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 American Rolex Watch Corporation, a corporation, and its officers, directors, employees, agents, and representatives, directly or through any corporate or other device, in, or in connection with, the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Clayton Act, as amended, of watches, watch bracelets, watch accessories and other products, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of any customer as compensation or in consideration for any services or facilities consisting of advertising or other publicity in a catalog, newspaper, broadcast, or telecast or in any other advertising medium, furnished or distributed, directly or through any corporate or other device, by such customer, in connection with the processing, handling, sale, or offering for sale of any products manufactured, imported, sold, or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

It is further ordered, That the respondent herein 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 this order.

IN THE MATTER OF

FORSTER MFG. CO., INC., ET AL.

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

Docket 7207. Complaint, July 23, 1958—Decision, July 23, 1965

Order, pursuant to remand by the Court of Appeals, First Circuit, dated July 29, 1964, 335 F. 2d 47, 7 S.&D. 943, modifying an earlier order, dated March 18, 1963, 62 F.T.C. 852, which prohibited a Farmington, Maine, manufacturer of woodenware products from discriminating in price between its competing customers selling at retail by specifically enumerat-

ing the items incuded in "woodenware products" as "woodenware skewers, clothespins, ice cream spoons, and other wooden products sold by respondents."

OPINION ON REMAND

On January 3, 1963, this Commission, with one member dissenting, concluded that respondents had engaged in discriminatory pricing in violation of Section 2(a) of the amended Clayton Act, 15 U.S.C. 13(a), and issued a proposed order to cease and desist.[1] On March 18, 1963, the Commission rejected respondents' objections to that proposed order for the reasons set forth in an accompanying opinion,[2] and issued its final order.

It was found that respondents had violated Section 2(a) in their discriminatory pricing of three separate woodenware products, wooden meat skewers, wooden clothespins, and wooden ice cream spoons. In the sale of their skewers, respondents were found to have unlawfully discriminated in favor of three customers, Armour, MCA, and Hantover. In the sale of their clothespins, respondents were found to have unlawfully discriminated in favor of 17 customers, all located in the Pittsburgh area. In the sale of their wooden ice cream spoons, respondents were found to have unlawfully discriminated in favor of two buyers, Pet and Sealtest.

On July 29, 1964, the Court of Appeals for the First Circuit handed down its opinion and order remanding the matter to the Commission for further proceedings in regard to respondents' proffered defense that, in some of the discriminatory transactions, they were discriminating "to meet the equally low price of a competitor" as provided in Section 2(b) of the Act, 15 U.S.C. 13(b), and for possible clarification or modification of the order to cease and desist. *Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F. 2d 47 (1st Cir. 1964).

On August 25, 1964, respondents petitioned the court for a rehearing, their principal contentions being that the court "appears not to have recognized the differing standards of proof which have been firmly established by the courts in 'primary-line' and 'secondary-line' cases," and that the court had allegedly overlooked several of respondents' contentions in regard to their discriminatory sales of one of the products, wooden ice cream spoons. This petition for rehearing was denied on September 1, 1964. On March 1, 1965, the Supreme Court denied respondents' petition for certiorari. Thereafter, respondents petitioned the Commission for leave to brief

[1] *In the Matter of Forster Mfg. Co., Inc.*, 62 F.T.C. 852, CCH Trade Reg. Rep. (1961-1963 Transfer Binder) Par. 16,243.

[2] CCH Trade Reg. Rep. (1961-1963 Transfer Binder) Par. 16,342 [62 F.T.C. 852,924].

one of the issues remanded by the court of appeals (the meeting competition question). This was granted, together with leave to brief the other remand issue (clarification and modification of the order), and such briefs have now been received.

The principal issue remanded to us by the court involves the question of "meeting competition" under Section 2(b). Specifically, the court has sent the case back "for application to the evidence of the standard of the 'reasonable and prudent person' in the situation of the respondents with respect to their sales of skewers to Armour & Co. and their sales of clothespins in the Pittsburgh area." 335 F. 2d at 56. There is thus no further issue as to the illegality of respondents' discriminatory sales of ice cream spoons to Pet and Sealtest[3] nor as to the illegality of respondents' discriminatory sales of skewers to two other customers, MCA and Hantover.[4] It is thus settled that respondents have violated the statute in their discriminatory sales of two different products involving four different customers.

Two distinct factual situations are involved in the "meeting competition" problem returned to us by the court. One, as noted, involves respondents' sales of their wooden clothespins to 17 customers in the Pittsburgh area at a 10% lower price than they were

[3] The "meeting competition" defense was not asserted as to these transactions, and the court expressly affirmed our finding as to their discriminatory and injurious character.

[4] The only defense really proffered by respondents here was their contention that MCA (a group of meat packers, organized as a "buying group" with headquarters in Chicago) and Hantover, a Kansas City, Missouri, distributor, performed a "function" that automatically justified the 5% lower price they received, irrespective of whether it injured competition, was unjustified by reason of cost savings, and so forth. The court squarely rejected this argument, pointing out that Section 2(a) "does not sanction 'functional' discounts as such," requiring them to meet the same tests as all other discriminatory low prices. Respondents' contention on this point also suffered from the fact that *other* meat packers and distributors did *not* get that 5% lower price.

