefore is not within the scope of the proceeding. Since there is no basis in the record for this finding, it will be stricken. Nevertheless, respondent has had the opportunity to raise the good faith meeting of competition defense and has not done so; thus, it is foreclosed from again raising such defense on the same or substantially similar facts. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 476–477 (1952).

Respondent lastly challenges the scope of the order. It argues that the order should be limited (1) to biscuit products, (2) to retail grocery customers as purchasers, and (3) to price discriminations between chain stores and independents by means of quantity discounts which aggregate the purchases of chain store outlets. Respondent also contends that the order should not prohibit all price discriminations without regard to the likelihood of adverse competitive effect. Counsel supporting the complaint opposes all such limitations, except that as to product coverage, and on this question he believes the order should appropriately encompass "food products" rather than the product coverage in the initial decision, which is "their products, including cookies and crackers." Said counsel also asks that the phrase "in the resale of such products" be inserted at the end of the order.

We agree with the recommendations of complaint counsel for modification of the initial order. Plainly, the Commission's order should be broad enough to prohibit not only the further use of the precise practice found to have existed in the past but also the future use of related and similar practices. *Cf. Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960); *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962). The proposal of the respondent would limit the scope of the order to such a degree that it would not even cover the whole of the area of illegality found. The price discriminations disclosed in the record consist of all those resulting from the use of volume discount schedules and not just the price differences where the purchases of multiple chain outlets were combined for the purpose of discounts.

Respondent's objection to the order on the ground that it prohibits price discrimination without regard to whether the discrimination has an adverse effect on competition is rejected because such a qualification has no place in a Commission Section 2(a) order. The likelihood of competitive injury is a fact question for the Commission to determine as basis for the order, and the Commission cannot shift to the courts a responsibility in enforcement proceedings of trying such issues. *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37, 54 (1948).

In connection with the product coverage of the order, the Commission may frame its order to prohibit the use of the illegal practice in conjunction with respondent's sale of any and all products. *Niresk Industries, Inc.* v. *Federal Trade Commission*, *supra*, at page 343; *Mueller Co.* v. *Federal Trade Commission*, *supra; Carter Products, Inc.* v. *Federal Trade Commission*, 323 F. 2d 523 (5th Cir. 1963). The propriety of such an order, however, depends upon the circumstances in the proceeding. *Carter Products, Inc.* v. *Federal Trade Commission*, *supra; cf. Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, *supra; The Quaker Oats Co.*, Docket No. 8119, decided April 25, 1962 [60 F.T.C. 798].

In the circumstances of this case, we believe a more limited order is appropriate, namely, an order covering "food products." Respondent urges that the order should be limited to biscuit products, i.e., crackers and cookies, but this would so narrow the order that the same practices engaged in as to any other product, even as to closely related products, would not be covered and would require a whole new proceeding to prohibit violations of law. Complaint counsel urges, and respondent does not dispute, that one of respondent's competitors is presently engaged in the sale of potato chips. If such a product is introduced in a competitor's line, it is not improbable that respondent might similarly expand its line. The Commission's order should at least be broad enough to cope with such related products. *Cf. Hershey Chocolate Corp.* v. *Federal Trade Commission*, 121 F. 2d 968, 971–972 (3d Cir. 1941); *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43, 52–53 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958). An order covering "food products" will be clear and precise as to the products to which it applies and sufficiently comprehensive to cover products related to those for which the violation is found. Yet, it is not so broad as to extend into all possible facets of respondent's business, regardless of the relationship to the practices herein found to be unlawful.

There is an objection by respondent to the inclusion of all purchasers in the order, rather than only retail grocery customers. Respondent, as found by the examiner, sells not only to retail grocery concerns but to restaurants as well. We agree that the qualifying phrase "in the resale of such products" should be added at the end of the order. Thus the order will be limited to customers competing in the resale of respondent's products and will not apply to sales to restaurants for their own use. Respondent's exception to the order on this question is granted to the extent indicated but not otherwise.

