IN THE MATTER OF

THE MAGEE CARPET COMPANY

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

Docket 7631. Complaint, Oct. 28, 1959—Decision, Feb. 10, 1964

Consent order requiring a manufacturer of rugs and carpets in Bloomsburg, Pa., to cease discriminating in price among retailers who compete in reselling its rugs and carpets by means of its annual cumulative quantity discount system, 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. Title 15, Section 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, The Magee Carpet Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located in the city of Bloomsburg, Pennsylvania.

PAR. 2. Respondent is engaged in the manufacture, sale and distribution of rugs and carpets. Respondent is a substantial factor in the rug and carpet industry, with sales in 1958 in excess of $32,893,000 and manufacturing facilities located in Bloomsburg, Pennsylvania.

PAR. 3. In the course and conduct of its business respondent now causes, and for some time last past has caused, its rugs and carpets, when sold for use or resale, to be shipped from its manufacturing plant in the aforesaid State to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said rugs and carpets in commerce as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its rugs and carpets of like grade and quality, by selling said products at higher and less favorable net purchase prices to some purchasers than the same are sold to other purchasers who have been and are in competition with the purchasers paying the higher prices.

Respondent sells as aforesaid to direct purchasers in the wholesale trade and by and through such means to indirect purchasers in the retail trade. Respondent in making said indirect sales controls and sets the sales price to the retailer-purchaser by the furnishing of published price lists setting forth the terms and conditions of sale for its said products. Respondent in said indirect sales also furnishes and has in effect a published discount plan under which it allows rebates to the retailer-purchaser in the form of merchandise credits to be applied by the retailer on purchases made from or through the wholesaler of respondent's said products.

PAR. 5. The following examples are illustrative of respondent's discriminatory pricing practices between and among the retailer-purchasers of its rugs and carpets.

Respondent now has, and for the past several years has had in effect, an annual cumulative quantity discount system ranging from one to five per cent, based on the amount of the customer's total annual net purchases of its rugs and carpets as follows:

Annual Purchases	*Discounts (percent)*
Up to $5,999	0
$6,000 to $11,999	1
$12,000 to $19,999	1½
$20,000 to $29,999	2
$30,000 to $39,999	2½
$40,000 to $49,999	3
$50,000 to $59,999	3½
$60,000 to $69,999	4
$70,000 to $79,999	4½
$80,000 and over	5

Respondent's aforedescribed annual cumulative quantity discount system results in discriminatory net sales prices as between competitive purchasers in the different volume and discount brackets of said schedule. Purchasers of respondent's products for competitive resale unable to reach an annual purchase volume of $6000, for example, receive no volume discounts on their purchases and thus have a significant buying price disadvantage.

Moreover, the competitive effect of the resulting net price differences becomes even more apparent in connection with respondent's application of the above discount schedule to individual chain stores whose separate purchase volume reaches $6,000 or over.

Respondent allows said chain purchasers to combine the purchase volumes of these various stores so as to qualify for the higher discount allowed on the larger aggregate total of such purchase volume.

In many instances the purchase volumes of these different individual stores of the chain are not sufficient to warrant such higher discount, but because of the policy of the respondent in granting the rate of discount on the combined purchase volumes of all such stores, each individual store is allowed this higher discount.

In many instances respondent's non-chain customers are purchasing individually from respondent in considerably greater volume than the individual chain store with whom they compete, and in so doing receive either no discount, or at best a low bracket discount corresponding with their actual volume of purchases, while the competitive individual chain store is allowed the aforedescribed higher discount. The products sold under respondent's various product lines are of like grade and quality in their respective lines, and these independent non-chain customers purchase the same grade and quality of merchandise from respondent as do its chain store customers. In many instances the individual chain stores and the independently owned stores are located in the same city or metropolitan area and both the chain and non-chain stores are in active and constant competition with and among and between each other for the consumer trade.

Specific illustrations of representative net price differences occasioned between and among various but not all of the said favored and non-favored competing customers on commodities of like grade and quality sold by respondent in commerce during 1958, are as follows in but one sample trade area:

Customer	Purchase volume [2]	Percent of Rebate
Cleveland, Ohio Trade Area:[1]		
W. Levy Carpet Co	$14, 895. 92	1. 5
Wm. Taylor & Son Co. (chain store)	6, 318. 17	1. 5
Weissman & Co	7, 024. 99	1.
Solitex Carpet & Rug Co	5, 781. 20	0

[1] In the Cleveland, Ohio area 188 different retailer customers of respondent purchased $342,699.27 of said commodities during 1958. Of this number only 12 customers received discounts from the respondent totaling $1,516.18.

[2] Purchase volume determines rebate percentage. Rebate percentage is then applied to dollar amount of purchase volume remaining after deduction of cash discounts for payment within specified time periods.

PAR. 6. The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said products of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent or said favored purchasers.

PAR. 7. The aforesaid discriminations in price by respondent as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

Mr. Eldon P. Schrup and *Mr. Robert G. Cutler* for the Commission.

Truscott, Kline, O'Neill and Howson, by *Mr. Frank F. Truscott* and *Mr. Otis W. Erisman*, Philadelphia, Pa., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated October 28, 1959, the respondent is charged with violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

On April 14, 1960, the respondent and its attorney entered into an agreement with counsel supporting the complaint for a consent order. On June 15, 1960, the parties entered into a supplemental agreement.

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 that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

This agreement is entered into subject to the condition that the initial decision based thereon shall be stayed by the Commission and shall not become the decision of the Commission unless and until the Commission disposes of Docket Nos. 7420, 7421, 7632, 7633, 7634, 7635, 7636, 7637, 7638, 7639 and 7640, by orders to cease and desist in substantially the same form as set forth herein, or by other appropriate order to cease and desist or of dismissal.

The complaint insofar as it concerns the allegation of "primary line injury," namely, to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, should be dismissed on the grounds that the evidence at hand in the light of subsequent developments is insufficient to substantiate such allegation.

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 this proceeding 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 The Magee Carpet Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at Bloomsburg, Pennsylvania.

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

ORDER

It is ordered, That respondent The Magee Carpet Company, a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of rugs and carpets in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

> Discriminating, directly, or indirectly, by cumulative volume discount or otherwise, in the price of rugs and carpets of like grade and quality, by selling to any purchaser at net prices lower than the net price charged any other purchaser competing in fact with such favored purchaser in the resale and distribution of such rugs and carpets.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the allegation in the complaint to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, be dismissed.

FINAL ORDER*

The Commission, by order issued August 19, 1960, having extended until further order of the Commission the time within which the initial decision of the hearing examiner would otherwise become the

*Reported as amended by order of April 2, 1964, which amended the time in which respondent is required to file a report of compliance.

decision of the Commission, pursuant to certain conditions contained in paragraph 8 of the consent agreement to cease and desist; and

The Commission having determined that the aforesaid conditions have been fulfilled and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner, filed July 25, 1960, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the above-named respondent shall, within sixty (60) days after the expiration of time allowed for filing a petition for review, if no such petition has been duly filed within such time by respondents in Docket 7634, Docket 7635 or Docket 7639, 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.

It is further ordered, That if petition for review is duly filed in Docket 7634, Docket 7635 or Docket 7639, then the time for filing a report of compliance shall begin to run de novo from the latest date of any final judicial determination in any such appellate review.

IN THE MATTER OF

C. H. MASLAND & SONS

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

Docket 7632. Complaint, Oct. 28, 1959—Decision, Feb. 10, 1964

Consent order requiring a manufacturer of rugs and carpets with plants in Pennsylvania, Rhode Island and Massachusetts, to cease discriminating in price among retailers who compete in reselling its rugs and carpets by means of its annual cumulative quantity discount system, 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. Title 15, Section 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, C. H. Masland & Sons, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located in the city of Carlisle, State of Pennsylvania.

PAR. 2. Respondent is engaged in the manufacture, sale and distribution of rugs and carpets. Respondent is a substantial factor in the rug and carpet industry with a sales volume in 1958 in excess of $24,-460,000 and manufacturing plants located in Carlisle, Pennsylvania, Wakefield, Rhode Island and Brockton, Massachusetts.

PAR. 3. In the course and conduct of its business respondent now causes, and for some time last past has caused, its rugs and carpets, when sold for use or resale, to be shipped from its manufacturing plants in the aforesaid States to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said rugs and carpets in commerce as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its rugs and carpets of like grade and quality, by selling said products at higher and less favorable net prices to some purchasers than the same are sold to other purchasers who have been and are in competition with the purchasers paying the higher prices.

PAR. 5. The following example is illustrative of respondent's discriminatory pricing practices between and among the retailer-purchasers of its rugs and carpets.

Respondent now has, and for the past several years has had in effect, an annual cumulative quantity discount system ranging from one to five percent, based on the total annual net purchases of its rugs and carpets as follows:

Annual purchases	*Discount (percent)*
Up to $4,999	0
$5,000 to $9,999	1
$10,000 to $14,999	1½
$15,000 to $19,999	2
$20,000 to $24,999	2½
$25,000 to $29,999	3
$30,000 to $39,999	3½
$40,000 to $49,999	4
$50,000 to $59,999	4½
$60,000 and over	5

Respondent's aforedescribed annual cumulative quantity discount system results in discriminatory net sales prices as between competitive purchasers in the different volume and discount brackets of said schedule. Purchasers of respondent's products for competitive resale unable to reach an annual purchase volume of $5,000, for example, receive no volume discounts on their purchases and thus have a significant buying price disadvantage.

Moreover, the competitive effect of the resulting net price differences becomes even more apparent in connection with respondent's application of the above discount schedule to chain stores.

Respondent allows said chain purchasers to combine the purchase volume of their various stores so as to qualify for the higher discount allowed on the larger aggregate total of such purchase volume. In many instances the separate purchase volumes of the different individual stores of the chain are not sufficient to warrant such higher discount, but because of the policy of the respondent in granting the rate of discount on the combined purchase volumes of all the chain stores, each individual store is allowed this higher discount.

For example, in 1958 total net purchases from respondent by the May Department Store chain were $390,516 on which a rebate of $18,544 calculated at 5% was paid. Individually, eleven of the thirteen stores participating failed to qualify for this 5% rebate, with one store qualifying for only one percent and two other of these stores qualifying for no rebate whatsoever. Similarly, ten R. H. Macy Stores purchased a total combined purchase volume of $71,764 from respondent in 1958 on which a rebate of $3,384 calculated at 5% was paid. Of the ten stores participating, seven were entitled to no rebate, one would have received 1%, another 2%, and the remaining store but 4%.

In many instances respondent's non-chain customers are purchasing individually from respondent in considerably greater volume than the individual chain store with whom they compete, and in so doing receive either no discount, or at best a low bracket discount corresponding with their actual volume of purchases, while the competitive individual chain store is allowed the aforedescribed higher discount. The products sold under respondent's various product lines are of like grade and quality in their respective lines and these independent non-chain customers purchased the same grade and quality of merchandise from respondent as do its chain store customers. In many instances the individual chain stores and the independently owned stores are located in the same city or metropolitan area and both the chain and non-chain stores are in active and constant competition with and among and between each other for the consumer trade.

Specific illustrations of representative net price differences occasioned between and among various but not all of the said favored and non-favored competing customers on commodities of like grade and quality sold by respondent in commerce during 1958 are as follows in but two sample trade areas:

Customer	Purchase volume [1]	Percent of Rebate
Cleveland, Ohio area:		
Wm. Taylor Sons (chain store)	$9, 422	5
Bailey Department Store (chain store)	40	4
London Furniture Co	23, 953	2. 5
Sterling Carpet Co	14, 167	2
Halle Brothers, Inc	10, 491	1. 5
Carpet Specialists	1, 249	0
Akron, Ohio area:		
O'Neil Co. (chain store)	30, 302	5
A. Polsky Co. (chain store)	1, 964	3. 5
Hower Corp	5, 948	1
Best Furniture Co	937	0

[1] Purchase volume determines rebate percentage. Rebate percentage is then applied to dollar amount of purchase volume remaining after deduction of cash discounts for payment within specified time periods.

PAR. 6. The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said products of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent or said favored purchasers.

PAR. 7. The aforesaid discriminations in price by respondent as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

Mr. Eldon P. Schrup and *Mr. Robert G. Cutler* for the Commission.

Clark, Ladner, Fortenbaugh & Young, by *Mr. John R. Young* and *Mr. James F. McMullan*, Philadelphia, Pa., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated October 28, 1959, the respondent is charged with violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

On April 29, 1960, the respondent and its attorney entered into an agreement with counsel supporting the complaint for a consent order. On July 8, 1960, the parties entered into a supplemental agreement.

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 that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

This agreement is entered into subject to the condition that the initial decision based thereon shall be stayed by the Commission and shall not become the decision of the Commission unless and until the Commission disposes of Docket Nos. 7420, 7421, 7631, 7633, 7634, 7635, 7636, 7637, 7638, 7639 and 7640, by orders to cease and desist in substantially the same form as set forth herein, or by other appropriate order to cease and desist or of dismissal.

The complaint insofar as it concerns the allegation of "primary line injury," namely, to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, should be dismissed on the grounds that the evidence at hand in the light of subsequent developments is insufficient to substantiate such allegation.

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 this proceeding 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 C. H. Masland & Sons is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located in Carlisle, Pennsylvania.

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

ORDER

It is ordered, That respondent C. H. Masland & Sons, a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of rugs and carpets in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

> Discriminating, directly or indirectly, by cumulative volume discount or otherwise, in the price of rugs and carpets of like grade and quality by selling to any purchaser at net prices lower than the net price charged any other purchaser competing in fact with such favored purchaser in the resale and distribution of such rugs and carpets.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the allegation in the complaint to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, be dismissed.

FINAL ORDER*

The Commission, by order issued August 19, 1960, having extended until further order of the Commission the time within which the initial decision of the hearing examiner would otherwise become the decision of the Commission, pursuant to certain conditions contained in paragraph 8 of the consent agreement to cease and desist; and

The Commission having determined that the aforesaid conditions have been fulfilled and that the initial decision of the hearing examiner is appropriate in all respect to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner, filed July 25, 1960, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the above-named respondent shall, within sixty (60) days after the expiration of time allowed for filing a petition for review, if no such petition has been duly filed within such time by respondents in Docket 7634, Docket 7635 or Docket 7639, 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.

*Reported as amended by order of April 2, 1964, which amended the time in which respondent is required to file a report of compliance.

It is further ordered, That if petition for review is duly filed in Docket 7634, Docket 7635 or Docket 7639, then the time for filing a report of compliance shall begin to run de novo from the latest date of any final judicial determination in any such appellate review.

IN THE MATTER OF

THE BEATTIE MANUFACTURING COMPANY

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

Docket 7633. Complaint, Oct. 28, 1959—Decision, Feb. 10, 1964

Consent order requiring a manufacturer of rugs and carpets in Little Falls, N.J., to cease discriminating in price among retailers who compete in reselling its rugs and carpets by means of its annual cumulative quantity discount system, 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. Title 15, Section 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, The Beattie Manufacturing Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office located in the city of Little Falls, State of New Jersey.

PAR. 2. Respondent is engaged in the manufacture, sale and distribution of rugs and carpets. Respondent is a substantial factor in the carpet industry with a sales volume in 1958 in excess of $8,583.000 and manufacturing facilities located in Little Falls, New Jersey.

PAR. 3. In the course and conduct of its business respondent now causes, and for some time last past has caused, its rugs and carpets, when sold for use or resale, to be shipped from its manufacturing plant in the aforesaid State to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said rugs and carpets in commerce as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its rugs and carpets of like grade and quality, by selling said products at higher and less favorable net purchase prices to some purchasers than the same are sold to other purchasers who have been and are in competition with the purchasers paying the higher prices.

Respondent sells as aforesaid to direct purchasers in the wholesale trade and by and through such means to indirect purchasers in the retail trade. Respondent in making said indirect sales controls and sets the sales price to the retailer-purchaser by the furnishing of published price lists setting forth the terms and conditions of sale for its said products. Respondent in said indirect sales also furnishes and has in effect a published discount plan under which it allows rebate to the retailer-purchaser in the form of merchandise credits to be applied by the retailer on purchases made from or through the wholesaler of respondent's said products.

PAR. 5. The following example is illustrative of respondent's discriminatory pricing practices between and among the retailer-purchasers of its rugs and carpets.

Respondent now has, and for the past several years has had in effect, an annual cumulative quantity discount system ranging from one to five percent, based on the total annual net purchases of its rugs and carpets as follows:

Annual purchases	*Discount (percent)*
Up to $4,999	0
$5,000 to $9,999	1
$10,000 to $17,499	1½
$17,500 to $24,999	2
$25,000 to $32,499	2½
$32,500 to $39,999	3
$40,000 to $47,499	3½
$47,500 to $54,999	4
$55,000 to $64,999	4½
Over $65,000	5

Respondent's aforedescribed annual cumulative quantity discount system results in discriminatory net sales prices as between competitive purchasers in the different volume and discount brackets of said schedule. Purchasers of respondent's products for competitive resale unable to reach an annual purchase volume of $5,000, for example, receive no volume discounts on their purchases and thus have a significant buying price disadvantage.

Moreover, the competitive effect of the resulting net price differences becomes even more apparent in connection with respondent's application of the above discount schedule to individual chain stores whose separate purchase volume reaches $5,000 or over.

Respondent allows said chain purchasers to combine the purchase volume of these various stores so as to qualify for the higher discount allowed on the larger aggregate total of such purchase volume. In many instances the separate purchase volumes of the different individual stores of the chain are not sufficient to warrant such higher discount, but because of the policy of the respondent in granting the rate of discount on the combined purchase volumes of all such chain stores, each of these individual stores is allowed this higher discount.

In many instances respondent's non-chain customers are purchasing individually from respondent in considerably greater volume than the individual chain store with whom they compete, and in so doing receive either no discount, or at best a low bracket discount corresponding with their actual volume of purchases, while the competitive individual chain store is allowed the aforedescribed higher discount. The products sold under respondent's various product lines are of like grade and quality in their respective lines, and these independent non-chain customers purchase the same grade and quality of merchandise from respondent as do its chain store customers. In many instances the individual chain stores and the independently owned stores are located in the same city or metropolitan area and both the chain and non-chain stores are in active and constant competition with and among and between each other for the consumer trade.

Specific illustrations of representative net price differences occasioned between and among various but not all of the said favored and non-favored competing customers on commodities of like grade and quality sold by respondent in commerce during 1958, are as follows in but one sample trade area:

Customer	Purchase volume [1]	Percent of rebate
Akron, Ohio trade area:		
M. O'Neil Co. (chain store)	$17, 610. 42	[2] 5
Superior Floors	7, 973. 00	1

[1] Purchase volume determines rebate percentage. Rebate percentage is then applied to dollar amount of purchase volume remaining after deduction of cash discounts for payment within specified time periods.

[2] Respondent has also departed from its "Retailers Volume Allowance Plan" in various other trade areas and likewise allowed off-scale discounts as high as 5% to retailer-purchasers on individual purchase, volumes of only $13,413.25 by a customer in Springfield, Ohio; $14,465.14 by a customer in Evansville, Indiana; $14,780.05 by a customer in Louisville, Kentucky; and for still another example $15,637.77 by a customer in Lima, Ohio.

PAR. 6. The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said products of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent or said favored purchasers.

PAR. 7. The aforesaid discriminations in price by respondent as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

Mr. Eldon P. Schrup and *Mr. Robert G. Cutler* for the Commission.

Proskauer, Rose, Goetz & Mendelsohn, by *Mr. Harold H. Levin and Mr. Marvin E. Frankel*, New York, N.Y., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated October 28, 1959, the respondent is charged with violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

On April 4, 1960, the respondent and its attorney entered into an agreement with counsel supporting the complaint for a consent order. On June 8, 1960, the parties entered into a supplemental agreement.

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 that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

This agreement is entered into subject to the condition that the initial decision based thereon shall be stayed by the Commission and shall not become the decision of the Commission unless and until the Commission disposes of Docket Nos. 7420, 7421, 7631, 7632, 7634, 7635, 7636, 7637, 7638, 7639, and 7640, by orders to cease and desist in substantially the same form as set forth herein, or by other appropriate order to cease and desist or of dismissal.

The complaint insofar as it concerns the allegation of "primary line injury," namely, to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, should be dismissed on the grounds that the evidence at hand in the light of subsequent developments is insufficient to substantiate such allegation.

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 jurisdictional findings are made and the following order issued.

1. Respondent The Beattie Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at Little Falls, New Jersey.

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

ORDER

It is ordered, That respondent The Beattie Manufacturing Company, a corporation, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the sale of rugs and carpets in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

> Discriminating, directly or indirectly, by cumulative volume discount or otherwise, in the price of rugs and carpets of like grade and quality, by selling to any purchaser at net prices lower than the net price charged any other purchaser competing in fact with such favored purchaser in the resale and distribution of such rugs and carpets.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the allegation in the complaint to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, be dismissed.