Respondents made no serious effort to sustain their contention that this discriminatory low price was extended to MCA to "meet competition." It had been given long *before* any of the competitive prices pointed to by respondents. Further, it was a regular and *systematic* discriminaiton, always fixed at 5% and granted without regard to what competing sellers were charging. "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." *Federal Trade Commission* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945) (emphasis added). See also *Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F.2d 674, 677 (2d Cir. 1959): "A lowered price is within §2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system * * *."

As to respondents' discriminatory sales of skewers to Phil Hantover, the favored distributor in Kansas City, Missouri, respondents conceded even before our hearing examiner that these sales were indefensible under Section 2(b). See Tr. 3394. As a matter of fact, this favored buyer got his regular, systematic 5% discount from respondents' "list" price even after the latter had been plunged below cost. For example, Hantover bought skewers from Forster for *$6.56* on January 8, 1957 (CX 39) when even Armour, buying at respondents' then below-cost list price, was paying $6.90. When asked whether he knew what Forster was referring to when it wrote him about allegedly lower prices from competing sellers, Hantover replied: "I do not." Tr. 1980.

charging other customers located in other geographical areas. The other factual situation involves respondents' sales of skewers to a single large customer, Armour & Co., at the discriminatory and below-cost price of $6.90 per case when other buyers were paying $8.20 per case.

The ultimate legal question is whether respondents have sustained their burden of affirmatively establishing that, when they granted these discriminatory prices to those favored customers and thus caused the adverse competitive effects found by the court, they were acting "in good faith to meet an equally low price of a competitor," as Section 2(b) requires, that is, whether respondents have sustained their burden of showing "the existence of facts which would lead a reasonable and prudent person to believe that the granting of [those] lower price[s] would in fact meet the equally low price of a competitor." *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-760 (1945).

Turning to the Pittsburgh clothespin situation first, the critical facts are these. In May and June of 1957, a small manufacturer of clothespins—Penley Bros. of Paris, Maine—entered the Pittsburgh clothespin market for the first time. Its sales there were handled by a local food and merchandise broker, a Mr. Mander. His Pittsburgh sales force consisted of himself and his son.

Mander, Penley's broker, naturally encountered sales resistance from the Pittsburgh clothespin buyers. "They told me that I had no advantage," that "Forster had as good a deal as I did and they also had merchandise available through a local warehouse."[5] In an obvious effort to get the "advantage" he needed to start getting "some distribution around the area," the Penley broker, in May and June of 1957, made three sales[6] at what was, in effect, an approximately 10% lower price than respondents were then charging: for every 10 cases purchased at the then-current price, one additional case was given to the customer "free." Penley's three sales at this "special" price—each of the three to a different customer, and each made on a different date, namely, May 13, June 4, and June 24, 1957—amounted to 60 cases "sold" and six cases given

[5] Tr. 2964.

[6] Those three sales were: (1) On May 13, 1957, Penley's broker sold 10 cases of clothespins (each case contains 48 retail "boxes," and each box contains 30 individual clothespins, for a total of 1,440 clothespins per case) to Irwin Wholesale Company, of Irwin, Pennsylvania, at Forster's then-current price, but gave the customer one additional case "free." (2) On June 4, 1957, Penley's broker sold 30 cases to Fayette Feed Company, of Charlerois, Pennsylvania, giving the customer an additional three cases "free." (3) On June 24, 1957, the Penley broker sold 20 cases to Caplan Grocery Company, Ambridge, Pennsylvania, giving two additional cases "free."

away "free," the aggregate sales price, for all three sales, being $318.50.

Penley made no further sales at this special price. On July 29, 1957—just over two months after its first sale in the Pittsburgh market—Penley wrote a letter to its broker, Mander, flatly refusing to fill a fourth order except at the full price, sans any concessions.[7] During the rest of 1957, Penley sold a total of 55 cases in the Pittsburgh area. The next year, 1958, it sold 59 cases there.

Respondent Forster had been the dominant factor in the Pittsburgh clothspin market for many years. Its Pittsburgh broker, a Mr. Fisher of National Brokerage Company, testified that, while it would be "a pretty broad statement" to say Forster had 90% of the Pittsburgh clothespin market, "perhaps we have 70 percent of the business."[8] His sales force of 15 to 20 salesmen called on the area's roughly 125 clothespin buyers approximately once in every two-week period, and Fisher himself calls on those customers about once a month. The salesmen submit written reports of their calls daily, including in those reports information concerning competitive prices encountered.

This broker of respondents testified that, in the early part of 1957, his salesmen began to report to him that "Penley [was] quoting one free with ten."[9] While the written reports by his salesmen had been destroyed prior to the trial, the broker testified that eight to ten customers had given reports to him and his salesmen "to the effect that Penley was offering one case free with ten."[10]

On the basis of this information, Forster's Pittsburgh broker informed the home office in Maine that Penley was cutting prices in the area.[11] Forster's sales manager, a Mr. Lovejoy, who was going to Pittsburgh for other reasons anyway, went in to investigate. According to the broker, he and Forster's sales manager made a call on one customer from whom they "received an absolute report" that "Penley [was] offering one free with ten."[12] The broker says he then turned the Forster sales manager "over to a salesman and they made several calls."

Discussing the results of their investigation that evening, the broker and the sales manager concluded "that we had to do something."

[7] CX 331.
[8] Tr. 2927.
[9] Tr. 2892.
[10] Tr. 2895.
[11] "Morris Fisher [the Pittsburgh broker] advised me that the competition Penley was offering, one free case of round clothespins with ten in his market, or his territory through the Penley broker, which at that time was the A.R. Manders Co." Tr. 2772.
[12] Tr. 2907-2908.