The exceptions of the respondent are sustained to the extent above indicated and otherwise rejected. The initial decision will be modified in accordance with the views expressed in this opinion and, as modified, will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman concurred in the result and Commissioner Reilly did not participate for the reason he did not hear oral argument.

FINAL ORDER AS TO COUNT I *

FEBRUARY 7, 1964

This matter having come on to be heard upon the exceptions of respondent to the hearing examiner's initial decision upon remand as to Count I, filed November 9, 1962, and upon briefs and oral argument in support of and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having sustained in part and rejected in part the respondent's exceptions, and having directed that the initial decision be modified in accordance with the views therein expressed and as so modified adopted as the decision of the Commission:

It is ordered, That the sentence in the finding numbered 8 in the initial decision, reading "In the case of a customer making individual monthly purchases of less than $500, who is a member of a voluntary buying group, an additional one percent of his monthly sales is payable to the group headquarters if the aggregate monthly purchases by the group are $500 or more, without regard to the amount of the customer's own monthly purchases" be, and it hereby is, stricken.

It is further ordered, That the term "*inter alia*" in the first line in the finding numbered 22 in the initial decision be, and it hereby is, stricken.

It is further ordered, That the phrase "and other acts related above," in the third line of the third paragraph in the Conclusions in the initial decision be, and it hereby is, stricken.

It is further ordered, That the phrases "tend to create a monopoly," in the sixth and seventh lines of the finding numbered 23 and the second line of the fourth paragraph in the Conclusions in the initial decision be, and they hereby are, stricken.

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* Respondent's motion for reconsideration and stay of this order was denied on April 10, 1964. 65 F.T.C. 1300.

It is further ordered, That the first sentence in the finding numbered 24 in the initial decision be, and it hereby is, stricken.

It is further ordered, That the order to cease and desist contained in the initial decision be, and it hereby is, modified to read as follows:

> *It is ordered*, That the United Biscuit Company of America, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the sale and distribution of their food products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale of such products.

It is further ordered, That the initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent, United Biscuit Company of America, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist as set forth in this order.

Commissioner Elman concurring in the result and Commissioner Reilly not participating for the reason he did not hear oral argument.

FINAL ORDER AS TO COUNT II

FEBRUARY 7, 1964

The Commission, on December 7, 1961, having stayed the effective date of the initial decision herein as to Count II, filed November 13, 1961, which decision was based upon an agreement containing a consent order to cease and desist executed by respondent and counsel supporting the complaint pursuant to the Commission's Rules of Practice published May 6, 1955, as amended, and notice filed under Fed. Reg. Document 61-6766, 27 Fed. Reg. 6472-73 (1961), and the Commission now having determined that the aforesaid decision should become the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner as to Count II, filed November 13, 1961, be and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondent United Biscuit Company of America, a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in or in connection with the sale of biscuit products in commerce as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

> Paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for any advertising, promotional activities, or other services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale or distribution of respondent's products, unless such payment or consideration is offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

It is further ordered, That the respondent, United Biscuit Company of America, shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist as set forth in this order.

Commissioner Elman concurring in the result and Commissioner Reilly not participating.

IN THE MATTER OF

STAUFFER LABORATORIES, INC., ET AL.

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

Docket 7841. Complaint, Mar. 21, 1960—Decision, Feb. 7, 1964

Order requiring Los Angeles sellers of a device operated by electric current and designated as a "Posture Rest" and "Magic Couch", to cease representing falsely in advertisements in magazines and periodicals and in advertising matter and brochures distributed to dealers that the device was of value in reducing the body in particular areas such as hips, thighs, legs and stomach, as well as the over-all body weight, and that it would tone and firm sagging muscles.

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 Stauffer Labora-

* Reported as amended by order of hearing examiner dated Oct. 20, 1960.