FINAL ORDER*

The Commission, by order issued August 19, 1960, having extended until further order of the Commission the time within which the initial decision of the hearing examiner would otherwise become the decision of the Commission, pursuant to certain conditions contained in paragraph 8 of the consent agreement to cease and desist; and

The Commission having determined that the aforesaid conditions have been fulfilled and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner, filed July 25, 1960, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the above-named respondent shall, within sixty (60) days after the expiration of time allowed for filing a petition for review, if no such petition has been duly filed within such time by respondents in Docket 7634, Docket 7635 or Docket 7639, 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.

It is further ordered, That if petition for review is duly filed in Docket 7634, Docket 7635 or Docket 7639, then the time for filing a report of compliance shall begin to run de nova from the latest date of any final judicial determination in any such appellate review.

IN THE MATTER OF

CALLAWAY MILLS COMPANY ET AL.

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

Docket 7634. Complaint, Oct. 28, 1959—Decision, Feb. 10, 1964

Order requiring a manufacturer of rugs and carpets with main office in La Grange, Ga., and three manufacturing plants in La Grange, Manchester and Milstead, Ga., along with its corporate selling agent, to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by means of a cumulative annual volume schedule with volume discounts ranging from

*Reported as amended by order of April 2, 1964, which amended the time in which respondent is required to file a report of compliance.

one to five percent based on total net purchases, under which chains of stores were granted discounts based on the aggregate purchases of all stores in a chain with the result that nonchain retail stores paid higher prices on the same or greater volume than were paid by individual stores of chains in the same market area.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C. 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, Callaway Mills Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office located in the city of La Grange, State of Georgia. Respondent, Callaway Mills, Inc., a Delaware corporation with executive offices located at 295 Fifth Avenue, New York, New York, is a wholly owned and controlled subsidiary of respondent Callaway Mills Company. Respondent Callaway Mills, Inc., acts as the selling agent for respondent Callaway Mills Company.

PAR. 2. Respondents are engaged in the manufacture, sale and distribution of rugs and carpets. Respondents are a substantial factor in the rug and carpet industry with a sales volume in 1958 in excess of $70,100,000 and manufacturing plants located in La Grange, Manchester and Milstead, Georgia.

PAR. 3. In the course and conduct of their business respondents now cause, and for some time last past have caused, their rugs and carpets, when sold for use or resale, to be shipped from their manufacturing plants in the aforesaid State to purchasers thereof located in various other States of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said rugs and carpets in commerce, as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondents, in the course and conduct of their business, have discriminated in price between different purchasers of their rugs and carpets of like grade and quality, by selling said products at higher and less favorable net purchase prices to some purchasers than the same are sold to other purchasers who have been and are in competition with the purchasers paying the higher prices.

PAR. 5. The following example is illustrative of respondents' discriminatory pricing practices between and among the retailer-purchasers of its rugs and carpets.

Respondents now have, and for the past several years have had in effect, an annual cumulative quantity discount system ranging from one to five percent, based on the total annual net purchases of its rugs and carpets as follows:

Annual purchases	*Discount (percent)*
Up to $4,999	0
$5,000 to $7,999	1
$8,000 to $14,999	2
$15,000 to $29,999	3
$30,000 to $49,999	4
Over $50,000	5

Respondents' aforedescribed annual cumulative quantity discount system results in discriminatory net sales prices as between competitive purchasers in the different volume and discount brackets of said schedule. Purchasers of respondents' products for competitive resale unable to reach an annual purchase volume of $5,000, for example, receive no volume discounts on their purchases and thus have a significant buying price disadvantage.

Moreover, the competitive effect of the resulting net price differences becomes even more apparent in connection with respondents' application of the above discount schedule to individual chain stores whose separate purchase volume reaches $5,000 or over.

Respondents allow said chain purchasers to combine the purchase volume of these various stores so as to qualify for the higher discount allowed on the large aggregate total of such purchase volume. In many instances the separate purchase volumes of the different individual stores of the chain are not sufficient to warrant such higher discount, but because of the policy of the respondents in granting the rate of discount on the combined purchase volumes of all such chain stores, each of these individual stores is allowed this higher discount.

In many instances respondents' non-chain customers are purchasing individually from respondents in considerably greater volume than the individual chain store with whom they compete, and in so doing receive either no discount, or at best a low bracket discount corresponding with their actual volume of purchases, while the competitive individual chain store is allowed the aforedescribed higher discount. The products sold under respondents' various product lines are of like grade and quality in their respective lines, and these independent non-chain customers purchase the same grade and quality of merchandise from respondents as do its chain store customers. In many instances the individual chain stores and the independently owned stores are located in the same city or metropolitan area and both the chain and non-chain stores are in active and constant competition with and among and between each other for the consumer trade.

Specific illustrations of representative net price differences occasioned between and among various but not all of the said favored and non-favored competing customers on commodities of like grade and quality sold by respondents in commerce during 1958, are as follows in but one sample trade area:

Customer	Purchase volume [1]	Percent of rebate
Cleveland, Ohio trade area: [2]		
The May Co. (chain store)	$19, 756. 33	4. 75
The Higbee Co	29, 125. 80	2. 85
Carlisle-Allen Co	6, 121. 04	. 95
Erhardt Furniture Co	4, 090. 28	0

[1] Purchase volume of all items determines rebate percentage. Rebate percentage is then applied to dollar amount of purchase volume of rebateable items remaining after deduction of cash discounts for payment within specified time periods.

[2] For further examples, among others, respondents allowed a 4.75% rebate to chain department stores in the Seattle, Washington, San Antonio and Houston, Texas, Akron, Ohio and Boston, Massachusetts trade areas. The purchase volume of none of these stores would have qualified for such rebate. In fact, two such stores would have qualified for only a 1% rebate, two for a 2% rebate, and the fifth store for only 3% under respondents' volume discount schedule.

PAR. 6. The effect of respondents' aforesaid discriminations in price between the said different purchasers of their said products of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondents or said favored purchasers.

PAR. 7. The aforesaid discriminations in price by respondents as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

OPINION OF THE COMMISSION

FEBRUARY 10, 1964

By DIXON, *Commissioner:*

This matter is before the Commission for consideration of complaint counsel's appeal from the hearing examiner's initial decision dismissing the complaint. Said complaint charges that respondents unlawfully discriminated in price in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (49 Stat. 1526; 15 U.S.C. 13(a)).[1] Section 2 of the Clayton Act, as amended, reads in pertinent part as follows:

> Sec. 2. (a) That it will be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, 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: * * *.

The hearing examiner's dismissal was founded upon his conclusion that respondents' lower prices were "* * * made in good faith to meet an equally low price of a competitor * * *" within the meaning of Section 2(b) of the Act.

The parties executed a stipulation for the purposes of the proceeding wherein Callaway admitted that it has sold, in commerce, as "commerce" is defined in the Clayton Act, roll carpets and rugs cut therefrom of like grade and quality to competing retailers purchasing the same for resale within the United States at net prices calculated pursuant to the following cumulative, annual volume discount schedule:

Aggregate annual purchases	*Discount (percent)*
0 to $4,999	0
$5,000 to $7,999	1
$8,000 to $14,999	2
$15,000 to $29,999	3
$30,000 to $49,999	4
$50,000 and over	5

The stipulation and record evidence reveal that under the above discount schedule, chains of stores under common ownership are granted

[1] This is one of twelve similar proceedings brought against major carpet manufacturers. At this juncture, an order to cease and desist has issued against only one manufacturer, *James Lees and Sons Company*, Docket No. 7640, effective September 8, 1961 [59 F.T.C. 418]. Eight of the remaining eleven cases have been settled by the negotiation of consent orders to cease and desist, and the Commission is today approving and adopting these orders as the orders of the Commission. The consenting respondents are: *Bigelow-Sanford Carpet Company, Inc.*, Docket No. 7420 [p. 704 herein]; *Mohasco Industries, Inc.*, Docket No. 7421 [p. 709 herein]; *The Magee Carpet Company*, Docket No. 7631 [p. 716 herein]; *C. H. Masland & Sons*, Docket No. 7632 [p. 721 herein]; *The Beattie Manufacturing Company*, Docket No. 7633 [p. 727 herein]; *A. & M. Karagheusian, Inc.*, Docket No. 7636 [p. 781 herein;] *Roxbury Carpet Company, et al.*, Docket No. 7637 [p. 787 herein]; and *The Firth Carpet Company*, Docket No. 7638 [p. 793 herein].

In addition to the instant proceeding, there were formal adjudicative hearings in Docket No. 7635, *Philadelphia Carpet Company, et al.* [p. 762 herein], and Docket No. 7639, *Cabin Crafts, Incorporated* [p. 799 herein]; and these two matters were also today decided by the Commission.

discounts based upon the aggregate purchases of all stores in each chain, with the result that nonchain retail stores pay higher net prices on the same or on greater volume than that purchased by individual stores of chains located in the same city or market area.

It also was stipulated that in the sample trading areas of Cleveland and Cincinnati, Ohio, and Boston, Massachusetts, the effect of the differences in purchase price caused by the annual cumulative volume discount schedule "may be substantially to lessen competition * * * or to injure, destroy or prevent competition," among and between Callaway's customers purchasing carpets and rugs at the resulting higher and lower net prices within the meaning of Section 2(a) of the Clayton Act, as amended.

Further, it was agreed between the parties that the evidence would be limited to the stipulation and such additional evidence which tends either to support or to refute Callaway's contention that its lower prices were set "in good faith to meet an equally low price of a competitor" under Section 2(b) of the Clayton Act, as amended.

The hearing examiner found that Callaway pioneered the process and began manufacturing tufted roll carpeting in 1950. He also found that beginning long before 1950 and continuing up to the present time the "old line" carpet manufacturers (i.e., those manufacturing woven carpeting and/or later tufted carpeting, as well) had been granting annual volume allowances based on a percentage of their customer's total purchases for the year. The rebates paid by each range from 1 percent to 5 percent, but the different qualifying volumes established in the schedules vary between manufacturers.

Callaway began offering the volume allowances set forth above in December 1954. Callaway's experience since 1950 had shown that "old line" manufacturers were including purchases of tufted carpeting with woven carpeting in computing volume of purchases by a customer during a year. The hearing examiner found that Callaway devised and implemented its volume rebate schedule, with apparent reluctance, after company sales officials recommended that course of action as competitively necessary. However, the record reveals that Callaway sales of tufted carpeting increased steadily from a volume of less than \$3 million in 1951 to \$11 million in 1955.

The hearing examiner found also that the schedule adopted was prepared after Callaway took into account all facts of carpeting sales and analyzed the net prices that were available as a result of its competitors' volume allowances. This was done, the initial decision relates, in order to develop prices which would do no more than meet the prices available to Callaway customers from competitors and enable

Callaway to maintain its position in the market. The same percentages as were used by "old line" manufacturers, but with different qualifying volumes, were decided upon by Callaway in setting up its rebate schedule.

Of particular significance is the fact the hearing examiner found that Callaway and the "old line" manufacturers permit chain stores to combine the purchases of their wholly owned subsidiaries for the purpose of determining the percentage bracket into which the chain falls. In this connection, the record reflects that all chain stores are sold on the same basis by Callaway.

It is unquestioned that the statute permits a seller to discriminate in price even to the extent where serious injury may be incurred by unfavored customers in so long as the discriminatory lower price was set to meet the equally low price of a competitor. *A. E. Staley Mfg. Co., et al.* v. *Federal Trade Commission*, 144 F. 2d 221, 222 (7th Cir. 1944), *reversed on other grounds*, 324 U.S. 746 (1945). In a proceeding against the *Standard Oil Company of Indiana* (41 F.T.C. 263), this Commission adopted the view that "even though the lower prices in question may have been made by respondent in good faith to meet the lower prices of competitors, this does not constitute a defense in the face of affirmative proof that the effect of the discrimination was to injure, destroy, and prevent competition * * * ." (Id. at 281-282.) The Seventh Circuit Court of Appeals affirmed the Commission's position (*Standard Oil Co.* v. *Federal Trade Commission*, 173 F. 2d 210, 214, 217 [1949], but the Supreme Court, in a landmark decision, reversed, holding:

> In a case where a seller sustains the burden of proof placed upon it to establish its defense under § 2(b), we find no reason to destroy that defense indirectly, merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them or may, in a natural course of events, reduce their own resale prices to their customers. It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller. The proviso in § 2(b), as interpreted by the Commission, would not be available when there was or might be an injury to competition at a resale level. So interpreted, the proviso would have such little, if any, applicability as to be practically meaningless. We may, therefore, conclude that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor. (340 U.S. 231, 250 [1951].)

It was the view of three dissenting Justices that the holding of the majority was somewhat anomalous in that it " * * * would permit a seller of nationally distributed goods to discriminate in favor of large chain retailers, for the seller could give to the large retailer a price lower than that charged to small retailers, and could then completely justify its discrimination by showing that the large retailer had first obtained the same low price from a local low-cost producer of competitive goods. This is the very type of competition that Congress sought to remedy. To permit this would not seem consonant with the other provisions of the Robinson-Patman Act, strengthening regulatory powers of the Commission in 'quantity' sales, special allowances and changing economic conditions." (*Id.* at 263.)

While we, of course, follow without question the interpretation of the statute as announced by the majority in the *Standard* case, it is our view that the proponent of a statutory defense which, when successfully interposed, permits systematic price discriminations injurious to smaller retailers should be held to a strict showing that its lower prices were, in fact, set to meet the equally low prices of competitors.

There is no question concerning competitive injury in this proceeding. It was stipulated that the effect of respondents' discriminations in price between competing retailers in the sample trading area of Cleveland, Ohio, Cincinnati, Ohio, and Boston, Massachusetts, "may be substantially to lessen competition or to injure, destroy or prevent competition." Thus, the effect of a holding in favor of the respondents here would be to permit the indefinite continuation of substantial injury to smaller rug retailers. It should not be necessary to point out that such a result should be reached only with caution after due deliberation.

To prove a charge of unlawful price discrimination, counsel for a plaintiff or the government must identify with exactness the particular goods involved, showing that goods alike in grade and quality were sold at disparate prices. The statute requires such a showing, for it would be obviously inappropriate to require a seller to sell unlike goods at the same or cost justified prices. It is equally incumbent upon the proponent of a meeting competition defense to identify with particularity both his goods and the competing goods whose price was met so that the fact finder can determine the validity of the defensive claims.

A discriminatory lower price set to "meet" the price of inferior goods is in effect an undercutting of the latter price, and such a discriminatory price cannot be characterized as defensive, for it goes beyond the provocation which engendered it. There is no showing in this record that respondents' carpets at various price levels were comparable in materials and construction to the carpets of competitors at similar price levels. Rugs and carpets are not fungible goods of the nature of cement, oil or glucose. The quality and saleability of carpeting depend upon many variables and it offends our common sense to completely ignore all such possible differences and hold, sans affirmative evidence, as did the hearing examiner, that carpeting made by Callaway to sell at a certain price level is similar in grade and quality to all carpeting made by Callaway's competitors to sell at approximately the same level. As a matter of fact, there is some evidence in this record that certain of the favored buyers did not consider the goods they were buying from Callaway as either "competitive" or "comparable" with goods they were buying from others. Respondents should have introduced proof as to the comparative quality and saleability of their goods and the competitive goods allegedly defended against. Lacking such proof the finding that Callaway was meeting the price of its competitors is speculative.

Both the courts and the Commission have consistently denied the shelter of the defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods. For example, the defense will not lie when the price of Lucky Strikes is dropped to the level of a "poorer grade of cigarettes," *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929), *cert. denied* 279 U.S. 858 (1929); when the price of Budweiser beer is dropped to match the price of "nonpremium" local beers, *Anheuser-Busch, Inc.*, 54 F.T.C. 277, *set aside for other reasons*, 265 F. 2d 677 (7th Cir. 1959), *rev'd.* 363 U.S. 536 (1960), *again set aside for other reasons*, 289 F. 2d 835 (7th Cir. 1961); and, when the price of a "premium" automatic control is set above the price of less acceptable controls, *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, *rev'd on other grounds*, 191 F. 2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

Respondents failed to meet their burden in other particulars. We have searched this record in vain for some showing that on any particular grade of carpeting the respondents' *price* was set to match a competitor's *price* on a similar grade. There is a good deal of evidence concerning respondents' and competitors' discounts, but discounts can only be compared in conjunction with gross prices on equivalent merchandise. The discounts here involved are not overly large and a slight variation of gross price or, perhaps, wool content makes it impossible to compare transactions. Certainly buyers are not so unsophisticated as to prefer a rug selling for $10 per yard less 5 percent discount over a rug of equal quality selling for $9.50 per yard. And it seems equally obvious that they will not blindly select a rug because of an available discount over a rug of superior quality, color or design in the same price range but without discount. Buyers are concerned with buying the best possible quality rugs at the lowest available prices. Where discounts are involved, all other things being equal, they will undoubtedly select the supplier offering the "longest" discount. This is respondents' position, but they haven't introduced proof from which we could find that in fact all other things *are* equal. Without this necessary showing, proof that their discounts met a competitor's discounts is meaningless.

Moreover, the record clearly establishes that the Callaway pricing schedule grants higher discounts on lower purchase volumes than those employed by their competitors. Respondents' Exhibit 6 A–C reveals that not one of the twelve competitors whose price schedules are there set out permits a discount of 5 percent on less than $60,000 in total annual purchases. Callaway grants 5 percent on $50,000. The hearing examiner specifically points to Bigelow-Sanford as a large competitor whose competition must be met. The exhibit reveals that a customer must buy $105,000 annually from this company to qualify for a 5 percent rebate. Other so-called "old line" companies cited by the hearing examiner as competitors are here listed together with the minimum volume which they require for their top discount of 5 percent:

James Lees & Sons Co	$90,001
Mohasco Industries, Inc	100,000
A. & M. Karagheusian, Inc	60,000
The Magee Carpet Co	80,000

In addition, the record reveals that Callaway grants discounts of 4 percent, 3 percent and 2 percent on purchase volumes lower than those required by its competitors.

It is no answer to contend, as do the respondents and the hearing examiner, that so-called "old line" companies have a broader product line (*i.e.*, both woven and tufted carpeting) and that respondents' qualifying purchase volumes must hence be lower. The plain fact is that respondents are offering lower net prices on an equivalent volume of purchases and this constitutes undercutting, not meeting, a competitor's prices.

This brings us to a related point contended by the appealing complaint counsel, that Callaway's discriminatory prices are the product of a formal pricing system of universal application and that prices so arrived at cannot be successfully presented as meeting the lower prices of competitors. This contention has its foundation in the Supreme Court's decision in *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746 (1945). That case involved the sale of glucose pursuant to a basing point system whereby each competitor provided customers in the same geographic areas with identical discriminatory prices. In spite of the fact that there were no significant differences as among the goods of the various suppliers and the further fact that the respondents' prices exactly met their competitors' prices, the Court rejected the meeting competition defense, holding:

> * * * Thus it is the contention that a seller may justify a basing point delivered price system, which is otherwise outlawed by § 2, because other competitors are in part violating the law by maintaining a like system. If respondents' argument is sound it would seem to follow that even if the competitor's pricing system were wholly in violation of § 2 of the Clayton Act, respondents could adopt and follow it with impunity.
>
> This startling conclusion is admissible only upon the assumption that the statute permits a seller to maintain an otherwise unlawful system of discriminatory prices, merely because he had adopted it in its entirety, as a means of securing the benefits of a like unlawful system maintained by his competitors. But § 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition. * * * (324 U.S. at 753.)

The rule has been reinforced by subsequent opinions of the Supreme and lesser courts. In 1948, the Supreme Court again ruled that blind adherence to competitors' pricing system (this time a multiple basing point system) did not constitute a sanctioned meeting of competition. (*Federal Trade Commission* v. *Cement Institute, et al.*, 333 U.S. 683.) The Court held:

> * * * [T]his does not mean that § 2(b) permits a seller to use a sales system which constantly results in his getting more money for like goods from some customers than he does from others. * * * (*Id.* at 725.)

More recently, quantity discount schedules closely akin to those here involved were held illegal and not justified by the fact that competitors employed similar schedules. *Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F. 2d 674, 677 (2d Cir. 1959), *cert. denied*, 361 U.S. 826 (1959); *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37, 41 (7th Cir. 1957), *vacated on other grounds*, 355 U.S. 411 (1958); *Whitaker Cable Corporation* v. *Federal Trade Commission*, 239 F. 2d 253, 255 (7th Cir. 1956).

The record here clearly shows that respondents' prices are not responsive to individual competitive situations but are set to be generally attractive to large volume customers. This is not a situation where departures from an otherwise lawful pricing formula are intermittently made to retain a customer being enticed by a competitor's lawful low price or to obtain a new customer by matching the price of the customer's former supplier. As a matter of fact, the net price to be paid on any one purchase is not even determined until a purchaser's year end volume is determined. Respondents are not offering prices to buyers and prospective buyers but a formula permitting them to set their own prices, and such a procedure does not fulfill the requirements of Section 2(b).

Complaint counsel argues that respondents' attempted 2(b) defense must fail for the additional reason that respondents should have known the prices they were allegedly meeting were not lawful prices. In view of what has been held above, the Commission does not consider it necessary to rule upon this contention.