What they did was this. "We covered the market, the entire market on the basis of one free with ten. We didn't pick out specific customers."[13]

The record shows that 17 Pittsburgh buyers took advantage of respondents' area-wide offer of the 10% lower price. Altogether these discriminatory sales totaled 1,980 cases, or almost $10,000. This amounted to 95,040 retail "boxes" containing 30 clothespins each, a saturation of the Pittsburgh area with 3,136,320 clothespins. The lower price was continued until about August 1, 1957, "until we found evidence that the other [Penley's offer] was withdrawn."

Penley, the small competitor who had provoked this retaliation, was virtually repulsed from the market. As noted, after its third sale at the lower price on June 24, 1957, its sales for the remainder of 1957 amounted to only 55 cases, and its total sales for the following year, 1958, amounted to only 59 cases. For a period of about nine months—September 1957 to May 1958—Penley made no sales in the Pittsburgh area at all. In addition, as discussed in our earlier opinion, respondents' only substantial competitor, Diamond, suffered a decline in its Pittsburgh sales as a result of the "stocking up" by the local buyers during the period of respondents' discriminatory pricing.

As we understand it, respondents' only claim here is that, when they granted the 10% lower price, they entertained a good faith belief that such a price was "generally available" in the Pittsburgh area, not that they believed it had actually been *offered* to those *particular* 17 customers. But assuming such a claim is now made, we find no reasonable basis for it in this record. All we have here is the testimony of respondents' own officials that no more than 10 of the approximately 125 clothespin buyers in the Pittsburgh area "reported" that Penley was "quoting" or "offering" a 10% price concession; nowhere in that testimony do we find a suggestion that any of those 10 "reporting" buyers claimed to have received such a competitive offer *himself*. Since respondents knew they had the burden of proof under the statute, the natural inference from the vague generality of this testimony is that none of those buyers had in fact made such a claim. If so, respondents could have

---

[13] *Id.* The broker testified further:

Q. You made the offer regardless of whether or not any particular prospective customer had or had not received any specific offer from Penley or anybody else as to one free case with ten?

A. I said that before.

Q. That's correct?

A. That's correct. Tr. 2936-2937.

readily resolved all doubt in their favor by simply calling those buyers to the stand. Under these circumstances, the failure to do so "is itself persuasive that their testimony, if given, would have been unfavorable to [respondents]. The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse * * * Silence then becomes evidence of the most convincing character." *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226 (1939).

Respondents would apparently have us infer that a competitive price concession is automatically "available" to a buyer once he "hears" about it. Their reasoning, we suppose, is that the buyer can always get that concession for himself by simply calling the supplier in question and saying, "I want to buy clothespins from you at the 10% lower price I hear you are offering." But this ignores the possibility that the seller, even if he has actually sold to one or a few buyers at the rumored lower price, may not be *capable* of sustained selling to all buyers in the area on those particular terms. It also ignores the fact that he might be *unwilling* to extend a price he has given to only 2 or 3 buyers in an area to another 100 or more in that market. Sellers who are both willing and able to offer special low prices or other concessions are generally at some pains to communicate that fact to customers and potential customers. Indeed, this desire of sellers to keep their buyers fully informed as to any particularly favorable terms of sale being "generally" offered is so universal that a seller's failure to notify all of his customers of special terms accorded only to a few is considered "tantamount to concealment" and thus a purposeful effort to preclude "those [uninformed buyers] from participating in them." *Fred Meyer, Inc.*, Dkt. 7492, p. 16 (March 29, 1963) [63 F.T.C. 1, 37]; Hickey, "The Fred Meyer Case," 9 *Antitrust Bulletin* 255, 261 (Mar.-Apr. 1964). As we understand the price discrimination law, a price or other special concession is not "available" to a particular customer until he has been affirmatively notified of that fact by a willing seller. See, e.g., *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962).

The equivocal testimony of respondents' officials as to what they were told by these 10 buyers they allegedly interviewed, together with their failure to call any of those buyers to the stand, raises another adverse inference as well. Nothing in our experience suggests that buyers who "hear" about price concessions of this magnitude are slow in checking on such rumors; they frequently

call the various suppliers of the article in question and demand the rumored price. Here, for example, we would suppose that at least some of the 10 Pittsburgh buyers who allegedly reported the lower competitive offer to respondents would have taken the trouble to get on the phone and *ask* the various suppliers whether the rumored concession was "generally available." Respondents have given us no hint as to whether any such calls were reported to them and, if they were, what the inquiring buyers were told by either the Diamond Gardner or Penley representatives.[14] Respondents' silence in this regard can only be construed as an admission that no such calls were reported to them or that, if they were, the inquiring buyers reported that neither Diamond nor Penley was willing to sell to them at the 10% lower price.

Nor were these 10 buyers the only source of information available to respondents. As noted above, their salesmen call on each of the area's approximately 125 clothespin buyers every two weeks. If Penley's lower price had in fact been "widespread" throughout the area, it seems reasonable to suppose those salesmen would have encountered numerous buyers claiming to have actually received it. Yet not one such buyer was presented here.