The stipulation entered by counsel as to the competitive injury effected by the price discriminations was limited to the so-called "secondary line," *i.e.*, it was agreed that the competition affected was "* * * among and between Callaway's customers * * *." Thus, the complaint allegation that competition may be affected in the line of commerce in which Callaway is engaged must be dismissed.

It is our conclusion that the respondents have violated Section 2(a) of the amended Clayton Act, and that an order against continued violations should issue. The hearing examiner is in error and is reversed. An order vacating the initial decision and requiring the respondents to cease and desist will issue.

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

Dissenting Opinion

FEBRUARY 10, 1964

By ELMAN, *Commissioner*, *dissenting:*

I

This is one of a series of twelve cases involving the leading American carpet manufacturers,[1] whereby the Commission is endeavoring to terminate, uniformly and equitably, a highly unfair and anti-competitive pricing practice that has been followed for many years in the

[1] See page 736, footnote 1, of the Commission's opinion.

carpet industry. I concur wholeheartedly in the Commission's objective.

Not one of the respondents in these cases has denied that the practice of granting annual cumulative volume rebates inflicts competitive injury on small purchasers. Nor is there any denial that this injury is inflicted discriminatorily and unfairly, and that it cannot be justified as a byproduct of the free play of legitimate competitive forces. The practice does not favor the large efficient purchaser, but the large purchaser as such. Not only may a store which habitually purchases in small quantities and at irregular intervals still be entitled to the maximum rebate, depending on its total annual purchases; in addition, if such a store happens to be part of a chain, it may receive the maximum rebate even if its total annual volume is small, since the chains are permitted to aggregate the purchases of all their branches in computing the rebate to which they are entitled. Conversely, an independent store which, in the interests of efficient buying, purchases in large single-sale quantities and at regular intervals, but whose total purchases are small on an annual basis, will not reach a high rebate bracket.

It is hardly surprising that in only one of the twelve proceedings has the defense of cost justification even been attempted. The awarding of rebates on the basis of the cumulative total of separate sales, over an arbitrary period of time, without regard to the quantity or other terms or circumstances of the individual sale, and even if made to separate stores (under common ownership), seems a clear example of the kind of price concession that is based, not on cost savings in manufacture, sale or distribution, but on the bargaining leverage, the sheer power, and not efficiency, of large buyers, particularly chain stores—the especial concern of Congress in passing the Robinson-Patman Act. This kind of price concession seems distinctly less fair than, for example, a single-sale quantity discount. The latter is far more likely to reflect actual efficiencies; and even a small independent store may be able to purchase in relatively large quantities per sale.

It is notable that the carpet manufacturers themselves appear to have no real desire to grant annual cumulative volume rebates, as is demonstrated by their concerted discontinuance of the practice in 1939. Such action, however, was soon aborted by a consent decree obtained by the Department of Justice, which forbade, among other things, any agreement or conspiracy "To refrain from giving volume allowances or rebates to purchasers of rugs and carpets * * *." *United States* v. *Institute of Carpet Manufacturers*, 1940–1943 CCH Trade Cases, ¶ 56097 (S.D.N.Y. 1941). Since there is no showing in the cases before us that any carpet manufacturer is using such rebates as a weapon to prey upon his competitors (*i.e.*, there is no showing of "primary line" injury), and since the rebates would seem not to reflect cost savings derived from doing business with large-volume purchasers, the practice has apparently persisted these many years only because powerful buyers demand it and because no seller can afford to abandon it unless all his major competitors do likewise, and thereby neutralize any competitive advantage to be gained from adherence to the practice. With industry-wide discontinuance through voluntary joint action barred by the consent decree, only the Commission can resolve this problem on a broad and equitable basis.

It should not be difficult for the Commission to eliminate, from an industry having relatively few members, a manifestly unfair and anti-competitive practice which the industry members themselves are anxious to end, if only its elimination be reasonably simultaneous and uniform throughout the industry. But it is most unlikely that this objective can be effectively achieved by the technique of proceeding separately against the industry members with a view to the entry of cease and desist orders, predicated upon a finding of unlawful conduct, against each respondent.

In the first place, since no carpet manufacturer wants to grant annual cumulative volume rebates, but is forced to do so because his competitors grant such rebates, I question the need or propriety of stigmatizing each manufacturer as a law violator. The Commission's objective is to obtain the carpet manufacturers' mutual renunciation, on equitable terms, of a concededly undesirable practice. Why then insist, at all events in the first instance, on coercive orders, based on the premise of individual guilt, which "marry" the respondent to the Commission, perhaps for the rest of his business life, and, for that reason alone, may be vigorously contested?

In the second place, I question whether conventional cease and desist adjudication is, in the particular circumstances, the most effective means of law enforcement. For one thing, a multiplicity of separate, narrowly adversary proceedings, in which the facts developed are limited in the main to those supplied by brief stipulations, as in the cases before us, is not likely to provide a comprehensive picture of the industry's problem, and of the requirements for its solution. The real need would seem to be for a single, all-embracing, industry-wide proceeding to develop broadly the facts bearing on the practice in question, and to explore avenues of relief.

Moreover, to attempt to deal with an industry-wide discriminatory pricing practice on the basis of individual guilt or innocence will frequently be thwarted by the meeting-competition defense (Section 2(b)). If one seller in an industry succeeds in establishing that *his* conduct is justified as a good-faith meeting of competition, the Supreme Court has made clear that he cannot be held to have violated the law, regardless of how injurious to competition among his and his competitors' purchasers the persistence of the practice in the industry may be. *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231. And if any one seller may thus engage with impunity in discriminatory pricing, all his competitors may—to oversimplify somewhat—lawfully emulate him under the aegis of 2(b). Nor is the Commission helped significantly by having conventional 2(a) orders to cease and desist against the competitors of the exonerated seller. Since the statutory defenses, including 2(b), are implicit in all such orders (see *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470), the determination that one competitor's pricing practice was lawful would inevitably lead to eventual industry-wide reversion to the objectionable practice. In short, a chain of individual price-discrimination proceedings against a group of competitors is only as strong as its weakest link. The chain must break unless every member of the group can be deemed individually guilty of a violation of law.

The fatally weak link in the carpet industry proceedings is the instant case involving Callaway Mills. [2] I can understand a reluctance to permit the complete collapse of this series of cases, which might be the ultimate consequence of exonerating Callaway. But there is, in my opinion, no basis upon which to reject the 2(b) defense offered in this case without, in effect, nullifying 2(b).

II

The facts bearing on Callaway's 2(b) defense, as found by the hearing examiner, are simple and essentially uncontroverted. Callaway first entered the carpet industry in 1950, pioneering the manufacture of tufted carpets. At the time, the major carpet manufacturers were manufacturing woven carpets (which are fully competitive with tufted) exclusively. Despite the fact that all the "old line" carpet manufacturers had been granting annual cumulative volume rebates continuously ever since the 1941 consent decree, Callaway, upon first entering the industry, did not adopt the practice. Nor did it make any move in this direction even when the old line manufacturers entered the tufted field. Eventually, however, competitive exigen-

[2] I also have certain reservations respecting the Commission's disposition of the two other contested cases, *Philadelphia Carpet Co.*, Docket No. 7635 [p. 762 herein], and *Cabin Crafts, Inc.*, Docket No. 7639 [p. 799 herein]. See my separate opinions in those cases.

cies forced Callaway to consider adoption of an annual cumulative volume rebate schedule, for its customers threatened to withdraw their patronage unless Callaway would conform to the industry practice. These threats were fully credible in light of the volatile manufacturer-dealer relationship in the industry. Owing to the absence of term contracts and to the fact that dealers customarily carry more than a single manufacturer's line, the ties which bind carpet dealers to particular carpet manufacturers are slack. At least twice a year, the dealers become "free balls", in the language of the trade, owing no allegiance to any manufacturer.

In December 1954, Callaway finally yielded to pressure and adopted a schedule of annual cumulative volume rebates. In doing so, however, it did not imitate slavishly the schedule of any of its competitors. Rather, it considered carefully the various existing schedules and designed its own, different from any other, with the intention of going only so far in the adoption of discriminatory pricing practices as necessary to preserve its market position. A procedure was devised whereby sales officials of Callaway would check up from time to time on the operation of the schedule to determine whether competitive conditions had so changed as to warrant its modification or elimination.

The stipulation that is the only basis of the finding of a *prima facie* violation of Section 2(a) by Callaway recites that Callaway's rebates inflicted competitive injury in three trading areas. Accordingly, Callaway, in seeking to prove its 2(b) defense, called as witnesses its salesmen and the buying agents involved in its sales to the eight stores that received a volume rebate from Callaway in the relevant trading areas. The uncontroverted testimony of these witnesses establishes that all eight were customers of Callaway previous to the time the rebates were granted; all eight actually received rebates from a competitor or competitors of Callaway in amounts equal to or larger than Callaway's rebates; all eight communicated to Callaway the fact of having received these rebates from competitors and demanded that Callaway grant equivalent rebates, and only thereafter did Callaway actually grant rebates to the eight stores. In no case were Callaway's rebates larger than those granted by its competitors to the favored purchasers on equivalent purchases, or its net prices lower.

It appears that between the adoption of its rebate schedule and 1959, Callaway gained only four new customers in the three trading areas covered by the stipulation, and these new customers earned total volume rebates of less than $75. (Callaway has a total of more than 2,200 customers.) In the same period, Callaway's market position in the carpet industry remained constant.

On these facts, the good-faith meeting of competition defense would seem to have been clearly established. *Continental Baking Co.*, F.T.C. Docket 7630 (decided December 31, 1963) [63 F.T.C. 2071]. Nevertheless, the Commission in its opinion advances two grounds for rejecting Callaway's 2(b) defense: that Callaway, by not establishing that its carpeting was of "like grade and quality" to its competitors', failed to prove that its volume allowances were "defensive" only; and that Callaway's plan or schedule of volume allowances constitutes an impermissible pricing "system".

As to the first ground, the opinion begins by seeming to question the correctness of the first *Standard Oil* decision (*Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231), in which the Supreme Court held that 2(b) provides an absolute defense to a charge of violation of 2(a). With this as prologue, the Commission, while conceding that it is bound by the first *Standard* decision, proceeds to announce the wholly novel proposition that the 2(b) defense is to be strictly construed against the respondent, and will be accepted "only with caution after due deliberation" and after the respondent has demonstrated every possibly material fact with "particularity". I cannot agree that 2(b) should be given a narrow, grudging interpretation. In the Robinson-Patman Act, as in the other federal antitrust statutes, "'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'" *Standard Oil Co.* v. *F.T.C.*, *supra*, at 249. Section 2(b) not only recognizes a right of self-defense in a seller threatened by a rival's price raid, but also, and more important, in doing so it alleviates the price rigidity, the "stickiness" and inflexibility of price levels, that would result if sellers were compelled to ignore competition and maintain completely uniform prices. Section 2(b) serves an essential function by allowing necessary competitive flexibility in pricing actions, and should therefore be fairly—not narrowly or grudgingly—construed.

However, even if 2(b) is construed narrowly, it cannot reasonably be interpreted to require proof that a respondent's products are of "like grade and quality" compared with its competitors' products. The "like grade and quality" provision of 2(a) qualifies the requirement of that section that the seller maintain price uniformity among competing purchasers. Transposed to a 2(b) context, the provision is meaningless, since 2(b) is solely concerned with permitting the respondent to meet a competitive situation. A seller is permitted by 2(b) to meet a competitive price, that is, a price on *competing* products, irrespective of whether those products are of "like grade and quality", for 2(a) purposes, to his own. This is the holding of *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 366 (9th Cir. 1955), and, until today, was, I think, considered a well-settled proposition.

But even if the "like grade and quality" provision were a part of 2(b), that should offer the Commission scant comfort in this case, since there is substantial, and uncontroverted, evidence of record—not mentioned by the Commission in its opinion—that Callaway's carpeting was of like grade, quality and price to that sold by competing manufacturers whose prices Callaway was attempting to meet. See, e.g., Transcript of Hearings, pp. 38, 58, 71, 79, 131–32, 145, 148.

The reasoning by which the Commission attempts to equate respondent's alleged failure to prove "like grade and quality" with bad-faith, non-defensive conduct seems to me explicable only on some theory that, since the 2(b) defense is a formidable obstacle to a finding of individual guilt where separate proceedings are brought against a number of competing sellers (see p. 746 above), the defense will be made unavailable, as a practical matter, in such circumstances, by compelling the respondent to prove to a nicety even facts not genuinely in issue.

On the highly dubious premise that only strictly "defensive" meeting of competition is embraced by the 2(b) defense (but see *Sunshine Biscuits, Inc.* v. *F.T.C.*, 306 F. 2d 48 (7th Cir. 1962)), it is conjectured that if Callaway carpeting is a superior-grade, premium product, or—what seems rather contradictory—if Callaway carpeting is lower priced than that of competing manufacturers, the granting of volume allowances by Callaway may have been an aggressive tactic intended not to match, but to undercut, its competitors' prices; not to protect, but to enlarge, its market position. The record, however, supports neither the factual premise nor the conclusion of this reasoning. On the contrary, as has been noted, there is positive and uncontradicted evidence (which the majority opinion does not mention) that Callaway had no aggressive purpose or intent but acted in complete good faith; that it did not, in fact, increase its market share as a result of granting volume allowances, could not have retained its share of the market without conforming to the industry-wide practice of granting such allowances, and did not grant larger allowances than its competitors to favored customers, or sell at lower net prices to them.

In light of this uncontradicted and unrebutted evidence that Callaway acted reasonably and moderately in response to a clear competitive necessity, how can it be held that Callaway has not sustained its burden of proof under 2(b) merely because it did not specifically negative remote, unfounded and wholly conjectural hypotheses of possible aggressive conduct? I do not know what kind of evidence Callaway should or could have introduced to satisfy the doubts now raised.

Reliance on unfounded conjecture is also apparent in the Commission's attempt to attach significance to the fact that a customer of Callaway could, theoretically, obtain a larger volume allowance than Callaway's competitors provide on equivalent purchases. The fact is that in the relevant trading areas Callaway did not grant any such larger allowances. Nor is there any indication that Callaway has ever offered a greater allowance than a competitor. There is thus no factual basis whatever for concluding that Callaway used its allowance schedule in any improper fashion.

In my opinion, the evidence introduced by Callaway in support of its 2(b) defense amply established a *prima facie* case of good-faith meeting of competition. If complaint counsel believed that, notwithstanding such evidence, Callaway could be shown to have acted in an "aggressive" fashion, it was his burden to introduce rebuttal evidence. He did not. On the present record there is no indication that Callaway acted otherwise than in complete good faith.

The second ground given for rejecting the 2(b) defense is that because Callaway's price reductions in the three trade areas described in the stipulation accorded with an established rebate schedule, and were not the exclusive result of spur-of-the-moment decisions to match competitors' price concessions, its meeting-competition defense is vulnerable under the principle that pricing "systems", as differentiated from individual competitive responses, are outside the scope of 2(b).

The "system"/"individual competitive situation" dichotomy originated in a basing-point decision, *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, where the respondent had adopted the basing-point delivered-price system uniformly prevailing in its industry. Such conduct was patently inconsistent with an inference of good-faith meeting of competition. While a basing-point system involves price reductions to some customers through freight absorption, at the same time it involves price increases to other customers, who must pay "phantom" freight. A seller who adopts such a system, then, is not merely matching his competitors' *lower* prices; he is matching *all* their prices. He is not meeting competition, but ensuring industry-wide price uniformity.[3]

[3] In a subsequent basing-point decision, *F.T.C.* v. *Cement Institute*, 333 U.S. 683, the element of phantom freight was apparently absent. However, the respondents' alleged meeting of competition had overtones of collusion and price-fixing, as in *Staley*, and hence an inference of bad faith was drawn. See note. *Pricing Systems and the Meeting Competition Defense*, 49 Va. L. Rev. 1325, 1338–39 (1963).

The vice in the 2(b) defense offered by the basing-point respondents was not that they were responding to their competitors' pricing conduct in accordance with a plan or schedule, but that a basing-point plan or schedule cannot be a *bona fide* method of meeting competition, since it is intended, rather, to eliminate competition. The point of the basing-point cases was not that the respondents were using a pricing *system*, but that their pricing system was an *illegal*, collusive, price-fixing instrumentality. Callaway's rebate schedule has nothing in common with a basing-point or similar system.

Carried over uncritically into contexts wholly different from that of the basing-point cases, the language of "system" versus "individual competitive situations" only retards the intelligent solution of 2(b) problems. Unquestionably, there are situations in which reliance on a schedule of price concessions may be inconsistent with an inference of good-faith meeting of competition. That might be true, for example, where such concessions were "granted as a matter of course, irrespective of what other sellers were offering". *Forster Mfg. Co.*, F.T.C. Docket 7207 (decided Mar. 18, 1963) [62 F.T.C. 852] p. 909. "Section 2(b) presupposes a lower price *responsive* to rivals' competitive prices" (Rowe, Price Discrimination Under the Robinson-Patman Act 234 (1962)), and is inapplicable in the case of "a preconceived pricing scale which is operative regardless of variations in competitor's prices". *Ibid.* But that is not this case. Callaway's schedule did not pre-exist the competitive necessity therefor; it was adopted only after Callaway found that it could no longer retain its market position without acceding to buyers' demands that it adopt a schedule comparable to those used by its competitors. Callaway introduced positive and uncontroverted evidence that in each of the three relevant trading areas, it granted price concessions only after and in response to equal or larger concessions actually granted by its competitors to its customers.

The fact that Callaway's rebates, which were responsive to proved competitive exigencies, were computed according to a rebate schedule, is logically and legally irrelevant to the question of whether Callaway acted in good faith. See *Standard Oil Co.* v. *F. T. C.*, 233 F. 2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396. It has never been held that the amount of each allowance offered to meet a competitor's price must be separately negotiated. Under the volatile conditions which obtain in the carpet industry, such a rule would be manifestly unrealistic. If Callaway cannot, at the beginning of the year, promise its customers that if they purchase a specified amount during the year they will receive a specified rebate, how can it retain those customers, who receive such rebates from all its major competitors? Should Callaway agree in advance to grant its customers as large a rebate as they would expect to receive from one of its competitors? If so, Callaway might find itself committed to granting a larger rebate than it could afford. Should Callaway, in setting a price to each customer, estimate the probable rebate that the customer could expect to receive from a competitor of Callaway? Surely the element of sheer guesswork in this method would be so great as to result in a completely erratic pricing pattern, which might not even approximately reflect Callaway's competitive needs, and could never pass muster under the rigorous standards of 2(b). Should Callaway simply accede to every dealer's demands for a specified lower price? If so, it would not be meeting competition within the meaning of 2(b), but merely bowing to large buyers' pressures—precisely what the Robinson-Patman Act was enacted to stop. Must Callaway, which has more than 2,200 customers, negotiate with each of them the terms of every sale? Surely that would be completely impractical.

If we will not permit Callaway to grant allowances according to a schedule, it would seem to be incumbent upon us to indicate how Callaway can lawfully meet the competition created by its competitors' schedules, for "the statute does not place an impossible burden upon sellers". *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759. I find it difficult to imagine how Callaway could have retained its market position without adopting some sort of rebate schedule, for the competition it faced, in the context of unstable seller-purchaser relationships, was persistent and recurring and could not have been dealt with practically through individual negotiations. Cf. *F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396, 403, n. 8. Complaint counsel concedes that Callaway "made the best of a difficult competitive situation * * * ." Appeal Brief, p. 19. What more does Section 2(b) require?

In my opinion, Callaway discharged its burden under 2(b) by proving that the schedule it did adopt was fairly designed to meet competition, and that, in operation, as demonstrated by the testimony of participants in the transactions with favored purchasers, its schedule resulted in the granting of price concessions only to customers offered larger concessions by Callaway's competitors. We do not know, and it is immaterial, whether in some circumstances not of record in this case Callaway's adherence to this schedule might have led to price concessions unjustified by competitive necessity.

In any event, a complete answer to complaint counsel's argument that pricing according to an established plan or method is impermissible under 2(b) was given by the Supreme Court in the second *Standard Oil* decision (*F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396). Respondent maintained a two-price schedule whereby dealers who met certain qualifications, involving the maintenance of delivery and bulk storage facilities, a specified annual volume of business, and a responsible credit rating, were classified as jobbers and received the lower price. The system had been established before enactment of the Robinson-Patman Act. To the charge that the two-price method violated Section 2(a), respondent offered the defense of good-faith meeting of competition. It introduced evidence which showed that the four dealers whose receipt of the lower, jobber's price was the basis of the commission's case had been offered jobber classification by respondent's competitors, who maintained two-price schedules basically the same as respondent's. In acceding to the four dealers' demands that respondent continue their jobber classification, respondent was following its competitor's "established method of pricing", 49 F.T.C. 923, 954, and bestowing jobber status in accordance with a general scheme of pricing classification. Anyone who qualified as a jobber under respondent's established schedule was entitled to the lower price. The Supreme Court upheld respondent's good-faith meeting of competition defense, rejecting explicitly the Commission's position that respondent was meeting competition impermissibly by means of a system.

A customer of Callaway who qualifies, by annual purchase volume, for a specified rebate percentage, receives that rebate; a customer of Standard Oil who qualified as a jobber according to pre-established criteria, received the lower of the two established prices. The cases seem indistinguishable. If anything, the validity of the 2(b) defense is, in the present case, *a fortiori*, since Callaway first adopted its pricing schedule only after competitive conditions forced it to meet the price concessions made to its customers by its competitors.

The second *Standard Oil* decision has never, to my knowledge, been departed from or qualified, and certainly not in the automotive-parts cases, upon which complaint counsel relies so heavily for his position that Callaway was granting allowances according to a forbidden "system". There is broad language in some of these cases, but in each, the respondent's meeting-competition defense was actually rejected for reasons that have nothing to do with Callaway's situation.[4]

The majority opinion declines to reach complaint counsel's argument that Callaway's 2(b) defense must be rejected because the competition being met was not "lawful", since, in the Commission's view, the defense must be rejected on other grounds. Without laboring the point, I would like to suggest that the argument is, in any event, untenable.

It has been the Commission's settled view that a respondent, in seeking to establish the defense of goodfaith meeting of competition, need not prove that the prices he met were lawful under the Robinson-Patman Act.[5] It has also been stated, but never authoritatively settled, that the meeting of a price known to be illegal is impermissible. See Rowe, *op. cit. supra*, at 223. Of course, Callaway could not "know" whether its competitors' prices were legal or not, for the matter had never been adjudicated. Cf. *F.T.C.* v. *Standard Oil Co.*, *supra*, at 400, n. 4. And one competitor, Philadelphia Carpet Company, spent time and effort on a cost study aimed at demonstrating that its rebates were cost justified and hence lawful under the Robinson-Patman Act. The lawfulness of the rebate practices of Callaway's competitors was, then, at the time Callaway instituted its rebate schedule, and until today, at least arguable.

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[4] In *Standard Motor Products, Inc.*, 54 F.T.C. 814, aff'd, 265 F. 2d 674 (2d Cir. 1959), the decisive consideration was that respondent's pricing practice was found to be, not a method of meeting competition, but a device for spurring the formation of "buying groups" and so gaining new customers. The evidence showed that respondent had designedly attracted and obtained numerous new customers. In *Whitaker Cable Co.*, 51 F.T.C. 958, *aff'd*, 239 F. 2d 253 (7th Cir. 1956), there was no evidence that respondent's pricing policy had resulted in responsive price concessions. See 51 F.T.C., at 966. The principal testimony on the meeting-competition issue was that of respondent's president, and he merely indicated vaguely that respondent some 15 to 18 years before had adopted the same plan as a competitor's. *Id.*, at 976. *E. Edelmann & Co.*, 51 F.T.C. 978, *aff'd*, 239 F. 2d 152 (7th Cir. 1956), turned on factual matters of no pertinence to Callaway's 2(b) defense. As the Court of Appeals emphasized, there was no evidence that respondent had attempted to meet the prices of its principal competitors. The holding of *C. E. Niehoff & Co.*, 51 F.T.C. 1114, aff'd, 241 F. 2d 37 (7th Cir. 1957), rev'd on other grounds, 355 U.S. 411, was simply that there was no "substantial, reliable and probative evidence on this record that * * * [respondent's] lower price or prices were made to meet equally low price or prices of a competitor or competitors". 51 F.T.C., at 1146–47. In *Moog Industries, Inc.*, 51 F.T.C. 931, *aff'd*, 238 F. 2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411, respondent did not press its 2(b) defense.

[5] E.g., *American Oil Co.*, F.T.C. Docket 8183 (decided June 27, 1962) [60 F.T.C. 1786], p. 1812, rev'd on other grounds, 325 F. 2d 101 (7th Cir. 1963); Brief for the Federal Trade Commission, *F.T.C.* v. *Standard Oil Co.*, 355 U.S. 396 (No. 24, October Term 1957), p. 35, see Report of the Attorney General's National Committee to Study the Antitrust Laws 182 (1955).

III

If my view of Callaway's 2(b) defense prevailed, and the defense was accepted, would the Commission thereby disable itself from eliminating the practice of annual cumulative volume allowances in the carpet industry? In other words, is the Commission really forced to choose (as it evidently believes) between rejecting Callaway's defense on untenable grounds and abandoning its efforts to rid the carpet industry of an unfair and discriminatory practice? I think not. It is not too late for the Commission to adopt a realistic and effective approach to this industry-wide problem.

Let me revert for a moment to the proposition that the 2(b) defense is not available to one who meets a price he knows to be unlawful. It seems to stem from the *Staley* basing-point decision (see 324 U.S., at 754), and its context in that decision is illuminating. Each firm's basing-point plan was a link in an industry-wide, collusive, price-maintenance arrangement; and the Court refused to permit each individual firm to justify its basing-point plan by pointing to the identical plans of its competitors. To allow the 2(b) defense in such circumstances would nullify effective law enforcement whenever the principal members of an industry are *in pari delicto*.

The *Staley* principle suggests how the Commission can effectuate the Robinson-Patman Act in situations, as here, of an industry-wide discriminatory practice—and with no need to have recourse to specious evasions of the 2(b) defense. If the Commission first finds and declares such a practice to be unlawful under 2(a), thereafter no member of the industry—any more than in *Staley*—would be heard to defend on the ground that he was merely following his competitors' practices.

In suggesting recourse in this situation to the principle that prices known to be unlawful may not lawfully be met, I do not mean to indicate approval of any simple touchstone for determining the availability of the 2(b) defense. Used uncritically, "lawful"/"unlawful", like "aggressive"/"defensive" and "system"/"individual competitive situation",only retards the intelligent and practical solution of 2(b) problems. *Continental Baking Co.*, F.T.C. Docket 7630 (decided December 31, 1963) [63 F.T.C. 2071] (separate opinion of Commissioner MacIntyre). However, each of these formulas has a kernel of validity. Thus, there are situations where meeting the competition provided by a known unlawful price, or meeting competition "aggressively" or by means of a "system", may be a misuse or abuse of the 2(b) defense, and hence inconsistent with an inference of good faith. That would be true where the meeting of competition took the form of participation in a collusive price-maintenance arrangement, as in *Staley*, or was otherwise predatory or unfair. See Hall & Phillips, *Good Faith, Discrimination, and Market Organization*, 30 Southern Economics J. 144 (1963). Beyond that, a seller, to avail himself of the 2(b) defense, should be required to act reasonably to avoid unnecessarily aggravating the anti-competitive effects of his competitors' discriminatory pricing. Finally, where an industry-wide discriminatory practice has been held to violate 2(a), mutual justification under 2(b) by the industry members plainly does not comport with the policy of 2(b), and, if allowed, would paralyze 2(a) enforcement in the areas where it was most urgently needed. At least in this special situation, as in the special situation present in the basing-point decisions, the principle that a known unlawful price may not be met is clearly valid. Hence, if the Commission establishes the unlawfulness of the carpet industry's volume allowances practice, it can with fairness preclude future resort to the 2(b) defense by members of the industry.

How may the Commission go about this? The Commission should forthwith convene a Trade Regulation Rule proceeding, as contemplated in Section 1.63 of the Commission's Rules of Practice and Procedure, to determine the lawfulness of annual cumulative volume allowances in the carpet industry. Trade Regulation Rules "express the experience and judgment of the Commission, based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers". The "substantive requirements" involved in this proceeding would be the requirements of the Robinson-Patman Act, and inquiry would be directed to the appropriateness of adopting a Trade Regulation Rule that would declare unlawful certain annual cumulative volume allowances in the carpet industry.

This proceeding would not be narrowly adversary, and it would not focus on whether a past violation of law had occurred. Attention would be directed toward formulating, for the future, clear and precise guidelines delimiting the permissible range of volume allowances in the industry. Hopefully, such guidelines would be clear enough to obviate the danger of future resort to 2(b) by respondents uncertain as to whether their competitors' pricing practices were cost justifiable. Moreover, the proceeding would be broad-gauged enough to enable the Commission not only to decide what allowances were unlawful, but also to indicate what kind of allowance plans in the industry would comport with the policy of the Robinson-Patman Act. Only then would the carpet industry have fully concrete guidance as to the requirements of law.

Once a Rule was promulgated stating the lawful limits of annual cumulative volume allowances in the carpet industry, a member of the industry could not, thereafter, credibly maintain that in granting allowances forbidden by the Rule he was meeting a lawful pricing practice of his competitors. Cf. *Standard Motor Products, Inc.*, 54 F.T.C. 814, 832, *aff'd*, 265 F. 2d 674 (2nd Cir. 1959). Hence, no firm in the carpet industry could lawfully continue the granting of allowances forbidden by the Rule, and, if any did so, the issuance of a cease and desist order against it would be relatively simple, not only because the Commission could rely on the Rule, but also because the 2(b) defense would be unavailable. Callaway, for example, could interpose no legitimate objection to the entry of a Rule such as I have suggested, for the Rule would be, in operation, prospective only. It would say to Callaway, not "you have violated the law", but "the unlawfulness of the industry's practice has now been authoritatively determined, and if henceforth you grant allowances within the scope of the Rule, you will not be heard to defend under 2(b)." If the Commission is to deal with Callaway's 2(b) defense fairly, and stamp out effectively a pernicious, industry-wide practice, its action must operate prospectively along the lines suggested, not retrospectively.

Although the issuance of cease and desist orders that would not be vulnerable to the objections canvassed in this opinion should not be difficult or time-consuming once a Rule was promulgated, it is doubtful whether the need for such orders would actually arise. A Trade Regulation Rule, based as it would be on a broad-ranging, industry-wide inquiry in which all cost and other relevant factors were isolated and studied, would state the requirements of law with clarity and particularity, yet would avoid stigmatizing any businessman as a law violator. It would, in my opinion, be a fair and effective means of obtaining from the carpet manufacturers—who, as noted earlier, and entirely willing to abandon illegal volume allowances—voluntary compliance with the law.

To institute a Trade Regulation Rule proceeding in the manner I have described would not be a novel course of action for the Commission to take. Just recently, in the "exercise of the Commission's discretion in determining whether, and when, not to enter an immediate cease and desist order, so that a general practice may be dealt with more comprehensively", we declined to enter such an order in a Robinson-Patman matter, though finding a violation, because we had reason to believe that the practice of which the particular respondent was guilty was widespread in the industry. *Atlantic Products Corp.*, F.T.C. Docket 8513 (Order of December 13, 1963) [63 F.T.C. 2237]. Instead, we determined forthwith to institute a Trade Regulation Rule proceeding for industrywide corrective action. I do not see why such a procedure would not be equally, and indeed more, appropriate in the special facts involved in the present industry situation.

The procedure I have suggested need entail no delay whatever in accomplishing the Commission's ultimate objective in this series of cases: immediate elimination of discriminatory allowances from the carpet industry. For I do not suggest that the Commission should simply suspend these twelve cases pending the outcome of a Trade Regulation Rule proceeding. Rather, the Commission should issue, at this time, an opinion stating that the practice of granting annual cumulative volume allowances in the carpet industry has been found to be in violation of Section 2(a), but declining to reach or decide the question whether any of the respondents has established a 2(b) defense and also declining to issue any cease and desist orders. Such an opinion would serve, specifically, to place Callaway on notice that should it grant such allowances in the future, the 2(b) defense would not be available to it.

In other words, the Commission, at this time, rather than enter any cease and desist orders against the carpet companies, could enter declaratory orders against them, declaring the practice of granting annual cumulative volume allowances in the carpet industry unlawful and thereby precluding Callaway (or any other carpet respondent) from resorting to the 2(b) defense in the future. If Callaway, notwithstanding the Commission's declaration, continued to grant such allowances, the Commission's declaratory order against Callaway could readily be enlarged to include a formal command to cease and desist. The Commission could, of course, proceed in like fashion against any carpet respondent which disobeyed the declaratory order against it.

Such a disposition is well within the bounds of Section 5(d) of the Administrative Procedure Act, which authorizes the issuance of declaratory orders "to terminate a controversy or remove uncertainty". And the propriety of the Commission's finding that the volume allowance practice, as it has been employed in the carpet industry, violates the standard of legality of Section 2(a), seems clear, since in none of the twelve cases is it denied that the practice inflicts competitive injury, and since, on the Commission's view, the only attempt at cost justification, that of Philadelphia Carpet Company, has failed.

Use of the declaratory-order procedure in this situation would be supplementary, not alternative, to a full, wide-ranging, non-adjudicative inquiry, under our Trade Regulation Rule procedure, which would develop all the relevant facts and considerations and assure truly effective, industry-wide corrective action. In terms of practical results, this double-barreled procedure seems to me far more promising than the procedure the Commission has employed. The entry of a number of cease and desist orders is, in the present circumstances, little more than a paper accomplishment.

Final Order

This matter having been heard by the Commission upon the appeal of complaint counsel from the hearing examiner's initial decision dismissing the complaint and upon briefs and oral argument in support of and in opposition to said appeal; and the Commission having determined that the appeal should be granted, and that the initial decision should be vacated and set aside, now makes these, its findings as to the facts, conclusions and order, the same to be in lieu of said initial decision.

FINDINGS AS TO THE FACTS

Paragraph 1. Respondent Callaway Mills Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia with its principal office located in La Grange, Georgia. Respondent Callaway Mills, Inc., is a Delaware corporation with executive offices located at 295 Fifth Avenue, New York, New York, and is a wholly owned and controlled subsidiary of Callaway Mills Company, functioning principally as a sales solicitor for Callaway Mills Company.

Par. 2. Respondents are engaged in the manufacture and sale of a wide range of textile products, including roll carpets and rugs cut therefrom.

Par. 3. Respondents ship or cause their rugs and carpets to be shipped from their place of manufacture in the State of Georgia to purchasers located in various other States of the United States and are actively and continuously engaged in the solicitation of customers and in the sale of said products to customers located in various States other than the states in which respondents are located.

Par. 4. In the course of their activities as aforesaid, the respondents have sold and are selling carpets and rugs of like grade and quality to competing retailers purchasing the same for resale subject to the following cumulative, annual quantity discounts:

Aggregate annual purchases	*Discount (percent)*
$5,000 to $7,999	1
$8,000 to $14,999	2
$15,000 to $29,999	3
$30,000 to $49,999	4
$50,000 and over	5

PAR. 5. By pricing their rugs and carpets pursuant to the above set out discount schedule, respondents have discriminated in price between retailers who compete with each other in the resale of respondents' rugs and carpets to consumers. Customers receiving discounts at each of the various levels of the discount schedule have been favored over all other customers who receive a lower discount or no discount at all.

PAR. 6. Without regard to the above discount schedule, respondents have granted the top discount of 5 percent to individual stores belonging to or which are members of a store chain, with the result that independent retail stores have been required to pay higher net prices on approximately the same volume as that purchased by chain stores with which they compete. In some instances, the individual annual purchases of a chain store unit have been insufficient to qualify it to receive any discount—but in each such instance, the unit has been granted a 5 percent discount.

PAR. 7. Within the sample trading areas of Cleveland, Ohio, Cincinnati, Ohio, Boston, Massachusetts, and in any and all trading areas where respondents have discriminated in price by granting disparate prices to competing customers as described above, the effect of said discriminations may be substantially to lessen competition or to injure, destroy or prevent competition among and between respondents' customers purchasing said carpets and rugs.

PAR. 8. The record fails to reveal that respondents' lower discriminatory prices have been set to meet the equally low prices charged by respondents' competitors for goods similar in quality to respondents' goods.

PAR. 9. The record also fails to reveal that respondents' lower discriminatory prices have in fact only met the net prices charged by respondents' competitors, but, to the contrary, discloses that respondents have granted lower net prices than their competitors on an equivalent volume of purchases and have thereby undercut their competitors' prices.

PAR. 10. Respondents' prices are determined by a formula with broad application to all respondents' customers and hence have not been responsive to individual competitive situations. Instead, they have resulted from a sales system productive of continued discriminations between competing customers, without regard to whether the customers have been offered lower prices by competitors.

CONCLUSIONS

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

2. The facts in this record as described above and in the accompanying opinion of the Commission conclusively establish that respondents have discriminated in price in the sale of rugs and carpets in commerce in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act.

3. The public interest requires the issuance of the order directing respondents to cease and desist from the violations found.

ORDER

It is ordered, That respondents Callaway Mills Company, Callaway Mills, Inc., corporations, their officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of rugs and carpets in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

> Discriminating, directly or indirectly, by the allowance of cumulative volume discounts or otherwise, in the price of rugs and carpets or like grade and quality, by selling to any purchaser at a net price lower than the fact with such favored purchaser in the resale and distribution of such rugs and carpets. For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the allegation in the complaint that respondents, discriminations in price may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondents are engaged, or to injure, destroy or prevent competition with said respondents, be dismissed.

It is further ordered, That respondents shall, within sixty (60) days after a 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 set forth herein.

224-069—70——49

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

IN THE MATTER OF

PHILADELPHIA CARPET COMPANY ET AL.

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

Docket 7635. Complaint, Oct. 28, 1959—Decision, Feb. 10, 1964

Order requiring a Philadelphia rug and carpet manufacturer and its exclusive sales agent, with manufacturing plants in Philadelphia, Pa., and Cartersville, Ga., to cease discriminating in price among any of their purchasers in violation of Sec. 2(a) of the Clayton Act by means of an annual cumulative quantity discount system ranging from one to five percent based on total net purchases.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C. 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, Philadelphia Carpet Company, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its principal office located at Allegheny Avenue and "C" Street, in the city of Philadelphia, Commonwealth of Pennsylvania. Respondent, Doerr Carpets, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office located in the city of Cartersville, State of Georgia. The corporate officers and owners of each respondent are largely the same. Respondent, Philadelphia Carpet Company, originally established as Philip Doerr & Sons, acts as the exclusive sales agent for respondent, Doerr Carpets, Inc.

PAR. 2. Respondents are engaged in the manufacture, sale and distribution of rugs and carpets. Respondents are a substantial factor in the rug and carpet industry with a combined sales volume in 1958 in excess of $9,000,000 and manufacturing plants located in Philadelphia, Pennsylvania and Cartersville, Georgia.

PAR. 3. In the course and conduct of their business respondents now cause, and for some time last past have caused, their rugs and carpets, when sold for use or resale, to be shipped from their manufacturing plants in the aforesaid States to purchasers thereof located in various other States of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said rugs and carpets in commerce, as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondents, in the course and conduct of their business, have discriminated in price between different purchasers of their rugs and carpets of like grade and quality, by selling said products at higher and less favorable net purchase prices to some purchasers than the same are sold to other purchasers who have been and are in competition with the purchasers paying the higher prices.

Respondents sell as aforesaid to direct purchasers in the wholesale trade and by and through such means to indirect purchasers in the retail trade. Respondents in making said indirect sales control and set the sales price to the retailer-purchaser by the furnishing of published price lists setting forth the terms and conditions of sale for their said products. Respondents in said indirect sales also furnish and have in effect a published discount plan under which they allow rebates to the retailer-purchaser in the form of merchandise credits to be applied by the retailer on purchases made from or through the wholesaler of respondents' said products.

PAR. 5. The following example is illustrative of respondents' discriminatory pricing practices between and among the retailer-purchasers of their rugs and carpets.

Respondents now have, and for the past several years have had in effect, an annual cumulative quantity discount system ranging from one to five percent, based on the total annual net purchases of their rugs and carpets as follows:

Annual purchases	*Discount (percent)*
Up to $3,999	0
$4,000 to $7,499	1
$7,500 to $11,999	1½
$12,000 to $24,999	2
$25,000 to $39,999	3
$40,000 to $64,999	4
$65,000 and over	5

Respondents' aforedescribed annual cumulative quantity discount system results in discriminatory net sales prices as between competitive purchasers in the different volume and discount brackets of said schedule. Purchasers of respondents' products for competitive resale unable to reach an annual purchase volume of $4,000, for example, received no volume discounts on their purchases and thus have a significant buying price disadvantage.

Specific illustrations of representative net price differences occasioned between and among various but not all of the said favored and non-favored competing customers on commodities of like grade and quality sold by respondent Philadelphia Carpet Company in commerce during 1958, are as follows in but one sample trade area:

Customer	Purchase volume [2]	Percent of Rebate
Cleveland, Ohio Trade Area:[1]		
Wm. Taylor & Son Co.	$53, 784. 83	4.
M. A. Weisman Co.	[3] 40, 821. 19	4.
Regal Floor Coverings	32, 558. 37	3.
John P. Sedlak	16, 256. 90	2.
Woldman's	8, 237. 11	1. 50
McKinney-Kelly	5, 495. 40	1.
Colony House	3, 986. 50	0.

[1] In the Cleveland, Ohio area 58 different retailer-customers of respondents purchased $311,029.46 of said commodities during 1958. Of this number only 14 customers received discounts from respondents totaling $3,928.51.

[2] Purchase volume of all items determines rebate percentage. Rebate percentage is then applied to dollar amount of purchase volume of rebateable items remaining after deduction of cash discounts for payment within specified time periods.