Respondents themselves conceded in their original brief before the court of appeals that the Section 2(b) defense does not permit a seller to blanket an entire area with a discriminatory price when he has reason to believe the competitive offer he purports to be meeting is not "general," but limited: "Obviously, if a seller's investigation of a competitive offer indicated that it was made to only a limited number of customers, the seller would not be acting in good faith if he 'met' the offer with a counter-offer to all customers in a wide area."[15] We believe that is precisely what respondents have done here. We think it a fair inference from the ambiguous testimony they presented, and from the buyer testimony they failed to present, that they well knew the Penley price had not been offered either to the 17 particular customers to whom they gave the 10% lower price or to the trade "generally" in Pittsburgh. Certainly they have failed to carry their burden under the statute of showing they had any reasonable basis for believing otherwise. We conclude that their discriminatory pricing in Pittsburgh was an aggressive slash designed to repel that small competitor from the market—that it was, as the court summed it up,

[14] Several of respondents' customers identified Penley as the seller allegedly making the lower offer, and some of them apparently identified A. R. Manders as Penley's local (Pittsburgh) broker. See n. 11, *supra*.

[15] Brief on Behalf of Petitioners, p. 76.

"such a violent reaction to Penley's rather feeble and tentative attempt to enter the market that it could not be said that respondents' equally low price was made in good faith." 335 F. 2d at 55.

Turning to the discriminatory sales of skewers to Armour, the critical facts are these. Respondents, with approximately 58% of the country's skewer production and, as the court and the Commission found, a predatory desire to get the rest, first instituted a series of nondiscriminatory, across-the-board price cuts designed to put out of business its principal competitor, Farmington Dowel, a company that had approximately 22% of the national market in the relevant period, 1957.[16] This predatory price cutting culminated in a price respondents conceded to be below their own costs. For example, on the basic size skewer (and other sizes accordingly), respondents first plunged the price from $9.50 to $7.50, a drop of 20%, on June 8, 1956. After several months of selling at that low price, respondents tried to buy Farmington out. Rebuffed on that proposal, they then dropped the price to $6.90 (January 2, 1957), the latter price being admittedly below respondents' costs.[17] It remained in effect for approximately six weeks. On February 13, 1957, respondents raised their price to $8.20, well above costs.

Armour, having enjoyed this below-cost price of $6.90 for six weeks, was naturally unhappy when the price was raised to $8.20. Its purchasing agent wrote to respondents on March 11, 1957, as follows:

> We wish to acknowledge receipt of your price quotation on skewers, dated February 23.
>
> Upon review of this price-list, we regret to report that the volume of business formerly extended to your concern will be sharply reduced because of the introduction of these new prices. As we have mentiond in conversation and correspondence, competition is becoming very keen, and in view of *interesting offers made by your competition,* we feel that the volume of orders from Armour and Company will be considerably reduced.
>
> Should the foregoing information prompt your organization to review their list further, we would appreciate hearing from you.[18] (Emphasis added.)

A few days later, March 21, 1957, respondents wrote to the Armour buyer, saying "we have reviewed the matter thoroughly and are adjusting our prices to you" from the existing level ($8.20)

[16] The country's four other skewer manufacturers and their respective market shares in 1957 were as follows: Diamond, 11%; Morgan, 7%; Hardwood, 1%; and Ranger, 1%.

[17] See, *e.g.*, CX 206. Respondents' total delivered costs at St. Louis, Missouri—including production, selling, administrative, brokerage, warehousing, and freight costs (freight from Maine to St. Louis)—were $7.23 for the standard size skewer, a net loss of $.47 at the $6.76 price charged ($6.90 less 2%—$.14—cash discount).

[18] RX 14.

to $6.90. This letter referred to the Armour buyer's letter, quoted above, and to a conversation between him and a Forster sales official on the matter, concluding: "We trust that you will find these prices to be attractive and hope that we may continue to supply your requirements for these items."[19]

The hearing examiner had found, and we agreed, that when respondents extended that discriminatory price of $6.90 to Armour on March 21, 1957, the lowest "offer" Armour had in *fact* received from any competing seller of skewers was $7.00.[20] Even this "offer," however, had no real commercial significance to Armour, since it came not from a manufacturer, but from a small distributor (Wood Specialty) who in turn bought from a skewer manufacturer with less than 1% of the industry's sales, the C. H. Ranger Company. Armour's buyer, a Mr. Betz, made it quite clear that he attached no real significance to the Wood Specialty/Ranger "offers" and that the "interesting offers" he was referring to in his March 11, 1957, letter to respondents was not the $7.00 price quoted by Wood Specialty, *but Farmington Dowel's offer of $7.70.*[21]

The Armour buyer testified that he had been contacted by a Farmington representative who said he "was interested in our skewer business * * *. I seem to recollect his prices were interesting at that time." Thereafter, "I believe that Forster Manufacturing Company's representative was in; I believe they told us that their volume was decreasing or shrinking somewhat, and at this time I told him that there were *more interesting offers* being offered to us, and we would like to have them take a look at their prices if they are interested in competing * * *. [I]t was one of these seesaw propositions, *Farmington had a price and then Forster asked about it;* we told them to review their prices again, and, as a matter of

[19] CX 316.

[20] Respondents contended that Armour had received an even lower offer from the seller that bid the $7.00 figure, an offer of $6.80. As we discussed at some length in our earlier opinion of January 3, 1963, p. 29, n. 75 [62 F.T.C. 852, 910], this claim was refuted by the fact that all of Armour's actual purchases from that competitor were at $7.00 until some two months *after* respondents' discriminatory price of $6.90, and that, even then, Armour's purchases at the $6.80 price were trifling in amount ($26.66 on June 4, 1957 (RX 37), and $6.66 on June 17, 1957 (RX 52)).