[3] Doerr Carpet, Inc. sales included to arrive at purchase volume.

PAR. 6. The effect of respondents' aforesaid discriminations in price between the said different purchasers of their said products of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondents or said favored purchasers.

PAR. 7. The aforesaid discriminations in price by respondents as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

Mr. Eldon P. Schrup and *Mr. Thomas A. Sterner* for the Commission.

Mr. Thomas M. Hyndman, Philadelphia, Pa., and *Mr. Albert E. Sawyer*, *Sawyer & Marion*, Washington, D.C. for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

NOVEMBER 1, 1961

In the complaint the respondents are charged with violating the provisions of subsections (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

The respondents stipulated the existence of a prima facie case and limited themselves to a cost justification defense. Hearings were held at Washington, D.C., on August 1, and 2, 1961, and the record was closed for the receipt of evidence on the latter date.

The findings of fact and conclusions of law, proposed by the parties, not hereafter specifically found or concluded, are herewith rejected. The hearing examiner, having considered the record herein, makes the following findings of fact and conclusions:

Respondent, Philadelphia Carpet Company (hereinafter called "Philadelphia"), is a corporation organized, existing and doing business under the laws of the Commonwealth of Pennsylvania, with its principal office located at Allegheny Avenue and "C" Street in the city of Philadelphia, Commonwealth of Pennsylvania.

Respondent Doerr Carpets, Inc. (hereinafter called "Doerr"), was, at the time the complaint issued in this matter, a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal office located in the city of Cartersville, State of Georgia. The officers and owners of both corporations were largely the same. On January 1, 1961, Doerr ceased to exist as a separate corporation and became a division of Philadelphia. Hereinafter, the term "respondent" will refer to Philadelphia and Doerr for the period prior to January 1, 1961, and to Philadelphia and its Doerr division for the period after January 1, 1961.

Respondent is engaged in the manufacture, sale and distribution of rugs and carpets with manufacturing plants located in Philadelphia, Pennsylvania, and Cartersville, Georgia.

With respect to the products described above, respondent is engaged in interstate commerce, as "commerce" is defined in the Clayton Act, and in the course of such commerce, respondent has sold such products to purchasers for resale within the United States, subject to the quantity discount hereinafter described.

During the period covered by the complaint, respondent has sold carpets and rugs of like grade and quality directly to competing retailers and indirectly to competing retailers purchasing from respondent through its distributors. All of such purchases from respondent for competitive resale as aforesaid, were and are subject to the following retroactive cumulative annual quantity discount:

Aggregate annual purchases	*Discount (percent)*
Up to $3,999	0
$4,000 to $7,499	1
$7,500 to $11,999	1½
$12,000 to $24,999	2
$25,000 to $39,999	3
$40,000 to $64,999	4
$65,000 and over	5

In each trading area in which respondent sells its aforestated products there are competitive customers purchasing from respondent as aforesaid, and the effect of the purchase price differences caused by the annual cumulative quantity discount schedule hereinbefore set forth, "may be substantially to lessen competition * * * or to injure, destroy or prevent competition," among and between respondent's customers directly and indirectly so purchasing said carpets and rugs at the resulting higher and lower net prices within the meaning of Section 2(a) of the amended Clayton Act.

The respondent used only one witness in connection with its defense, Mr. Alfred C. Gabrys who is employed by Albert E. Sawyer Company, an accounting firm of New York City, where he had worked for fourteen years. Mr. Gabrys made a special study with respect to direct selling costs of the Philadelphia-Doerr companies and his appraisal and analysis is contained in a document which was received in evidence. It is on this study that the respondent relys to sustain its defense. Before the document was received in evidence on voir dire examination conducted by Mr. Schrup, counsel in support of the complaint, Mr. Gabrys testified in part:

Q Mr. Gabrys, with reference to the document which is respondent's exhibit 1–A through 1–Z–2, would you state specifically from what books and record of Philadelphia Carpet, formerly Philadelphia Carpet and Doerr Carpets, Inc., were examined?

A The specific records that were examined were reporting forms which had been prepared by our office and submitted to them for completion, together with other statements which were prepared at the request of our office.

Q Did you personally do all this?

A I personally saw every document involved.

Q And the document which is respondent's exhibit 1–A through 1–Z–2 was that personally prepared by you?

A It was prepared by me, under the supervision of Mr. Sawyer.

Q So you have personal knowledge of everything that is contained in the document 1–A through 1–Z–2?

A To the best of my knowledge, I do have personal knowledge.

Q And that personal knowledge is based on certain reporting forms that were submitted to you?
A That, plus other supplementary information.
Q What was the other information?
A The various summaries of financial data which were submitted to us.
Q Who submitted those?
A Mr. Strong, the comptroller of the company.
Q And did you examine the books and records upon which these summaries were based?
A I did not.
Q You are not in a position to personally testify as to the correctness of those summaries?
A Insofar as they reflect the books and records of the company.
Q You have seen the books and records?
A No, sir. I am not in a position to—
Q In other words, you can not testify as to whether the summaries you examined were correct?
A That is correct, I can not.

Then with reference to summaries submitted by five salesmen, which he relied upon in making computations, he testified:

Q Can you testify that those reporting forms were correctly filled out by the salesmen and correctly reflect what the salesmen did, to your personal knowledge?
A I can not.

* * * * * * *

Q You have stated that you had talked to one salesman, Mr. McRae?
A Yes.
Q You did not have any personal conversation with the other four salesmen?
A No, I did not.

He further testified:

Q Now with reference to the spending of any time by any of the executive personnel, in addition to salesmen, with relation to the solicitation of any of these sales, who computed that time?
A These were reported to us through Mr. Nelson (Sales Manager of respondent).
Q How was that reported to you?
A My recollection is that it was at an actual physical conference that took place in our office.

The document was received in evidence, over the objections of counsel in support of the complaint, with this comment:

Hearing Examiner Johnson: The Hearing Examiner is not satisfied with the explanation that has been made by this witness as to the reliability of this particular report. However, I will receive it in evidence subject to a motion to strike. There may be evidence that will establish reliability of these figures, so they may be relied upon. But on the basis of the voir dire examination that has been made. I will have to say the Hearing Examiner is not satisfied that this report reflects something that could be relied upon in determining whether or not there is a cost justification. But on that basis it will be received in evidence.

Respondent closed its defense without calling a single witness who had personal knowledge of the accuracy of the underlying data which was employed in making the cost justification study. It is found that the cost justification study submitted is without evidentiary dependability.

The stipulation of competitive injury in this matter was confined to the secondary line and there is nothing in the record to substantiate the allegations of the complaint insofar as it concerns the primary line injury.

It is provided in the stipulation entered into by the parties that in the event the initial decision herein calls for entry of a cease and desist order against respondent the initial decision shall be stayed by the Commission and shall not become the decision of the Commission in this unless and until the Commission disposes of Docket Nos. 7420, 7421, 7631, 7632, 7633, 7634, 7636, 7637, 7638, 7639, and 7640 by orders to cease and desist or of dismissal.

CONCLUSION

Respondent has failed to prove that the differentials in price resulting from its cumulative annual quantity discount scale make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. Therefore, the acts and practices of respondent as herein found are violative of subsection (a) of Section 2 of the amended Clayton Act.

ORDER TO CEASE AND DESIST

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

Discriminating, directly or indirectly, by cumulative volume discount or otherwise, in the price of rugs and carpets of like grade and quality, by selling to any purchaser at net prices higher than the net price charged any other purchaser competing in fact with such favored purchaser in the resale and distribution of such rugs and carpets. For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are affected.

It is further ordered, That the allegation in the complaint that respondent's discriminations in price may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, be dismissed.

Opinion of the Commission

FEBRUARY 10, 1964

By Dixon, *Commissioner:*

I

This matter is before the Commission for consideration of respondents' appeal from the initial decision of the hearing examiner entered November 1, 1961, finding respondents in violation of the provisions of Subsection (a) of Section 2 of the amended Clayton Act. 49 Stat. 1526; 15 U.S.C. 13(a).[1]

The respondents in this proceeding are manufacturers and sellers of woven and tufted rugs and carpets with manufacturing plants located in Philadelphia, Pennsylvania, and Cartersville, Georgia.[2] At the time the complaint was issued on October 28, 1959, respond-

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[1] This subsection provides in pertinent part as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, 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: * * *"

[2] This is one of twelve similar proceedings brought against major carpet manufacturers. At this juncture, an order to cease and desist has issued against only one manufacturer, *James Lees and Sons Company*, Docket No. 7640, effective September 8, 1961 [59 F.T.C. 418]. Eight of the remaining eleven cases have been settled by the negotiation of consent orders to cease and desist, and the Commission is today approving and adopting these orders as the orders of the Commission. The consenting respondents are: *Bigelow-Sanford Carpet Company, Inc.*, Docket No. 7420 [p. 704 herein]; *Mohasco Industries, Inc.*, Docket No. 7421 [p. 709 herein]; *The Magee Carpet Company*, Docket No. 7631 [p. 716 herein]; *C. H. Masland & Sons*, Docket No. 7632 [p 721 herein]; *The Beattie Manufacturing Company*, Docket No. 7633 [p. 727 herein]; *A. & M. Karagheusian, Inc.*, Docket No. 7636 [p. 781 herein]; *Roxbury Carpet Company, et al.*, Docket No. 7637 [p. 787 herein]; and *The Firth Carpet Company*, Docket No. 7638 [p. 793 herein].

In addition to the instant proceeding, there were formal adjudicative hearings in Docket No. 7634, *Callaway Mills Co; et al.* [p. 732 herein], and Docket No. 7639, *Cabin Crafts, Incorporated* [p. 799 herein]; and these two matters were also today decided by the Commission.

ent Doerr Carpets, Inc., was a separate corporation although its officers and shareholders were largely the same as those of respondent Philadelphia Carpet Company. On January 1, 1961, the separate corporate identity of Doerr was terminated and since that time it has operated as a division of the respondent, Philadelphia.

The vehicle and method by which respondents are alleged to have violated the act is by pricing their customers pursuant to what is commonly referred to as a cumulative, annual quantity discount schedule. The schedule used by the respondents is here set out:

Aggregate annual purchases	*Discount (percent)*
Up to $3,999	0
$4,000 to $7,499	1
$7,500 to $11,999	1½
$12,000 to $24,999	2
$25,000 to $39,999	3
$40,000 to $64,999	4
$65,000 and over	5

At the hearing the respondents stipulated that they had sold carpets and rugs of like grade and quality to competing retailers pursuant to the above set out schedule. It was further stipulated that in trading areas in which the respondents sell their products there are competing customers purchasing respondents' goods and that the effect of the purchase price differences caused by the discount schedule may be substantially to lessen competition or to injure, destroy, or prevent competition among and between respondents' customers. It was further stipulated and agreed that the respondents' defense would be limited to cost justification, i.e., to proof tending to show that the price differentials stipulated made only the statutory permissible "due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

The matter then proceeded on to hearing and on November 1, 1961, the hearing examiner issued his initial decision finding the respondents in violation substantially as charged in the complaint and ordered them to cease and desist from discriminating in price between competing customers.

The respondents used only one witness in their defense, Mr. Alfred G. Gabrys, an accountant, employed by Albert E. Sawyer Company, a public accounting firm of New York City. A document entitled, "Respondents' Submission of a Cost Justification Defense of Their Cumulative Quantity Discounts," and identified in the record as Respondents' Exhibit 1, was prepared by him from reporting forms which he had devised and submitted to the respondents for their completion. This witness testified that he did not have personal knowledge of and had not examined the books and records of the respondent company. He stated that he could not testify as to whether the information submitted to him by the respondents was correct and that he had never had any personal contact with the salesmen whose time, compensation and allowances are analyzed in the cost study. With respect to Respondents' Exhibit 1, the hearing examiner found in his initial decision:

Respondent closed its defense without calling a single witness who had personal knowledge of the accuracy of the underlying data which was employed in making the cost justification study. It is found that the cost justification study submitted is without evidentiary dependability.

Respondents' appeal to the Commission raises two primary issues. Respondents contend that the above-quoted finding by the hearing examiner that the cost study lacked evidentiary dependability was erroneous, arguing that the Commission should not be bound by rigid legal rules in appraising evidence and that the reports made by the salesmen must be considered to be reliable since they were compiled under the direction of the sales manager and the salesmen are accustomed to following the instructions of their manager. Respondents raised a collateral procedural issue alleging that the hearing examiner's failure to grant complaint counsel's motions to reject and strike the cost study prejudiced respondents since they were thereby denied the opportunity to support the cost study by additional witnesses.

II

We turn first to the procedural question. Just prior to the *voir dire* examination of Mr. Gabrys, through whom the cost justification study was to be offered in evidence, counsel supporting the complaint announced that he had some substantial objections to the introduction of this study. Immediately subsequent to the *voir dire* examination, counsel supporting the complaint specifically objected to the introduction of the study and in the course of his objection pointed out that the offered study was based entirely on hearsay and that no opportunity was being afforded to cross-examine any of the persons responsible for the underlying documents or data. The hearing examiner then stated on the record as follows:

The Hearing Examiner is not satisfied with the explanation that has been made by this witness as to the reliability of this particular report. However, I will receive it in evidence subject to a motion to strike. There may be evidence that will establish reliability of these figures, so they may be relied upon. But on the basis of the voir dire examination that has been made, I will have to say the Hearing Examiner is not satisfied that this report reflects something that could be relied upon in determining whether or not there is a cost justification. But on that basis it will be received in evidence * * *.

After counsel for respondents had rested his case, counsel supporting the complaint moved to strike the cost justification study. When asked to comment, counsel for respondents stated that he felt that the study was "in a state that should be acceptable to the Commission in matters of this kind." The hearing examiner denied the motion to strike, stating that he was doing so "* * * for the reason that he is not in a position to say that the information contained in the document presented is not reliable." The hearing examiner continued, "* * * I am not inferring they are reliable, because I want to study the record and study the particular documents."

The hearing examiner acted within his discretion in admitting the cost justification survey. Presiding officers may admit not only evidence of doubtful admissibility. Having done so the examiner is not thereafter bound to consider all evidence admitted as being reliable. Evidence found to be unreliable is to be excluded from consideration in arriving at a decision. *Donnelly Garment Co.* v. *N.L.R.B.*, 123 F. 2d 215 (8th Cir. 1941).

In deciding which of the two courses available to him he might pursue, the hearing examiner elected to admit the offered cost justification study. While Commission hearing examiners are required to abide by the Commission's rules concerning the exclusion of irrelevant, immaterial, unreliable, and unduly repetitious evidence, we are not prepared to say that in every case, and especially in close cases, can it be immediately clear to a hearing examiner that he is dealing with evidence which should be excluded under the rules. In such situations the safest course, and the course pursued by the hearing examiner in this case, is to admit the evidence for what, on mature reflection and examination, it may be worth. That doubtfully valid evidence so admitted ultimately turns out, as here, to be without probative value is the risk necessarily taken by the offering party.

The above-quoted rulings and statements of the hearing examiner seem to us more than adequate to have informed counsel that his affirmative defense was in jeopardy or at least in serious doubt. The rulings appear to be no less than an invitation to counsel to resolve the doubts obviously present in the hearing examiner's mind. Instead of resolving the hearing examiner's doubts, counsel elected to stand on his belief that the cost justification study was in a state which should be acceptable to the Commission. Having been duly warned and made his election, counsel should not complain that he has been prejudiced for such is not the case.

III

There can be no question but that respondents' Exhibit 1 is hearsay in nature. It contains factual information generated and compiled by persons who were not in court and hence could not be examined as to its accuracy. The witness, Gabrys, testified that he had no personal knowledge as to the correctness of the underlying factual data and his testimony cannot fill the evidentiary gap between the exhibit and the basic facts. No other witness was called who could testify and be cross-examined as to the basic facts and thus, the exhibit's degree of probative value was not searched and could not be evaluated.

But it is long settled that hearsay evidence is not to be out of hand rejected or excluded by administrative tribunals. Indeed one of the purposes in establishing such tribunals was to devise a way whereby the exclusionary rules of evidence would be eliminated as a bar to common sense resolution of certain classes of controverted cases.

In *John Bene & Sons, Inc.* v. *Federal Trade Commission*, 299 Fed. 468, 471 (2d Cir. 1924), it was held that in Commission proceedings: " * * * evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done." In reviewing federal administrative agencies' decisions the courts have almost universally followed the rule of the *Bene* case. *E.g.*, *Phelps Dodge Refining Corp.* v. *Federal Trade Commission*, 139 F. 2d 393, 397 (2d Cir. 1943). And the Supreme Court has endorsed the rule, holding: " * * * rules which bar certain types of evidence in criminal or quasi-criminal cases are not controlling in proceedings like this, where the effect of the Commission's order is not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress." *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 706 (1948).

Since 1946, the Commission has been required to conduct its adjudicative procedures in conformity with the Administrative Procedures Act, 60 Stat. 241 (1946). Subsection 7(c) of that Act provides in pertinent part as follows:

> * * * Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. * * *

It is clear from the legislative history that Congress did not intend to modify or affect in any way the previous administrative and judicial practice with respect to evidence in administrative proceedings,[3] and the rule of the *Bene* case remains controlling. But there is a very important caveat to consider when applying the rule which may be referred to as the "substantial evidence" requirement. Even though incompetent evidence may be received and considered it will not support a decision while standing alone and uncorroborated. The requirement that an order be based upon "substantial" evidence has been universally adhered to. Even under the liberal original wording of Section 10(b) of the National Labor Relations Act,[4] the Supreme Court required the agency's findings to be based upon substantial evidence: " * * * [the] assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co., et al.* v. *National Labor Relations Board, et al.*, 305 U.S. 197, 230 (1938).

The requirement that the orders of administrative agencies be based upon substantial evidence was codified in Section 10(e)(B)(5) of the Administrative Procedure Act wherein reviewing courts are required to hold unlawful any action, findings or conclusions found to be "unsupported by substantial evidence." In the legislative history the term "substantial evidence" as used in Section 10 of the Act is defined as " * * * evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of Section 7(c), and material to the issues."[5]

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[3] " * * * as to the admissibility of evidence, an administrative hearing is to be compared with an equity proceeding in the courts. Thus, the mere admission of evidence is not to be taken as prejudicial error (there being no lay jury to be protected from improper influence) although irrelevant, immaterial, and unduly repetitious evidence is useless and is to be excluded as a matter of efficiency and good practice; and no finding or conclusion may be entered except upon consideration by the agency of the whole record or so much thereof as a party may cite and as supported by and in accordance with evidence which is plainly of the requisite relevance and materiality—that is, 'reliable, probative, and substantial evidence'. Thus while the exclusionary 'rules of evidence' do not apply except as the agency may as a matter of sound practice simplify the hearing and record by excluding improper or unnecessary matter, the accepted standards and principles of probity, reliability, and substantiality of evidence must be applied. These are standards or principles usually applied tacitly and resting mainly upon common sense which people engaged in the conduct of responsible affairs instinctively understand."
House Report No. 1980, 79th Congress, 2nd. Session.

[4] " * * * In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling * * * " 49 Stat. 449, 454 (1935).

[5] House Report No. 1980, 79th Congress, 2nd Session.

As stated above, the respondents' cost study exhibit stands alone. The witness called to support it was not qualified to testify as to the truth of any statements made therein. These were not books and records kept in the ordinary course of business but compilations and summaries specially constructed for this litigation. There is therefore, no circumstantial probability of trustworthiness as would be the case with regular business records. Moreover, there was clearly no necessity to offer the exhibit without corroborating testimony since only one company official and five salesmen could have verified the study's factual basis. The failure to produce so limited a panel of witnesses cannot be excused on the grounds of mercantile inconvenience.

Our conclusion with respect to the competence of the respondent's cost study exhibit must be the same as the hearing examiner's—it lacks "evidentiary dependability." Ordinarily this should end the matter, for the respondents rely completely upon the cost study. But the Commission is reluctant to enter a decision adverse to respondents which is susceptible of the interpretation that it is based upon a technical evidentiary deficiency which could have been easily corrected by a remand. Just as the Commission will not permit the public interest to suffer from the mistakes of government counsel, it will not cause a respondent's case to be defeated by counsel's miscalculation. We have, therefore, considered respondents' cost study and the testimony adduced in support thereof in the same manner and with the same care as if it were completely authenticated.

IV

As stated above, the prices to be cost justified were set pursuant to a retroactive cumulative volume discount system. Respondents essentially rely on an attempt to show that the savings in direct selling costs attributable to customers in the cumulative discount brackets more than exceeded the discount granted to such customers. Since the data needed to undergird this attempt were not obtainable from books of account kept in the regular course of business, respondents *post litem motam* designed a reporting form to be completed by 5 salesmen serving 5 of 26 sales territories. These forms were submitted daily to the home office during the three-month period February, March, and April 1960. The forms were to provide a basis for determining direct solicitation costs for the various customers within each selected area and within each bracket. The study also takes into account the cost of executive time attributable to each surveyed customer. Figures obtained from the three-month study were projected for twelve months and employed as a base for the final computation of costs used in the offered justification.