[21] He emphasized that, in selecting suppliers, you pick those who can handle your requirements properly, that an important consideration is "whether their source or whether their production was sufficient to take care of your requirements at all times." Tr. 2002. Asked if the fact that Wood Specialty was merely a distributor, not a manufacturer, would "influence the size" of the orders he would give it, he replied: "Well, the question would be in my mind whether or not he could handle an order that large, whether he could make delivery on it." Tr. 2039-2040. While he later insisted that Wood Specialty's prices "could" have been "one" of the "interesting offers" refered to in his letter to respondents, his testimony left no doubt that the lowest price really available to him *for any substantial part of his requirements* on March 21, 1957, was Farmington Dowel's price of $7.70 per case.

fact, I wrote a letter to the Forster people * * *. I wrote them a letter and told them that under the circumstances their business would be sharply reduced in view of this. In the event that at any time they felt like they would like to review their prices and *come up with something more interesting*, we would consider going along with them on more business."[22]

The Armour buyer testified that he "switched" a substantial part of Armour's business to respondents on the basis of that discriminatory, $6.90 price extended to Armour alone on March 21, 1957. The record bears this out. During 1956, Farmington had overtaken respondents in the competition for Armour's business, selling that important customer $1,382 worth of skewers in *December* of that year, as compared to respondents' sales of only $843 to Armour that month. In the next year, 1957, however—the year the discriminatory, below-cost price of $6.90 was given to Armour by respondents—that buyer purchased $14,804 worth of skewers from respondents and only $4,111.16 worth from Farmington. Then Farmington went out of business in February 1958. That year, 1958, respondents' skewer sales to Armour amounted to $17,289 (75% of Armour's total skewer requirements). The following year, 1959, respondents' skewer sales to Armour totaled $22,245 (82% of Armour's skewer requirements).[23]

The next month after its major competitor, Farmington, went out of business, respondents raised their "list" prices (to the trade as a whole) from $8.20 to $8.90. A few months later, in November, 1958, they raised them again, this time to $9.00.

Since respondents' discriminatory, below-cost price of $6.90 successfully took almost all of Armour's business away from their competitors and contributed substantially to the elimination of Farmington ,their most important competitor, it is clear that, when respondents gave that discriminatory price to Armour on March 21, 1957, they were not, *in fact*, merely "meeting" competition, but were "beating" it.

[22] Tr. 2009-2011 (emphasis added). He further testified:

Q. As a matter of fact, it was the fact that you were buying or had started buying from Farmington Dowel that really prompted that letter, wasn't that true?

A. Yes, sir. [Tr. 2023.]

Q. However, if you look at Respondents' Exhibit 15, it would appear that Wood Specialties has a lower price than Farmington, does it not, and I would like to have you explain why you agreed that Farmington's pricing would have prompted that letter?

A. I believe you will recollect, Mr. McCarty, that I stated that price is not the only factor involved in purchasing. There are many factors, several factors that are very important: Whether or not a company is able to service you adequately; whether they have the outlets, the distribution that other companies have, that a similar competitor has * * *. [Tr. 2043.]

[23] In each of the years 1957-1959, Armour also bought approximately $5,000 worth of skewers from a third seller, Morgan Company.

The ultimate legal issue, however, is not whether respondents were in fact meeting competition, but whether they have shown, under the standard laid down in *Staley, supra,* 324 U.S. at 759-760, "the existence of facts which would lead a reasonable and prudent person to *believe*" the granting of that discriminatory price "would in fact meet the equally low price of a competitor." (Emphasis added.)

We find that respondents have made no such showing here. In addition to the letter from the Armour buyer (quoted above) telling them about "interesting offers made by your competition" and that, unless respondents should see fit, "to review their [price] list further," their "volume of orders" from Armour would "be sharply reduced," respondents relied upon the testimony of one of their sales officials as to a conversation he had had with the Armour buyer about the matter of competitive prices.

According to the Forster representative, the Armour buyer had told him "that the main reason that our sales had decreased was because our prices were not in line with competition." Asked if the Armour buyer had told him what price he would have to quote "to be competitive," the Forster representative replied: "Not in actual dollars and cents, but he referred to this increase in price of ours of February 13th, in saying that the prices we would need to be in line with would be the ones we had in effect right after January 1st [the below-cost price of $6.90]."[24]

The Armour buyer denied this, however: "We never inform any suppliers of what prices are being extended by anybody else."[25] There was nothing further. Shortly thereafter respondents "came up with a new price list," the discriminatory, below-cost figure of $6.90, and that quotation, as noted, caused Armour to "switch"[26] a greatly increased portion of its business (75% in 1958) to respondents.

From all of these circumstances, respondents could reasonably have concluded that Armour had, in fact, received from some competitor an offer of a lower price than respondents' own then-current price of $8.20. Armour's purchases from them had started to drop, an indication that the Armour buyer was telling the truth when he said he had more interesting offers from other sellers. But

[24] Tr. 2849, 2850. He testified further:

Q. Now, when you spoke to Mr. Betz it is true, is it not, that the offers made by no particular company for any particular type of skewer was mentioned?

A. No, nothing in that detail * * *.

Not in any specific competitor or price. [Tr. 2855, 2859.]

[25] Tr. 2046.

[26] Tr. 2048-2049.

an offer that is "more interesting" than $8.20 furnishes no rational link to a below-cost price of $6.90. Between those two figures lies a vast gulf, the difference between life and death for the smaller members of the industry.

Respondents' claim that the foregoing constitute "facts which would lead a reasonable and prudent person to believe" that granting Armour the discriminatory price of $6.90 "would in fact meet the equally low price of a competitor" is, in our view, wholly defeated by the fact that respondents knew it was a *below-cost* price. Since they knew it was below their own costs, they necessarily knew that it was also below the costs of their competitors; in view of the close relationship between volume and costs in this industry,[27] and in view of the fact that respondents had 58% of that industry while its five competitors shared the remaining 42%, respondents' contention that the "fact that the $6.90 price was below petitioners' costs does not prove that it was below the costs of every competitor of petitioners"[28] is wholly unpersuasive. We find that, when respondents extended this discriminatory, below-cost price of $6.90 to Armour, they knew very well they were "beating," not meeting, their competitors' prices.

A further fact that should have put respondents on notice that they were beating, not meeting, their competitors' prices to Armour was the fact, noted above, that their discriminatory price of $6.90 was immediately followed by a switch of a substantial volume of Armour's purchases to respondents, and thus away from their competitors. This stepped up volume of sales to Armour, *e.g.*, 75% of that buyer's total requirements in 1958, with the ultimate business failure of their largest competitor, Farmington, should have put respondents again on notice that their prices were not merely meeting a competitor's "equally low price" but were substantially below it.

In summary, we find that respondents, knowing the $6.90 price to Armour was below respondents' own and thus their competitors' costs, necessarily knew that no competitor could have made such an offer to Armour for any substantial part of its requirements. Secondly, we find that respondents, observing that this price was in fact "switching" the bulk of Armour's business to them, and thus destroying their major competitor, Farmington, were again

[27] A representative of Diamond, respondents' second largest competitor (11% of national market), testified that his company's "sales on skewers are a relatively low-volume item. In producing them at low volume quantities we could not be competitive with high-volume producers * * *. We could not be competitive with concerns that were making large quantities of this particular item." Tr. 2403.

[28] Brief on Behalf of Petitioners, p. 88.

and continuously informed that no competitor *was* offering Armour such a price on any substantial part of its requirements. From all of these circumstances we conclude that respondents have not shown "the existence of facts" which would have led a "reasonable and prudent person to believe" that the granting of the discriminatory prices to Armour was merely a meeting of an "equally low price of a competitor." While respondents could have reasonably believed Armour had received a competitive offer that was *some* lower than respondents' own then-current price of $8.20, they had every reason to believe that competitive quotation was nowhere near as low as the below-cost figure of $6.90 with which they retaliated.

We believe the foregoing is more than sufficient to demonstrate that these respondents, when they granted the discriminatory prices to the favored clothespin purchasers in Pittsburgh, and the discriminatory price to Armour on its skewer purchases, were not acting "in good faith to meet an equally low price of a competitor." Hence we think it unnecessary to analyze in detail the extent to which we think respondents further demonstrated their lack of good faith by failing in their duty, under *Staley*, to take steps to "investigate" the competitive prices they claimed to have been meeting, and thus "to learn of the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact be meeting the lower price of a competitor." 324 U.S. at 758, 759. In our earlier opinion, we expressed the view that an appropriate place to begin such an investigation would be in the office of the buyer claiming to have received the lower price quotations from other sellers, and that the seller's inquiry of his buyer should include a request for the amount of the competitive quotation and the identity of the seller that gave it. It was not our intention to require "proof positive" on either of these points; only full access to a buyer's books and records could furnish such proof. We intended no more than that respondents, in failing to demand a statement of those particulars from its favored buyer, that is, in guessing blindly at an alleged "competitive offer in an unknown amount made by an unnamed competitor," as they argued it to the court,[29] had shown, in *Staley's* words, an "entire lack of a showing of diligence on the part of respondents to verify the reports" of lower competitive prices. A buyer's report of such lower price offers, like a witness' testimony in court, takes on increased credibility, and justifies greater reliance, as detail is

[29] Brief on Behalf of Petitioners, p. 76.

added. And a seller "should have better-and-better proof of competitive price the lower and lower he gets."[30] Not all such statements by purchasers are true, of course;[31] but certainly they provide a more rational basis for an investigation than a mere statement that "more interesting offers" have been received.

In our earlier consideration of this problem, we gave little weight to respondents' contention that Armour would have refused a really "diligent" request for this information, notwithstanding the Armour buyer's statement that it was the company's practice not to give it, because it seemed to us that a buyer would be reluctant to change suppliers (with the disruption of routine and so forth that such changes bring) when he could get the "equally low price" from a regular supplier, without making such a change, by simply answering a perfectly lawful question. We must confess we had not considered the possibility that a buyer might not be content with merely getting from his regular supplier a price that merely "equals" the competitive price offered by the newcomer, but might, by remaining mute and letting that supplier "guess" at the amount of the competitive bid, hope to get a still lower price. We would have hesitated to consider this possibility without definite proof because a buyer's silence here, if motivated by a desire to secure a discriminatory price that "beats" competitive offers, might very well place the buyer himself in violation of another provision of

[30] Van Cise, "Antitrust in an Expanding Economy," *National Industrial Conference Board* 101 (May 16, 1962).