The study in evidence, then, is based on a sample and not on a universe. Studies so based are obviously not for this reason alone to be rejected as without probative value. Since, however, there are obvious dangers inherent in any sampling technique, it is essential that the validity of the sample used be fully documented. Such a sample must be shown to be free from "seasonal, cyclical, or accidental variances in volume of business, characteristics of sales transactions, or incidence of expenses." *Advisory Committee on Cost Justification, Report to the Federal Trade Commission*, Sec. III(B)(8) (1956).

It is particularly necessary that such showing be made when, as here, the cost justification defense is constructed post complaint. Any costing process, whenever undertaken, is generally conceded to involve at least a degree of subjectivity. In such situations we believe the proponent of a cost justification defense must be held to a relatively high standard of proof. The record in this case is silent as to whether or not and in what way the three-month sample is fairly representative of respondents' selling year and for this reason, the study's validity is placed in question at the very outset.

The attempted cost justification has more substantial deficiencies. A large part of the respondents' total sales is not subject to rebate. Non-rebatable sales include all sales of Doerr carpeting having a list price of $4 or less per square yard; all sales of Doerr carpeting at less than list price, including outmoded styles and "seconds"; all sales of Philadelphia carpeting at less than list price, including outmoded styles and "seconds"; and all rug padding sales by both companies. The sale of goods not eligible for rebate accounted for approximately 60 percent of the respondents' total sales volume in the year under consideration. Of the total Doerr line sales of $7,657,282, only $674,645, or 8.81 percent, were of goods eligible for rebate. Out of total Philadelphia line sales of $7,701,115, sales of rebatable items accounted for 71.85 percent with a dollar value of $5,533,297.

The cost analysis offered by the respondents does not attempt to illustrate the costs of selling the items upon which a rebate was paid, but utilizes the total sales figure. Thus, the costs which respondents claim justify the price differentials are computed on an entirely different basis from the prices they seek to justify. Since the price to all customers on non-rebatable goods is the same, these goods and their sales costs are not even a part of the case. Moreover, there is nothing in this record to support the conclusion that the respondents incur similar sales costs for all items. It seems unlikely to us that the salesmen or selling executives of the companies would devote as much effort to selling rug padding, "seconds" or the under $4 per yard Doerr carpeting as they would to higher grade goods.

In separating the customers into classifications for the purpose of the cost study, the respondents classified the customers according to total purchases, not purchases of rebatable items. Thus, the customers are grouped in a fashion completely unrelated to the net prices they paid. This unrealistic procedure lumped together in certain brackets customers who had received different rates of rebate or no rebates at all. For example, 35 customers are considered in the $4,000–$7,499 bracket although only 13 of them received any discount. Thus, respondents' study purports to justify the discounts to the 13 customers who received a rebate by the costs of serving all 35 customers.

Were respondents' cost study accepted at full face value with all of its deficiencies ignored, it would yet fail as a defense to the price discrimination charge. It would appear to be the respondents' theory that the only price differential which must be justified is that existing between the customers who received no rebate and the various customers who did. Respondents make no attempt to justify the price differentials between customers receiving any of the various rebates from 1 percent to 5 percent. This course of action is incomprehensible since the price difference between customers granted a 1 percent rebate and those granted a 5 percent rebate is exactly the same as the difference between those granted no rebate and those granted 4 percent rebate. And, of course, the effect upon a customer operating under a 4 percent price disadvantage is not lessened by the fact that he happens to have qualified for a 1 percent rebate.

The following tabulation indicates the extent to which respondents' cost summary failed to justify the price differentials existing between the various customer classifications:

Volume bracket	Excess (deficit) of cost differential over price differential as between volume brackets (in percent)					
	$0–3,999	$4,000–7,499	$7,500–11,999	$12,000–24,999	$25,000–39,999	$40,000–64,999
$0 to $3,999						
$4,000 to $7,499	7.88					
$7,500 to $11,999	8.28	0.40				
$12,000 to $24,999	7.55	(.33)	(0.73)			
$25,000 to $39,999	7.63	(.25)	(.65)	0.08		
$40,000 to $64,999	6.83	(1.05)	(1.45)	(.72)	(0.80)	
$65,000 and over	6.21	(1.67)	(2.07)	(1.34)	(1.42)	(0.62)

The table above illustrates that respondents' attempt at cost justification failed in 13 out of 21 comparisons. The amounts involved are substantial and cannot be described as *de minimis*. The *Advisory Committee on Cost Justification Report to the Federal Trade Commission* (1956) states, *inter alia*, in Section II. C.: "In considering the applicability of the 'de minimis' concept, a primary test to be applied is the relation of the unjustified portion to the differential itself, not to the higher unit price." The tabulation which appears below accomplishes this mathematical comparison and clearly illustrates that the cost justification's failures are substantial.

Volume bracket	Discount per bracket	Failure of cost justification expressed as percent of price Differential					
		$0–3,999	$4,000–7,499	$7,500–11,999	$12,000–24,999	$25,000–39,999	$40,000–64,999
$0 to $3,999	0	------	------	------	------	------	------
$4,000 to $7,499	1	------	------	------	------	------	------
$7,500 to $11,999	1.45	------	------	------	------	------	------
$12,000 to $24,999	1.93	------	35.5	152.1	------	------	------
$25,000 to $39,999	3	------	12.5	41.9	------	------	------
$40,000 to $64,999	3.80	------	37.5	61.7	38.5	100.	------
$65,000 to and over	4.83	------	43.6	61.2	46.2	77.6	60.2

The percentages of failure revealed by the above two tabulations are a good deal greater than those tolerated in the *United States Rubber Co.* proceeding, 46 F.T.C. 998 (1950). There the largest disparity equaled .92 percent of the highest price while here the failure reached 2.07 percent. Stated as a percentage of the price differential the largest failure in the *Rubber* case was 30.7 percent as compared to 152 percent here.

We conclude and hold that respondents have not established that the discriminatory prices complained of make only due allowance for savings in cost and that respondents, after a fair trial, are shown to have violated Section 2 of the amended Clayton Act.

The initial decision of the hearing examiner as supplemented by this opinion will be adopted as the decision of the Commission, except that the order to cease and desist will be slightly modified to conform it to those issued this day against respondents' competitors.

Commissioner Anderson concurred in the result. Commissioner Elman's views on the disposition of the case are stated in a separate opinion. Commissioner Reilly did not participate for the reason he did not hear oral argument.

SEPARATE OPINION

FEBRUARY 10, 1964

By ELMAN, *Commissioner:*

I share the Commission's unwillingness to base its decision "upon a technical evidentiary deficiency which could have been easily corrected by a remand." I agree that if an order is to be entered in this case, it should be based upon a rejection, on the merits, of respondents' cost-justification study.

However, the hearing examiner rejected respondents' cost-justification defense on the sole ground that the evidentiary reliability of the cost study had not been adequately demonstrated. He made no finding on the merits of the study; and there was no discussion or argument concerning the merits in the briefs and oral argument before the Commission on this appeal. Counsel on both sides evidently thought, and justifiably so in view of the posture of the case, that the only question now before the Commission is the correctness of the examiner's evidentiary ruling—the only ruling he had made.[1]

I question whether the Commission should decide the merits of the cost-justification study without having the views of the parties. While it is ordinarily proper for the Commission to evaluate, *de novo*, documentary evidence excluded or disregarded by the hearing examiner, it seems inappropriate for the Commission to do so in circumstances where, as here, the evidence in question is the very heart of the controversy, consists of rather complex data fairly subject to different inferences and interpretations, and has not been analyzed in the briefs or oral argument of either side.

In these circumstances, we should order reargument directed to the merits of respondents' cost-justification study. This action, while it would cause a slight delay in the final decision of the case, would provide greater assurance of a correct decision.

FINAL ORDER

This matter having been heard by the Commission upon respondent Philadelphia Carpet Company's appeal from the hearing ex-

[1] See Appeal Brief, p. 18; Answer Brief, p. 9; Transcript of Oral Argument before Commission, pp. 34, 56–57. Counsel for respondents also contended that the complaint in this matter should be dismissed on the ground of absence of competitive injury. This is a quite different ground, however, from the sufficiency of respondents' cost study to establish the defense of cost justification.

aminer's initial decision,[1] and upon briefs and oral argument in support of said appeal and in opposition thereto, and the Commission having determined for the reasons stated in the accompanying opinion that said appeal should be denied:

It is ordered, That the initial decision, excepting the Order To Cease And Desist contained therein, be, and it hereby is, adopted, and it, together with this order and the accompanying opinion of the Commission, constitutes the decision of the Commission.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered as the order of the Commission:

ORDER TO CEASE AND DESIST*

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

> Discriminating, directly or indirectly, by the allowance of cumulative volume discounts or otherwise, in the price of rugs and carpets of like grade and quality, by selling to any purchaser at a net price lower than the net price charged any other purchaser competing in fact with such favored purchaser in the resale and distribution of such rugs and carpets. For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the allegation in the complaint that respondent's discriminations in price may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, be dismissed.

It is further ordered, That the respondents shall, within sixty (60) days after the date of the final judicial determination in *Callaway Mills Co.*, Docket No. 7634, or *Cabin Crafts, Inc.*, Docket No. 7639, whichever is later, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the Commission's order to cease and desist.

[1] Doerr Carpets, Inc., ceased to exist as a separate corporation on January 1, 1961, and it is now operated as a division of respondent Philadelphia Carpet Company.

*Reported as amended by order of May 14, 1965, to reflect the time within which respondents are required to file a report of compliance.

Commissioner Anderson concurred in the result. Commissioner Elman's views on the disposition of the case are stated in a separate opinion. Commissioner Reilly did not participate for the reason he did not hear oral argument.

IN THE MATTER OF

A. & M. KARAGHEUSIAN, INC.

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

Docket 7636. Complaint, Oct. 28, 1959—Decision, Feb. 10, 1964.

Consent order requiring a manufacturer of rugs and carpets with factories in New Jersey and North Carolina, to cease discriminating in price among retailers who compete in reselling its rugs and carpets by means of its annual cumulative quantity discount system, 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. Title 15, Section 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, A. & M. Karagheusian, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office located at 295 Fifth Avenue in the city of New York, State of New York. Seaboard Floor Coverings, Inc., a Delaware corporation with executive offices located at Ryders Lane, Milltown, New Jersey, is a wholly owned subsidiary of respondent A. & M. Karagheusian, Inc.

PAR. 2. Respondent is engaged in the manufacture, sale and distribution of rugs and carpets. Respondent is a substantial factor in the rug and carpet industry with a sales volume in 1958 well in excess of $5,000,000 and manufacturing plants located in Freehold, New Jersey, Roselle Park, New Jersey, Albany, Georgia and Aberdeen, North Carolina. Seaboard Floor Coverings, Inc., acts for respondent as wholesale distributor in the metropolitan New York area and in states along the eastern seaboard of the United States.

PAR. 3. In the course and conduct of its business respondent now causes, and for some time last past has caused, its rugs and carpets, when sold for use or resale, to be shipped from its manufacturing plants in the aforesaid States to purchasers thereof located in various other States of the United States and maintains and at all times mentioned herein has maintained, a substantial course of trade in said rugs and carpets in commerce as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its rugs and carpets of like grade and quality, by selling said products at higher and less favorable net purchase prices to some purchasers than the same are sold to other purchasers who have been and are in competition with the purchasers paying the higher prices.

Respondent sells as aforesaid to direct purchasers in the wholesale trade and by and through such means to indirect purchasers in the retail trade. Respondent in making said indirect sales controls and sets the sales price to the retailer-purchaser by the furnishing of published price lists setting forth the terms and conditions of sale for its said products. Respondent in said indirect sales also furnishes and has in effect a published discount plan under which it allows rebates to the retailer-purchaser in the form of merchandise credits to be applied by the retailer on purchases made from or through the wholesaler of respondent's said products.

PAR. 5. The following example is illustrative of respondent's discriminatory pricing practices between and among the retailer-purchasers of its rugs and carpets.

Respondent now has, and for the past several years has had in effect, an annual cumulative quantity discount system ranging from one to five percent, based on the total annual net purchases of its rugs and carpets as follows:

Annual purchases	*Discount (percent)*
Up to $9,999	0
$10,000 to $14,999	1
$15,000 to $19,999	1½
$20,000 to $24,999	2
$25,000 to $29,999	2½
$30,000 to $37,499	3
$37,500 to $44,999	3½
$45,000 to $52,499	4
$52,500 to $59,999	4½
Over $60,000	5

Respondent's aforedescribed annual cumulative quantity discount system results in discriminatory net sales prices as between competitive purchasers in the different volume and discount brackets of said schedule. Purchasers of respondent's products for competitive resale unable to reach an annual purchase volume of $10,000, for example, receive no volume discounts on their purchases and thus have a significant buying price disadvantage.

Moreover, the competitive effect of the resulting net price differences becomes even more apparent in connection with respondent's application of the above discount schedule to individual chain stores whose separate purchase volume reaches $10,000 or over. Respondent allows said chain purchasers to combine the purchase volume of these various stores so as to qualify for the higher discount allowed on the larger aggregate total of such purchase volume. In many instances the separate purchase volumes of the different individual stores of the chain are not sufficient to warrant such higher discount, but because of the policy of the respondent in granting the rate of discount on the combined purchase volumes of all such chain stores, each of these individual stores is allowed this higher discount. Respondent further does not enforce this minimum purchase volume requirement of $10,000 for such stores when the purchasing is not at the sole discretion and control of the individual stores but instead is carried on by the chain's headquarters.

In many instances respondent's non-chain customers are purchasing individually from respondent in considerably greater volume than the individual chain store with whom they compete, and in so doing receive either no discount, or at best a low bracket discount corresponding with their actual volume of purchases, while the competitive individual chain store is allowed the aforedescribed higher discount. The products sold under respondent's various product lines are of like grade and quality in their respective lines, and these independent non-chain customers purchase the same grade and quality of merchandise from respondent as do its chain store customers. In many instances the individual chain stores and the independently owned stores are located in the same city or metropolitan area and both the chain and non-chain stores are in active and constant competition with and among and between each other for the consumer trade.

Specific illustrations of representative net price differences occasioned between and among various but not all of the said favored and non-favored competing customers on commodities of like grade and quality sold by respondent in commerce during 1958, are as follows in but two sample trade areas:

Customer	Purchase volume [2]	Percent of rebate
Cleveland, Ohio trade area: [1]		
Repp Furniture & Appliance Co	$193, 743	5
Wm. Taylor Son (chain store)	10, 059	5
Alan Pearl Carpet & Linoleum Co	39, 469	3. 5
M. A. Weisman Co	30, 043	3
Windsor Furniture Co	20, 090	2
Appliance Mart	17, 746	1. 5
W. Levy Furniture Co	12, 803	1
Waldman Furniture Co	10, 800	1
W. Haffey Furniture Co	7, 623	0
Bubnick Furniture Co	7, 357	0
Washington, D.C. trade area: [1]		
Nazarian Bros., Inc	22, 929	2
S. Kann Sons Co	15, 287	1. 5
Lockhart's	11, 014	1
Peerless Furniture Co	9, 863	0
Wm. E. Miller Furniture Co., Inc	9, 706	0

[1] In the Cleveland, Ohio area 108 different retailer customers of respondent purchased $590,104 of said commodities during 1958. Of this number only 13 received discounts from respondent totaling $13,573.78. In the Washington, D.C. area 27 different retailer customers of respondent purchased $254,750 of said commodities during 1958. Of this number only 8 received discounts from respondent totaling $2,009.87. The Washington, D.C. area is served by respondent's wholly owned subsidiary, Seaboard Floor Coverings, Inc.

[2] Purchase volume determines rebate percentage. Rebate percentage is then applied to dollar amount of purchase volume remaining after deduction of cash discounts for payment within specified time periods.

Respondent A. & M. Karagheusian, Inc., also sells syndicate stores or so-called group buying purchasers. Under respondent's annual volume discount schedule independent separately owned non-syndicate retail stores must each purchase $60,000 and over to obtain respondent's 5% rebate. Individually owned syndicate stores, however, are allowed to combine their separate purchases for volume discount purposes by respondent. During 1958 respondent allowed a 5% rebate on purchase price, for example, to 17 syndicate stores competing with said non-syndicate stores in various trade areas. The separate purchases of 13 of these stores would normally have entitled them to no rebates under respondent's schedule, while 2 of these stores would have received only a 1% rebate, 1 store a 1½% rebate, and the remaining or 17th store a 3% rebate. Instead of rebates totaling $1,504.80 these syndicate stores received rebates from respondent totaling $6,223.55 or an excess amount of $4,718.75 in rebates.

PAR. 6. The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said products of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent or said favored purchasers.

PAR. 7. The aforesaid discriminations in price by respondent as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

Mr. Eldon P. Schrup and *Mr. Robert G. Cutler*, for the Commission.

White & Case, by *Mr. Thomas Kiernan*, New York, N.Y., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated October 28, 1959, the respondent is charged with violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

On April 22, 1960, the respondent and its attorney entered into an agreement with counsel supporting the complaint for a consent order. On June 15, 1960, the parties entered into a supplemental agreement.

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 that the content of the agreement meets all of the requirements of section 3.25(b) of the Rules of the Commission.

This agreement is entered into subject to the condition that the initial decision based thereon shall be stayed by the Commission and shall not become the decision of the Commission unless and until the

Commission disposes of Docket Nos. 7420, 7421, 7631, 7632, 7633, 7634, 7635, 7637, 7638, 7639 and 7640, by orders to cease and desist in substantially the same form as set forth herein, or by other appropriate order to cease and desist or of dismissal.

The complaint insofar as it concerns the allegation of "primary line injury," namely, to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, should be dismissed on the grounds that the evidence at hand in the light of subsequent developments is insufficient to substantiate such allegation.

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 jurisdictional findings are made and the following order issued.

1. Respondent A. & M. Karagheusian, Inc., is a corporation organized, 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 295 Fifth Avenue, New York, New York.

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

ORDER

It is ordered, That respondent A. & M. Karagheusian, Inc., a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of rugs and carpets in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

> Discriminating, directly or indirectly, by cumulative volume discount or otherwise, in the price of rugs and carpets of like grade and quality, by selling to any purchaser at net prices lower than the net price charged any other purchaser competing in fact with such favored purchaser in the resale and distribution of such rugs and carpets.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the allegation in the complaint to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, be dismissed.

FINAL ORDER *

The Commission, by order issued August 19, 1960, having extended until further order of the Commission the time within which the initial decision of the hearing examiner would otherwise become the decision of the Commission, pursuant to certain conditions contained in paragraph 8 of the consent agreement to cease and desist; and

The Commission having determined that the aforesaid conditions have been fulfilled and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner, filed July 25, 1960, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the above-named respondent shall, within sixty (60) days after the expiration of time allowed for filing a petition for review, if no such petition has been duly filed within such time by respondents in Docket 7634, Docket 7635 or Docket 7639, 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.

It is further ordered, That if petition for review is duly filed in Docket 7634, Docket 7635 or Docket 7639, then the time for filing a report of compliance shall begin to run de novo from the latest date of any final judicial determination in any such appellate review.

IN THE MATTER OF

ROXBURY CARPET COMPANY ET AL.

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

Docket 7637. Complaint, Oct. 28, 1959—Decision, Feb. 10, 1964

Consent order requiring three associated manufacturers of rugs and carpets located in Saxonville, Mass., and in Chattanooga, Tenn., to cease discriminating in price among retailers who compete in reselling their rugs and

*Reported as amended by order of April 2, 1964, which amended the time in which respondent is required to file a report of compliance.

carpets by means of their annual cumulative quantity discount system, in violation of Sec. 2(a) of the Clayton Act.

Complaint

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C. Title 15, Section 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, Roxbury Carpet Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its principal office and place of business located at 2 Central Street, Saxonville, Middlesex County, State of Massachusetts. Said respondent is the parent holding company for its two wholly owned subsidiaries Roxbury Southern Mills, Inc., and M. J. Whittall Associates, Inc.

Respondent, Roxbury Southern Mills, Inc., is a Tennessee corporation, with its principal office and manufacturing facilities located at 4900 Hooker Road in the city of Chattanooga, State of Tennessee. Respondent, M. J. Whittall Associates, Inc., is a Massachusetts corporation located at the same address of respondent Roxbury Carpet Company and doing business by permission of said holding company under the name of Roxbury Carpet Company.

Respondent M. J. Whittall Associates, Inc., has two manufacturing facilities, the Roxbury Division in Saxonville, Massachusetts and the Whittall Division, in Worcester, Massachusetts. Respondent M. J. Whittall Associates, Inc., maintains a selling organization and develops all policy on sales and issuance of rebates for itself and its affiliate Roxbury Southern Mills, Inc.

Par. 2. Respondents are engaged as aforesaid in the manufacture, sale and distribution of rugs and carpets. Respondents are a substantial factor in the rug and carpet industry, with sales in 1958 in excess of $23,219,000 and manufacturing facilities located in Massachusetts and Tennessee.