[31] One of the witnesses in this proceeding, the Penley broker, testified that "we wouldn't know what was going on in the market if it was not for the buyer telling us. There are certain individuals who will specifically state deals that have been offered to them that we have 99½ percent doubt about because ordinarily he will lie for his benefit. But there are other individuals whom we know to be honorable men." Tr. 2980-2981. See also the Court's comment in *Staley* on the absence of "evidence of respondents' knowledge of their informants' character and reliability." 324 U.S. at 758.

On the practice of sellers in gathering such information, see Anderson, "The Climate of Antitrust," Second Conference on Antitrust in an Expanding Economy, *National Industrial Conference Board* 62-63 (March 7, 1963), describing a "form" used by salesmen in recording and reporting numerous details of competitive price quotations. See also Van Cise, *supra*, n. 34, who advises sellers seeking "information as to specific prices offered by a competitor to a specific customer" to "go directly to that customer. At times, he will give you the price list of your competitor and say, 'Will you meet this?' and if your company can meet this competition, you're in. At other times, very rarely, he will give you an invoice showing your competitor's price, and, again, if your company can meet this price, you're in. In still another situation, he will say, 'I will not give you a piece of paper, but the price I am being quoted by a reputable supplier is such-and-such,' and this is very, very usual today * * * ." *Id.*, at 90. This commentator does note, however, that some purchasing agents claim "certain ethics" preclude them from "mentioning the specific price," telling the seller only " 'You're high' or 'You're low.' "

the statute, Section 2(f),[32] a danger we would assume a buyer of Armour's stature would be most reluctant to run. We need not press the point here, however. This is not a close case; the discrimination in favor of Armour was so great, the injury so severe, and respondents' failure to satisfy the *Staley* requirements so patent, that under no conceivable construction of the statute could we find that these respondents had granted that discriminatory concession in any reasonable belief that it was merely a meeting "in good faith" of a competitor's price.

The court has also directed us to clarify and perhaps modify the order to cease and desist.

That order directs respondents to cease and desist "selling woodenware products to any purchaser at a price which is higher than the price charged any other purchaser where respondents, at the time, are selling in two or more trading areas and in the trading area in which such products are sold at the lower price are in competition with any other seller *who then and thereafter enjoyed a substantially smaller volume of sales of woodenware products than the total volume of sales enjoyed by respondents*" (emphasis added).

Respondents' criticism of the order centers largely upon the emphasized portion quoted above, that is, the phrase that refers to competing sellers "who then and thereafter enjoyed a substantially smaller volume of sales of woodenware products than the total volume of sales enjoyed by respondents." In a brief filed with the Commission on May 7, 1965, they state that their "basic objection to the form of this order is the substitution of a completely unworkable criterion of injury to competition for the criteria of such injury established by the courts * * *. Section 2(a) prohibits only such price discriminations as are likely to injure competition * * *. In framing the order against respondents herein the Commission made an arbitrary determination that a price discrimination by respondents is likely to result in injury to any competitor who enjoys a substantially smaller volume of sales of woodenware

[32] Section 2(f) of the amended Clayton Act provides: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, *knowingly to induce* or receive a discrimination in price which is prohibited by this section [Section 2, including, of course, subsection 2(a), the provision involved here]." See *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61 (1953); *In the Matter of Fred Meyer, Inc.*, FTC Dkt. 7492 (March 29, 1963), [63 F.T.C. 1, 26]; *In the Matter of National Parts Warehouse*, FTC Dkt. 8039 (December 16, 1963), [63 F.T.C. 1692], *aff'd*, 346 F.2d 311 (7th Cir., May 28, 1965). "[I]f the buyer * * * —when he is asked what prices are being offered—misleads you by quoting a fictitiously low price and thereby induces a lower price from you than was the actual price of any competitor, he also by this misrepresentation is wilfully inducing a violation of the Robinson-Patman Act. I think many of your purchasing agents are very vulnerable, if someone wants to sue them for these practices." Van Cise, n. 30, *supra*, at 100-101.

products than the total volume of sales enjoyed by respondents. Thus, while pricing practices engaged in by respondents' competitors will continue to be legal unless they in fact are likely to result in injury to competition, respondents will be prohibited under the order from engaging in any pricing practices which involves price differentials solely on the basis that they are in competition with a smaller seller, *regardless of whether there is any likelihood of injury to competition.*"[33] Respondents argue that "the necessary effect of the order is to require respondents to eliminate all discounts of any kind, including trade or functional discounts, cash discounts, etc." and that this would leave them "no alternative under this order than to establish a uniform price throughout the United States."

In addition to these broad objections to the order, respondents further contend that the emphasized portion quoted above is confusing or unworkable in a number of particulars. They are especially troubled by the phrases "then or thereafter" and "woodenware products." They point out, for example, that many thousands of items, including such products as household furniture, are considered "woodenware products." And since respondents themselves produce only a few of these products "there is no possible way in which they could ascertain the total sales volume of any of their competitors." Hence, they conclude that this emphasized portion of the order, in prohibiting discriminatory prices in areas where they are competing with sellers having "a substantially smaller volume of sales of woodenware products," puts an unfair and unworkable burden upon them. Finally, respondents argue that this limitation of the order's applicability to those markets in which they have weaker competitors is in fact no limitation at all, "since in *every* trading area in the United States respondents are in competition with one or more sellers whose total volume of sales may be less than the total sales volume of respondents."[34]

The order will be amended to prohibit respondents from discriminating in price:

> By selling such products to any purchaser at a price which is lower than the price charged any other purchaser at the same level of distribution, where such lower price undercuts the lowest price offered to that purchaser by any other seller having a substantially smaller annual volume of sales of wood-

[33] Brief on Behalf of Respondents on Remand to Commission, May 7, 1965, pp. 29-31 (emphasis added).