Par. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their rugs and carpets, when sold for use or resale, to be shipped from their manufacturing plants in the aforesaid States to purchasers thereof located in various other States of the United States and maintain and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondents, in the course and conduct of their business, have discriminated in price between different purchasers of their rugs and carpets of like grade and quality, by selling said products at higher and less favorable net purchase prices to some purchasers than the same are sold to other purchasers who have been and are in competition with the purchasers paying the higher prices.

Respondents sell as aforesaid to direct purchasers in the wholesale trade and by and through such means to indirect purchasers in the retail trade. Respondents in making said indirect sales control and set the sales price to the retailer-purchaser by the furnishing of published price lists setting forth the terms and conditions of sale for their said products. Respondents in said indirect sales also furnish and have in effect a published discount plan under which they allow rebates to the retailer-purchaser in the form of merchandise credits to be applied by the retailer on purchases made from or through the wholesaler of respondents' said products.

PAR. 5. The following examples are illustrative of respondents' discriminatory pricing practices between and among the retailer-purchasers of their rugs and carpets.

Respondents now have, and for the past several years have had in effect, an annual cumulative quantity discount system ranging from one to five percent, based on the amount of the customer's annual net purchases as follows:

Annual purchases	*Discount (percent)*
Up to $5,999	0
$6,000 to $12,499	1
$12,500 to $24,999	2
$25,000 to $39,999	3
$40,000 to $59,999	4
$60,000 and over	5

Respondents' aforedescribed annual cumulative quantity discount system results in discriminatory net sales prices as between competitive purchasers in the different volume and discount brackets of said schedule. Purchasers of respondents' products for competitive resale unable to reach an annual purchase volume of $6,000, for example, receive no volume discounts on their purchases and thus have a significant buying price disadvantage.

Moreover, the competitive effect of the resulting net price differences becomes even more apparent in connection with respondents' application of the above discount schedule to chain store organizations. Respondents allow said chain purchasers to combine the purchase volumes of their various stores so as to qualify for the higher discount allowed on the larger aggregate total of such purchase volume. In many instances the separate purchase volumes of the different individual stores of the chain are not sufficient to warrant such higher discount, but because of the policy of the respondents in granting the rate of discount on the combined purchase volumes of all the chain stores, each individual store is allowed this higher discount.

In many instances respondents' non-chain customers are purchasing individually from respondents in considerably greater volume than the individual chain store with whom they compete, and in so doing receive either no discount, or at best a low bracket discount corresponding with their actual volume of purchases, while the competitive individual chain store is allowed the aforedescribed higher discount. The products sold under respondents' various product lines are of like grade and quality in their respective lines, and these independent non-chain customers purchase the same grade and quality of merchandise from respondents as do their chain store customers. In many instances the individual chain stores and the independently owned stores are located in the same city or metropolitan area and both the chain and non-chain stores are in active and constant competition with and among and between each other for the consumer trade.

Specific illustrations of representative net price differences occasioned between and among various but not all of the said favored and non-favored competing customers on commodities of like grade and quality sold by respondents in commerce during 1958, are as follows in but two sample areas:

Customer	Purchase volume [2]	Percent of rebate
Akron, Ohio trade area: [1]		
A. Polsky Co. (chain store)	$5, 921	5
Sokol Furniture Co	15, 092	2
Weinrich Furniture Co	7, 236	1
Super Floors	4, 197	0
Cleveland, Ohio trade area: [1]		
The May Co. (chain store)	10, 919	5
W. Levy Carpet Co	26, 242	3
Melzer Furniture Co	13, 726	2
Ross Furniture Co	4, 179	0

[1] In the Akron, Ohio area 53 different retailer customers of respondents purchased $128,797.00 of said commodities during 1958. Of this number only 9 received discounts from respondents totaling $1,245.36. In the Cleveland, Ohio area 247 different retailer customers of respondents purchased $504,611.00 of said commodities during 1958. Of this number only 28 received discounts from respondents totaling $5,536.80. (Based on temporary 9-month period during 1958 when volume discount schedule was 1% on $4,500, 2% on $9,375, 3% on $18,750, 4% on $30,000 and 5% on $45,000 and over. Respondents on October 31, 1958 reverted to the normal schedule shown supra.)

[2] Purchase volume determines rebate percentage. Rebate percentage is then applied to dollar amount of purchase volume remaining after deduction of cash discounts for payments within specified time periods.

PAR. 6. The effect of respondents' aforesaid discrimination in price between the said different purchasers of their said products of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondents or said favored purchasers.

PAR. 7. The aforesaid discriminations in price by respondents as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

Mr. Eldon P. Schrup and *Mr. Robert G. Cutler* for Commission.

Hale and Dorr, by *Mr. George H. Foley*, Boston, Mass. for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated October 28, 1959, the respondents are charged with violating the provisions of subsection (a) of section 2 of the Clayton Act, as amended.

On April 5, 1960, the respondents and their attorney entered into an agreement with counsel supporting the complaint for a consent order. On June 27, 1960, the parties entered into a supplemental agreement.

Under the foregoing agreement, the respondents admit 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 respondents 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 respondents that they have violated the law as alleged in the complaint.

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

This agreement is entered into subject to the condition that the initial decision based thereon shall be stayed by the Commission and shall not become the decision of the Commission unless and until the Commission disposes of Docket Nos. 7420, 7421, 7631, 7632, 7633, 7634, 7635, 7636, 7638, 7639 and 7640, by orders to cease and desist in substantially the same form as set forth herein, or by other appropriate order to cease and desist or of dismissal.

The complaint insofar as it concerns the allegation of "primary line injury", namely, to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondents are engaged, or to injure, destroy or prevent competition with said respondents, should be dismissed on the grounds that the evidence at hand in the light of subsequent developments is insufficient to substantiate such allegation.

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 jurisdictional findings are made and the following order issued.

1. Respondent Roxbury Carpet Company 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 2 Central Street, Saxonville, Massachusetts.

Respondent Roxbury Southern Mills, Inc., is a corporation organnized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its office and principal place of business located at 4900 Hooker Road, Chattanooga, Tennessee.

Respondent M. J. Whittall Associates, 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 2 Central Street, Saxonville, Massachusetts.

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

ORDER

It is ordered, That respondents Roxbury Carpet Company, a corporation, Roxbury Southern Mills, Inc., a corporation, and M. J. Whittall Associates, Inc., a corporation, their officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of rugs and carpets in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

> Discriminating, directly or indirectly, by cumulative volume discount or otherwise, in the price of rugs and carpets of like grade and quality, by selling to any purchaser at net prices lower than the net price charged any other purchaser competing in fact with such favored purchaser in the resale and distribution of such rugs and carpets.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the allegation in the complaint to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondents are engaged, or to injure, destroy or prevent competition with said respondents, be dimissed.

FINAL ORDER*

The Commission, by order issued August 19, 1960, having extended until further order of the Commission the time within which the initial decision of the hearing examiner would otherwise become the decision of the Commission, pursuant to certain conditions contained in paragraph 8 of the consent agreement to cease and desist; and

The Commission having determined that the aforesaid conditions have been fulfilled and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner, filed July 25, 1960, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That each of the above-named respondents shall, within sixty (60) days after the expiration of time allowed for filing a petition for review, if no such petition has been duly filed within such time by respondents in Docket 7634, Docket 7635 or Docket 7639, file with the Commission a report, in writing, setting forth in detail the manner and form in which each has complied with the order to cease and desist.

It is further ordered, That if petition for review is duly filed in Docket 7634, Docket 7635 or Docket 7639, then the time for filing a report of compliance shall begin to run de novo from the latest date of any final judicial determination in any such appellate review.

IN THE MATTER OF

THE FIRTH CARPET COMPANY

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

Docket 7638. Complaint, Oct. 28, 1959—Decision, Feb. 10, 1964

Consent order requiring a manufacturer of rugs and carpets with plants in New York, North Carolina, South Carolina, and Puerto Rico, to cease dis-

*Reported as amended by order of April 2, 1964, which amended the time in which respondents are required to file a report of compliance.

criminating in price among retailers who compete in reselling its rugs and carpets by means of its annual cumulative quantity discount system, 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. Title 15, Section 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, The Firth Carpet Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office located at 295 Fifth Avenue in the City of New York, State of New York. Respondent, The Firth Carpet Company, owns 100% of the common stock of Firth Industries, Inc., a New York corporation located at the same address as the respondent. Firth Industries, Inc. was established to handle the sale of Firth acrilan carpets but its sales activities have been terminated by the respondent and it is no longer active.

PAR. 2. Respondent is engaged in the manufacture, sale and distribution of rugs and carpets. Respondent is a substantial factor in the rug and carpet industry with a sales volume in 1958 in excess of $22,938,000 and manufacturing plants located in Auburn, New York, Firthcliffe, New York, Newburgh, New York, Burnsville, North Carolina, Laurens, South Carolina and Mayaguez, Puerto Rico.

PAR. 3. In the course and conduct of its business respondent now causes, and for some time last past has caused, its rugs and carpets, when sold for use or resale, to be shipped from its manufacturing plants in the aforesaid States and Commonwealth to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said rugs and carpets in commerce as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its rugs and carpets of like grade and quality, by selling said products at higher and less favorable net purchase prices to some purchasers than the same are sold to other purchasers who have been and are in competition with the purchasers paying the higher prices.

Respondent sells as aforesaid to direct purchasers in the wholesale trade and by and through such means to indirect purchasers in the retail trade. Respondent in making said indirect sales controls and sets the sales price to the retailer-purchaser by the furnishing of published price lists setting forth the terms and conditions of sale for its said products. Respondent in said indirect sales also furnishes and has in effect a published discount plan under which it allows rebates to the retailer-purchaser in the form of merchandise credits to be applied by the retailer on purchases made from or through the wholesaler of respondent's said products.

PAR. 5. The following example is illustrative of respondent's discriminatory pricing practices between and among the retailer-purchasers of its rugs and carpets.

Respondent now has, and for the past several years has had in effect, an annual cumulative quantity discount system ranging from one to five percent, based on the total annual net purchases of its rugs and carpets as follows:

Annual purchases	*Discount (percent)*
Up to $4,999	0
$5,000 to $8,499	1
$8,500 to $13,499	1½
$13,500 to $19,999	2
$20,000 to $27,999	2½
$28,000 to $39,999	3
$40,000 to $49,999	3½
$50,000 to $62,499	4
$62,500 to $74,999	4½
Over $75,000	5

Respondent's aforedescribed annual cumulative quantity discount system results in discriminatory net sales prices as between competitive purchasers in the different volume and discount brackets of said schedule. Purchasers of respondent's products for competitive resale unable to reach an annual purchase volume of $5,000, for example, receive no volume discounts on their purchases and thus have a significant buying price disadvantage.

Moreover, the competitive effect of the resulting net price differences becomes even more apparent in connection with respondent's application of the above discount schedule to individual chain stores whose separate purchase volume reaches $5,000 or over.

Respondent allows said chain purchasers to combine the purchase volume of these various stores so as to qualify for the higher discount allowed on the larger aggregate total of such purchase volume. In many instances the separate purchase volumes of the different individual stores of the chain are not sufficient to warrant such higher discount, but because of the policy of the respondent in granting the rate of discount on the combined purchase volumes of all such chain stores, each of these individual stores is allowed this higher discount.

In many instances respondent's non-chain customers are purchasing individually from respondent in considerably greater volume than the individual chain store with whom they compete, and in so doing receive either no discount, or at best a low bracket discount corresponding with their actual volume of puchases, while the competitive individual chain store is allowed the aforedescribed higher discount. The products sold under respondent's various product lines are of like grade and quality in their respective lines, and these independent non-chain customers purchase the same grade and quality of merchandise from respondent as do its chain store customers. In many instances the individual chain stores and the independently owned stores are located in the same city or metropolitan area and both the chain and non-chain stores are in active and constant competition with and among and between each other for the consumer trade.

Specific illustrations of representative net price differences occasioned between and among various but not all of the said favored and non-favored competing customers on commodities of like grade and quality sold by respondent in commerce during 1958, are as follows in but two sample trade areas.

Customer	Purchase volume [2]	Percent of rebate
Akron, Ohio, trade area: [1]		
M. O'Neil Co. (chain store)	$6, 156. 02	5
A. Polsky (chain store)	10, 872. 55	4
H. M. Strough Co	14, 847. 46	2
Robert L. Hunker, Inc	5, 572. 41	1
Harding Furniture	4, 847. 66	0
Washington, D.C., trade area: [1]		
Hecht Co. (chain store)	23, 359. 32	5
Lansburgh's (chain store)	13, 037. 06	5
Stanley Lloyd, Inc	13, 443. 97	1. 5
Wm. E. Miller	5, 635. 31	1
Barnes & Kimmel	4, 508. 58	0

[1] In the Akron, Ohio area 21 different retailer customers of respondent purchased $125,726.61 of said commodities during 1958. Of this number only 8 customers received discounts from the respondent totaling $2,495.77. In the Washington, D.C. area 51 different retailer customers of respondent purchased $355,393.79 of said commodities during 1958. Of this number only 18 received discounts from the respondent totaling $9,217.02.

[2] Purchase volume determines rebate percentage. Rebate percentage is then applied to dollar amount of purchase volume remaining after deduction of cash discounts for payment within specified time periods.

PAR. 6. The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said products of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent or said favored purchasers.

PAR. 7. The aforesaid discriminations in price by respondent as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

Mr. Eldon P. Schrup and *Mr. Robert G. Cutler* for the Commission.

White & Case, by *Mr. Thomas Kiernan*, New York, N.Y., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated October 28, 1959, the respondent is charged with violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

On April 21, 1960, the respondent and its attorney entered into an agreement with counsel supporting the complaint for a consent order. On June 7, 1960, the parties entered into a supplemental agreement.

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 that the content of the agreement meets all of the requirements of Section 3.25 (b) of the Rules of the Commission.

This agreement is entered into subject to the condition that the initial decision based thereon shall be stayed by the Commission and shall not become the decision of the Commission unless and until the Commission disposes of Docket Nos. 7420, 7421, 7631, 7632, 7633, 7634, 7635, 7636, 7637, 7639 and 7640, by orders to cease and desist in substantially the same form as set forth herein, or by other appropriate order to cease and desist or of dismissal.

The complaint insofar as it concerns the allegation of "primary line injury," namely, to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, should be dismissed on the grounds that the evidence at hand in the light of subsequent developments is insufficient to substantiate such allegation.

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 this proceeding unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order is issued.

1. Respondent The Firth Carpet Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 295 Fifth Avenue, New York, New York.

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

ORDER

It is ordered, That respondent The Firth Carpet Company, a corporation, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of rugs and carpets in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

> Discriminating, directly or indirectly, by cumulative volume discount or otherwise, in the price of rugs and carpets of like grade and quality, by selling to any purchaser at net prices lower than the net price charged any other purchaser competing in fact with such favored purchaser in the resale and distribution of such rugs and carpets.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the allegation in the complaint to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, be dismissed.

FINAL ORDER*

The Commission, by order issued August 19, 1960, having extended until further order of the Commission the time within which the initial decision of the hearing examiner would otherwise become the decision of the Commission, pursuant to certain conditions contained in paragraph 8 of the consent agreement to cease and desist; and

The Commission having determined that the aforesaid conditions have been fulfilled and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner, filed July 25, 1960, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the above-named respondent shall, within sixty (60) days after the expiration of time allowed for filing a petition for review, if no such petition has been duly filed within such time by respondents in Docket 7634, Docket 7635 or Docket 7639, 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.

It is further ordered, That if petition for review is duly filed in Docket 7634, Docket 7635 or Docket 7639, then the time for filing a report of compliance shall begin to run de novo from the latest date of any final judicial determination in any such appellate review.

IN THE MATTER OF

CABIN CRAFTS, INCORPORATED

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

Docket 7639. Complaint, Oct. 28, 1959—Decision, Feb. 10, 1964

Order requiring a manufacturer of rugs and carpets in Dalton, Ga., to cease discriminating in price among competing retailers in violation of Sec. 2(a) of the Clayton Act by means of a cumulative annual quantity discount system.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more

*Reported as amended by order of April 2, 1964, which amended the time in which respondent is required to file a report of compliance.

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. 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 Cabin Crafts, Incorporated, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office located in the City of Dalton, State of Georgia.

PAR. 2. Respondent is engaged in the manufacture, sale and distribution of rugs and carpets. Respondent is a substantial factor in the carpet industry with a sales volume in 1957–58 fiscal year in excess of $16,900,000 and manufacturing plants located in Dalton, Georgia.

PAR. 3. In the course and conduct of its business respondent now causes, and for some time last past has caused, its rugs and carpets, when sold for use or resale, to be shipped from its manufacturing plants in the aforesaid State to purchasers thereof located in various other States of the United States and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said rugs and carpets in commerce as "commerce" is defined in the aforesaid Clayton Act.

PAR. 4. Respondent, in the course and conduct of its business, has discriminated in price between different purchasers of its rugs and carpets of like grade and quality, by selling said products at higher and less favorable net purchase prices to some purchasers than the same are sold to other purchasers who have been and are in competition with the purchasers paying the higher prices.

PAR. 5. The following example is illustrative of respondent's discriminatory pricing practices between and among the retailer-purchasers of its rugs and carpets.

Respondent now has, and for the past several years has had in effect, an annual cumulative quantity discount system ranging from one to two and one-half percent, based on the total annual net purchases of its rugs and carpets as follows:

Annual purchases	*Discount (percent)*
Up to $9,999	0
$10,000 to $19,999	1
$20,000 to $34,999	1½
$35,000 to $49,999	1½
$50,000 or more	2½

Respondent's aforedescribed annual cumulative quantity discount system results in discriminatory net sales prices as between competitive purchasers in the different volume and discount brackets of said schedule. Purchasers of respondent's products for competitive resale unable to reach an annual purchase volume of $10,000, for example, receive no volume discounts on their purchases and thus have a significant buying price disadvantage. The products sold under respondent's various product lines are of like grade and quality in their respective lines and in many instances the aforesaid favored and non-price favored purchasers of respondent's said products are located in the same city or metropolitan area and are in active and constant competition with and among and between each other for the consumer trade.

Specific illustrations of representative net price differences occasioned between and among various but not all of the said favored and non-favored competing customers on commodities of like grade and quality sold by respondent in commerce during 1958, are as follows in but two sample trade areas:

Customer	Purchase volume [1]	Percent of rebate
Cleveland, Ohio trade area:		
Halle Bros., Inc	$23, 163. 59	1. 50
J. H. Boesch Company, Inc	11, 441. 56	1
Roberts Carpet Co	6, 707. 84	0
Ecker Shane Furniture Co	4, 398. 49	0
Washington, D.C. trade area:		
Diener's Inc	50, 608. 96	2. 50
Stanley Lloyd, Inc	41, 428. 74	2
Furniture Classics, Inc	23, 208. 15	1. 50
Wellington House	12, 628. 44	1
Cardwell's Inc	9, 400. 83	0
Revere Furniture & Equip. Co	8, 235. 97	0

[1] Purchase volume determines rebate percentage. Rebate percentage is then applied to dollar amount of purchase volume remaining after deduction of cash discounts for payment within specified time periods.

PAR. 6. The effect of respondent's aforesaid discriminations in price between the said different purchasers of its said products of like grade and quality sold in manner and method and for purposes as aforestated, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent or said favored purchasers.

PAR. 7. The aforesaid discriminations in price by respondent as hereinabove alleged and described constitute violations of subsection (a) of Section 2 of the aforesaid Clayton Act as amended.

Opinion of the Commission

FEBRUARY 10, 1964

By Dixon, *Commissioner:*

Cabin Crafts, Incorporated, the respondent herein, is a Georgia corporation engaged in the manufacture, sale, and distribution of tufted rugs and carpets.[1] The complaint, issued on October 28, 1959, charged respondent with unlawfully discriminating in price between different competing purchasers of its rugs and carpets of like grade and quality, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[2] Specifically, it was charged that respondent discriminated by selling to some purchasers at higher net prices than to others through the use of a cumulative, quantity discount system. The discount available, which was computed on the basis of the total annual purchases, ranged from one to two and one-half percent. The complaint further charged that the utilization of this system may substantially lessen competition or tend to create a monopoly in the lines of commerce in which respondent is engaged and in which the favored retailers compete. The matter is presently before the Commission on complaint counsel's appeal from the hearing examiner's initial decision dismissing the complaint. The examiner's dismissal was predicated upon his conclusion that respondent's discriminatory prices were made in good faith to meet equally low prices of competitors within the meaning of Section 2(b) of the above-mentioned Act.

The parties entered into a stipulation for the purposes of this proceeding in which respondent admitted engaging in interstate commerce, as "commerce" is defined in the Clayton Act, and in the course of such commerce, selling carpets of like grade and quality within the continental United States directly to competing retailers at net prices

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[1] This is one of twelve similar proceedings brought against major carpet manufacturers. At this juncture, an order to cease and desist has issued against only one manufacturer, *James Lees and Sons Company,* Docket No. 7640, effective September 8, 1961 [59 F.T.C. 418]. Eight of the eleven remaining cases have been settled by the negotiation of consent orders to cease and desist, and the Commission is today approving and adopting these orders as the orders of the Commission. The consenting respondents are: *Bigelow-Sanford Carpet Company, Inc.,* Docket No. 7420 [p. 704 herein]; *Mohasco Industries, Inc.,* Docket No. 7421 [p. 709 herein]; *The Magee Carpet Company,* Docket No. 7631 [p. 716 herein]; *C. H. Masland & Sons,* Docket No 7632 [p. 721 herein]; *The Beattie Manufacturing Company,* Docket No. 7633 [p. 727 herein]; *A. & M. Karagheusian, Inc.,* Docket No. 7636 [p. 781 herein]; *Roxbury Carpet Company, et al.,* Docket No. 7637 [p. 787 herein]; and *The Firth Carpet Company,* Docket No. 7638 [p. 793 herein].

In addition to the instant proceeding, there were formal adjudicative hearings in *Callaway Mills Co., et al.,* Docket No. 7634 [p. 732 herein], and *Philadelphia Carpet Company, et al.,* Docket No. 7635 [p. 762 herein]: and these two matters were also decided this day by the Commission.

[2] 49 Stat. 1526 (1936); 15 U.S.C. 13(a) (1958).

calculated by the following retroactive, cumulative, annual, quantity discount system:

Aggregate annual purchases	*Discount (percent)*
Up to $9,999	0
$10,000 to $19,999	1
$20,000 to $34,999	1½
$35,000 to $49,999	2
$50,000 or more	2½

The stipulation further provided that in trading areas in which respondent sold its aforesaid products, the effect of the purchase price differential caused by the annual cumulative quantity discount system "* * * 'may be to substantially lessen competition * * * or to injure, destroy, or prevent competition,' among and between respondent's customers so purchasing said carpets and rugs at the resulting higher and lower net prices within the meaning of Section 2(a) of the amended Clayton Act." Finally, the parties agreed that respondent would not contest the sufficiency of the stipulated facts as constituting a prima facie case, nor offer evidence in opposition to the prima facie case. As a result of this stipulation, the only issue before the examiner and the only issue presently before the Commission is the sufficiency of respondent's proffered evidence to establish the good faith, meeting competition defense set forth by Section 2(b) of the amended Clayton Act.

As background for its meeting competition defense, respondent introduced evidence tracing the history of the volume discount or rebate system. Prior to 1950, the vast majority of carpets were woven. In that process, the backing and surface of the carpet are manufactured at the same time. The woven market was dominated by a group of so-called "old line" manufacturers, and entry into that market was limited. There have been no new manufacturers of woven carpet since the late 1920's. Most of the companies producing woven carpet employed the annual discount system until 1939, when all simultaneously discontinued the practice. In 1941, the Department of Justice obtained a consent decree enjoining fourteen of the woven carpet manufacturers from conspiring to discontinue the volume allowances. *United States* v. *Institute of Carpet Manufacturers of America et al.*, 1940–1943 CCH Trade Cases #56097 (S.D.N.Y. 1941). Following this decree, the rebates or discounts were uniformly reinstated.

In 1950, certain carpet manufacturers began to produce tufted carpet in commercial or large widths for the first time. The tufted process, in which the yarn forming the surface is punched through a previously prepared backing in a continuous loop formation, permits more rapid production of carpets than the woven process. This development resulted in the formation of the tufted market, which since that time has continuously expanded both from the standpoint of the amount of carpet produced and the number of manufacturers in the market.

The "old line" manufacturers of woven carpets began the production of tufted carpets in 1951. In so doing, they projected their quantity discount system into that field and combined both woven and tufted carpet sales in arriving at the maximum discount. Those manufacturers engaged solely in producing tufted carpet did not at first employ the volume discount system. It was not until 1955 that Callaway Mills became the first exclusive tufter to grant volume rebates or discounts. Respondent's system was adopted shortly thereafter and became effective in January of 1956.

Respondent presented its meeting competition defense through a single witness, who had been employed for nine and one-half years as respondent's vice president in charge of sales. Prior to joining respondent, this witness had been associated for over twenty years with a competing carpet manufacturer in various sales capacities. He testified that in 1954 he suggested for the first time that adoption of a cumulative quantity discount system was mandatory to "hold our position and further increase our position in the industry." Such action was necessary, according to this witness, because the size of some of their accounts had grown to the level at which competitors were granting the annual rebate, and the absence of such a program was hindering respondent's attempts to further expand the size of these accounts. In addition, this witness indicated a possibility that these particular accounts could not be maintained at their present size in the absence of rebates. However, the decision to grant rebates was not made until December of 1955. According to respondent's witness, two factors influenced the ultimate decision to adopt the system. First, there was the continuing problem that some accounts had reached the size at which competitors were granting annual discounts. Secondly, Callaway Mills adopted a discount system. Prior to that time, no manufacturer engaged solely in the production of tufted carpets granted rebates. Later in his testimony, this witness stated that sales declined in 1955. Respondent now takes the position that said decline was also a contributing factor in the decision. However, respondent failed to establish the extent of the decline. Further, it is not clear from the evidence whether industrywide sales decreased, remained stationary, or increased at this time.[3]

Respondent stresses other factors as indicative that its system was adopted in good faith to meet the prices of competitors. Its schedule

[3] There was evidence that the size of the tufted carpet market had increased between 1950 and the time of the hearing. Although respondent's share of that market has decreased, its sales over the entire period have increased.

of rebates, which ranged from one to two and one-half percent, was not as generous as the programs of its competitors, may of which granted a maximum of five percent. In addition, respondent's system required that a customer purchase a minimum of $10,000 worth of goods before qualifying for a discount, while the beginning bracket for the remainder of the industry was $5,000. Further, respondent made no public announcement of the adoption of its system. Instead, salesmen informed only those customers who inquired whether rebates were granted. Finally, respondent does not permit customers with several branch stores to cumulate the purchases of all stores to qualify for the volume discount, as is permitted by most competitors, nor are buying groups allowed to pool their purchases in computing their discount.

Counsel in support of the complaint contend that much of the above testimony was adduced over objections that the questions were leading or that the answer would be hearsay. Pretermitting these questions, we are nevertheless compelled to reject respondent's theory that the system was adopted in good faith to meet the lower prices of competitors for essentially the same reasons as enunciated in *Callaway Mills*, Docket No. 7634, [p. 732 herein] decided this day. As stated therein, it is our opinion that the proponent of the meeting competition defense, a defense which permits systematic price discrimination injurious to small retailers when successfully interposed, bears the burden of proof and should be held to a strict accounting that its discriminatory prices were, in fact, set to meet the equally low prices of competitors. Contrary to the decision of the examiner, we are not of the opinion that the instant respondent has fulfilled the required standard.

One of the elements of the Section 2(b) defense is that of good faith. A respondent may adopt a pricing practice utilized by a competitor, but if through that practice said respondent undercuts the prices which he is purportedly meeting, he is not acting in good faith and may be denied the refuge of the defense. *Cf. Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951). Among other things, therefore, a respondent must establish his good faith by evidence that he is doing no more than meeting competitors' prices by setting prices of his own equivalent to those he is purportedly meeting. In a case such as that presently before us, where the net prices are determined by way of rebates or discounts, a comparison of the discounts offered is meaningless without some knowledge of the prices and the quality of merchandise to which the discounts are applied. Stated otherwise, it is necessary for us to compare net prices offered by respondent with the net prices of its competitors which it was purportedly meeting to determine the existence of the requisite good faith. To accomplish this result, we must relate the discounts to the prices of comparable merchandise to determine whether respondent's net price was lower than those of competitors. Such a result is impossible without the price lists of respondent and its relevant competitors.

Further, respondent must offer evidence of the quality of its goods as compared to that of its competitors. Both the courts and the Commission have consistently denied the shelter of the defense to sellers whose product, because of intrinsic superior quality or intense public demand, normally commands a price higher than that usually received by sellers of competitive goods. For example, the defense will not lie when the price of Lucky Strikes is dropped to the level of a "poorer grade of cigarettes," *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929), *cert. denied*, 279 U.S. 858 (1929); or when the price of Budweiser beer is dropped to match the price of "nonpremium" local beers, *Anheuser-Busch, Inc.*, 54 F.T.C. 277, *set aside for other reasons*, 265 F. 2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 536 (1960), *again set aside for other reasons*, 289 F. 2d 835 (7th Cir. 1961). Thus, we conclude that it is incumbent upon the proponent of a meeting competition defense to identify with particularity both his goods and the competing goods whose price was met so that the fact finder may determine whether the asserted good faith in fact exists.

In the instant case, respondent offered no evidence whatsoever concerning the prices of its carpets to dealers as compared with those of its competitors. Respondent did not submit a list of prices of its various types and grades of carpet, nor did it offer evidence on the prices of its competitors' carpets. Further, respondent did not establish whether its particular carpets at the various price levels were of the same or similar quality as that of its competitors at the same levels. Evidence of this nature is of particular importance in light of the testimony of respondent's vice-president concerning the variants which determine the grade and price of carpets. He stated that there are four factors which must be considered in comparing carpets — the type and quantity of fiber used in the face yarn, the number of stitches per inch, the quality of the material used to bind the tufts in place, and the type of double backing, if any. When any of these factors vary between carpets, according to this witness, the carpets are not of similar quality. Carpets which appear to be identical may vary in price to the retailer as much as $2.35 a yard because of differences in the above factors. In the light of this testimony, it is obvious that mere comparison of the rebates offered is inconclusive in determining the net prices of respondent's carpets to retailers or in comparing these net prices to those of competitors. There is some indication that respondent's carpets at the various price levels were of slightly superior quality to those of competitors at the same pricing points.[4] If such was the case, respondent, by subsequently granting the rebate, may have been dropping the price of a superior product to the level or below that of products of lesser quality, even though the amount of the discount was less than that granted by competitors. In such circumstances, the meeting competition defense would not have been available. Thus, since respondent offered no definitive evidence from which we might conclude that it was in fact meeting the net price of its competitors through its practice of granting rebates, acceptance of its good faith meeting competition hypothesis would be pure supposition.

Moreover, for the reasons indicated in our decision in *Callaway Mills, supra*, we do not feel that respondent has sufficiently demonstrated that it was responding to an individual competitive situation, as is required by the Section 2(b) defense. *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945); *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U.S. 683 (1948); *Federal Trade Commission* v. *National Lead Company, et al.*, 352 U.S. 419 (1957); *E. Edelmann & Company* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958).

We conclude, therefore, that respondent has violated Section 2(a) of the amended Clayton Act, and that an order against continued violation should issue. We do not adopt the hearing examiner's decision that respondent's acts may be excused pursuant to the meeting competition defense of Section 2(b) of that Act. Since the stipulation entered by counsel concerning the competitive injury effected by the price discriminations was limited to competition among and between respondent's customers, the complaint allegation that competition may be affected in the line of commerce in which respondent is engaged must be dismissed. Accordingly, an order vacating the initial decision and effecting the above results will issue. Rules of Practice, § 3.24(b), 28 Fed. Reg. 7080, 7091 (July 11, 1963).

Commissioner Anderson concurred in the result. Commissioner Elman's views on the disposition of the case are stated in a separate opinion. Commissioner Reilly did not participate for the reason he did not hear oral argument.

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[4] At one time in 1954, the chairman of respondent's board of directors is reputed to have said that the company could not afford to grant a rebate. As phrased by respondent's vice president in charge of sales: "He felt the value of the products we were making, we just couldn't afford to give volume rebates in addition to the quality we were giving."

SEPARATE OPINION

FEBRUARY 10, 1964

By ELMAN, *Commissioner:*

The Commission rejects respondent's Section 2(b) (meeting competition in good faith) defense on the basis of the same analysis employed in the companion case of *Callaway Mills, Inc.*, Docket 7634 [p. 732 herein]—an analysis which I cannot accept, for the reasons stated in my dissenting opinion in *Callaway*. As in *Callaway*, respondent is subjected to an impossible burden of proof ("held to a strict accounting") under 2(b), a result which the Commission again attempts to justify by suggesting that the 2(b) defense is inconsistent with the basic objectives of the price-discrimination law, since the defense "permits systematic price discrimination injurious to small retailers when successfully interposed".[1] Again, respondent is deemed obliged to prove that his goods are of like grade, price and quality to his competitors' in order to negative remote and entirely conjectural inferences of bad faith. Finally—and in the face of its finding that respondent's "salesmen informed only those customers who inquired whether rebates were granted" as to the existence of respondent's rebate schedule—the Commission holds that respondent was not sufficiently responding to individual competitive situations.

In basing its rejection of respondent's 2(b) defense on the foregoing grounds, the Commission expressly passes over a far more convincing basis for rejection. Respondent presented its 2(b) defense through a single witness, its vice president in charge of sales. There was no testimony from any of respondent's sales representatives in the field or customers. Hence, we have only a vague idea of how respondent's rebate schedule actually operated, and with what effects. Moreover, the testimony of respondent's one witness, the sales vice president, lacks concreteness and is frequently rather ambiguous.

In suggesting that respondent's 2(b) defense could be rejected on the ground of want of substantial, reliable and probative evidence, I expressly reject complaint counsel's contention that the defense must be rejected because based on hearsay testimony, or testimony elicited by means of leading questions. The common-law exclusionary rules do not govern administrative adjudication. Still, a defense, to prevail, must of course be credibly supported by the record; and

[1] The suggestion that the Section 2(b) defense embraces "systematic" price discrimination appears to contradict the Commission's position, expressed both in *Callaway* and in the present decision, that meeting competition by a "system" is never permissible under 2(b).

it is arguable that the testimony adduced on the 2(b) issue failed to establish that respondent's price discriminations were made, in good faith, to meet competition.

I grant that it would be a curious result to accept Callaway Mills' 2(b) defense, while rejecting Cabin Crafts' for failure of proof. It seems clear that the latter adopted its rebate schedule only after, and because, Callaway had adopted such a schedule, and that Cabin Crafts' is the less discriminatory. But such paradoxes are inherent in the use of the case-by-case method of law enforcement in situations of industry-wide unlawful practices. The method, with its emphasis on individual findings of violation, its discrete records, and its narrowly adversary focus, is bound to result in inequities among competitors. The proper way to avoid such inequities is not to penalize Callaway Mills for Cabin Crafts' failure of proof, but to abandon routine reliance on the case-by-case method in situations for which it is not suited.

Final Order

This matter having been heard by the Commission upon the appeal of complaint counsel from the hearing examiner's initial decision dismissing the complaint and upon briefs and oral argument in support of and in opposition to said appeal; and

The Commission, having determined that the appeal should be granted, and that the initial decision should be vacated and set aside, now makes the following findings relative to the facts, conclusions, and order, which are to be in lieu of said initial decision:

FINDINGS AS TO THE FACTS

1. Respondent, Cabin Crafts, Incorporated, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its principal office located in the city of Dalton, State of Georgia.

2. Respondent is engaged in the manufacture, sale, and distribution of rugs and carpets, with manufacturing plants located in Dalton, Georgia.

3. Respondent ships or causes its rugs and carpets to be shipped from their place of manufacture in the State of Georgia to purchasers located in various other States of the United States and is actively and continuously engaged in the solicitation of customers and in the sale of said products to customers located in various States other than the State in which respondent is located.

4. In the course of its activities as aforesaid, the respondent has sold and is selling carpets and rugs of like grade and quality to competing

retailers purchasing the same for resale subject to the following retroactive, cumulative, annual, quantity discounts:

Aggregate annual purchases	*Discount (percent)*
Up to $9,999	0
$10,000 to $19,999	1
$20,000 to $34,999	1½
$35,000 to $49,999	2
$50,000 or more	2½

5. By pricing its rugs and carpets pursuant to the above schedule, respondent has discriminated in price between retailers who compete with each other in the resale of respondent's rugs and carpets to consumers. Customers receiving discounts at each of the various levels of the discount schedule have been favored over all other customers who receive a lower discount or no discount at all.

6. In trading areas in which respondent sells the aforesaid products, there are competitive customers purchasing from respondent as aforesaid, and the effect of the purchase price differences caused by the annual, cumulative, quantity discount schedule set forth in the preceding paragraph may be substantially to lessen competition or to injure, destroy or prevent competition among and between respondent's customers so purchasing said carpets and rugs at the resulting higher and lower net prices, within the meaning of Section 2(a) of the amended Clayton Act.

7. The record fails to reveal that respondent's lower discriminatory prices have been set to meet the equally low prices charged by respondent's competitors for goods similar in quality to respondent's goods.

8. Respondent's prices are determined by a formula with broad application to all of respondent's customers and, hence, have not been responsive to individual competitive situations. Instead, they have resulted in a sales system productive of continued discriminations between competing customers, without regard to whether the customers have been offered lower prices by competitors.

CONCLUSIONS

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

2. The facts in this record as described above and in the accompanying opinion of the Commission conclusively establish that respondent has discriminated in price in the sale of rugs and carpets in commerce in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

3. The public interest requires the issuance of an order directing respondent to cease and desist from the violations found.

ORDER

It is ordered, That respondent, Cabin Crafts, Incorporated, its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of rugs and carpets in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

> Discriminating, directly or indirectly, by the allowance of cumulative volume discounts or otherwise, in the price of rugs and carpets of like grade and quality, by selling to any purchaser at a net price lower than the net price charged any other purchaser competing in fact with such favored purchaser in the resale and distribution of such rugs and carpets. For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the allegation in the complaint that respondent's discriminations in price may be to substantially lessen competition or tend to create a monopoly in the line of commerce in which respondent is engaged, or to injure, destroy or prevent competition with said respondent, be, and it hereby is, dismissed.

It is further ordered, That respondent 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 set forth herein.

Commissioner Anderson concurred in the result. Commissioner Elman's views on the disposition of the case are stated in a separate opinion. Commissioner Reilly did not participate for the reason he did not hear oral argument.

IN THE MATTER OF

CLIN-TEX PRODUCTS CORP. ET AL.

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

Docket C-709. Complaint, Feb. 13, 1964—Decision, Feb. 13, 1964

Consent order requiring Hoboken, N. J., manufacturers of wool products to cease violating the Wool Products Labeling Act by such practices as labeling quilting materials as containing tan wool when they contained substantially different amounts of other woolen fibers, and failing to disclose on labels the percentage of the total fiber weight of wool and other fibers; and to cease violating the Federal Trade Commission Act by representing the fiber content of said quilting materials falsely on invoices as "Tan Wool".

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Clin-Tex Products Corp., a corporation, and Jerome Shapiro, and Sol Stafford, individually and as managers of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Clin-Tex Products Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey.

Individual respondents Jerome Shapiro and Sol Stafford are the principal stockholders of said corporation and, as managers, cooperate in formulating, directing and controlling the acts, policies and practices of corporate respondent including the acts and practices hereinafter referred to.

Respondents are manufacturers of wool products with their office and principal place of business located at 1000 Clinton Street, Hoboken, New Jersey.

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

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

Among such misbranded wool products, but not limited thereto, were quilting materials stamped, tagged or labeled as containing tan wool, whereas, in truth and in fact, said quilting materials contained substantially different amounts of other woolen fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section

4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

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

PAR. 5. The acts and practices of the respondent as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

PAR. 6. Respondents in the course and conduct of their business, as aforesaid, have made statements on invoices and shipping memoranda to their customers misrepresenting the fiber content of certain of their said products.

Among such misrepresentations, but not limited thereto, were statements representing the fiber content thereof as "Tan Wool" which represents that the product was 100% wool, whereas in truth and in fact the product contained substantially different fibers than represented.

PAR. 7. In the course and conduct of their business, respondents now cause and for some time last past, have caused their said products, when sold, to be shipped from their place of business in the State of New Jersey to purchasers located in various other States of the United States, and maintain, and at all times mentioned herein, have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. The acts and practices set out in Paragraphs 6 and 7 have had and now have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof and cause them to misbrand products sold by them in which said materials were used.

PAR. 9. 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 within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Clin-Tex Products Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its offices and principal place of business located at 1000 Clinton Street, Hoboken, New Jersey.

Respondents Jerome Shapiro and Sol Stafford are managers and the principal stockholders of said corporation and their address is the same as that of said corporation.

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 Clin-Tex Products Corp., a corporation, and its officers, and Jerome Shapiro, and Sol Stafford, individually and as managers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment in commerce, of wool interlining material or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

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

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

It is further ordered, That respondents Clin-Tex Products Corp., a corporation, and its officers, and Jerome Shapiro, and Sol Stafford, individually and as managers 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 interlining material or any other textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in quilting material or any other textile products on invoices or shipping memoranda applicable thereto or in any other manner.

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

TRANEX SCIENTIFIC, INC., ET AL. DOING BUSINESS AS TRANEX SCIENTIFIC OF ILLINOIS

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

Docket C-710. Complaint, Feb. 13, 1964—Decision, Feb. 13, 1964

Consent order requiring concerns in Hinsdale, Ill., engaged in leasing a device designated as "Tranex" for use in cases of enuresis, or bed-wetting, to cease representing falsely in advertisements in newspapers, magazines and other media that use of the device would stop bed-wetting and correct the bed-wetting habit in all cases, and had been utilized successfully in the treatment of over 275,000 cases of bed-wetting.

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