[34] *Id.*, at p. 32 (emphasis added).

> enware products than respondents' annual volume of sales of those products.
>
> As used herein, the term "woodenware products" means wooden skewers, clothespins, ice cream spoons, and other wooden products sold by respondents.

This definition of "woodenware products" makes it clear that the order is directed solely to competition in the sale of the particular woodenware products sold by respondents themselves, not with "household furniture" or other items unrelated to their business. By omitting the phrase "then and thereafter," this order should also relieve respondents' professed fear that they might be prejudiced by some post-discrimination change in their competitive position vis-a-vis that of their competitors; here they need only concern themselves with probable injury to those of their competitors who are smaller at the time of the prohibited act—the discrimination—not at some later date. Finally, the limitation of the order to discriminations between purchasers "at the same level of distribution" should make it clear that this proceeding is directed not to price differences that merely reflect the compensation of bona fide middlemen for additional distributive services actually performed, but a program of predatory pricing designed to destroy respondents' own competitors.

We see no merit in respondents' other objections to the order. There is no requirement that cease-and-desist orders issued under Section 2(a) of the amended Clayton Act be conditioned upon future showings of adverse competitive effects; injury having followed discrimination in the past, the order may assume, without further proof, that it will continue to do so in the future. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 472-474 (1952). Indeed, any such general limitation of the order would have the necessary effect of shifting this burden of measurement to the courts in subsequent penalty or contempt proceedings and would therefore be at odds with the Supreme Court's unequivocal ruling on this point in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 54 (1948). Here, however, we have not in fact prohibited "all" future price discriminations, *Ruberoid, supra*, at 473-474, but have, instead, limited the prohibition to those we believe are virtually certain to have the adverse competitive effects described by the statute—those directed against competitors who are substantially smaller than respondents and thus unable, no matter how efficient they might be, to withstand a discriminatory price attack. See *Bergjans Farm Dairy Co.* v. *Sanitary Milk Pro-*

ducers, 241 F. Supp. 476 (D. Mo. 1965), 1965 Trade Cases Par. 71,466. Hence this provision of the order is not, as respondents contend, a "substitution" of another and arbitrary "standard" of competitive injury for the standard set forth in the Act; it is, instead, an express embodiment of that statutory standard into an order narrowly tailored to the facts of this particular case.[35]

If respondents are honestly resolved to cease their predatory pricing, they should have no difficulty complying with this order. As the court said in *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480, 488 (2d Cir. 1962): "The difficulties respondent foresees in determining whether it is complying with the order seem factitious. The order contains the usual provision for the filing of a report of compliance, 16 C.F.R. §3.26, and it is scarcely likely that if respondent proposes a method of compliance which the Commission accepts and thereafter follows it, the Commission will subsequently and without notice claim a violation entailing the civil penalties of 15 U.S.C. §21(1). If at some future time respondent desires to change to a procedure different from what it originally proposed, it need not proceed at its peril. The Commission's offices will still be open for discussion * * *."

Under the Commission Rule referred to by the court, respondents can secure at any time binding advice from the Commission "as to whether a proposed course of action" will "constitute compliance with such order." 16 C.F.R. §3.26(b). Moreover, as the Supreme Court noted only a few days ago in *Atlantic Refining Co.* v. *Federal Trade Commission*, 381 U.S. 357, 377 (1965), any unforeseen difficulties that might actually arise under the order can be permanently corrected through a petition for "reopening the order approved today. The Commission has statutory power to reopen and modify its orders at all times." Here, for example, respondents complain that the order would not allow them to discriminate anywhere at the present time, "since in every trading area in the United States respondents are in competition with one or more sellers whose total volume of sales may be less than the total sales volume of respondents."[36] We think this supports rather than argues against the order we are entering here. In time, however, the force

[35] Other primary-line orders have been considerably broader. In *Page Dairy Co.*, 50 F.T.C. 395, 399 (1953), respondent was ordered to "cease and desist from discriminating in price by selling said fluid milk of like grade and quality to any purchaser at prices lower than those granted other purchasers where respondent, in the sale of such product, is in competition with *any* other seller." (Emphasis added.) A similarly unqualified prohibition of price discrimination was included in the order entered in *E. B. Muller & Co.*, 33 F.T.C. 24, 57 (1941), *aff'd*, 142 F.2d 511 (6th Cir. 1944). The court found it "evident that the order is authorized by the statute and is proper in scope." 142 F.2d at 520.

[36] *Ibid.*

of competition can be expectd to dissipate respondents' unlawfully acquired dominance of this industry and restore a more evenly matched rivalry. When that occurs, any competitive disadvantages actually encountered under the order can be presented to us "in evidentiary form rather than as fantasies." *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431 (1957).

An appropriate order will be entered.

Commissioner Elman concurred and has filed a concurring opinion.

Commissioner MacIntyre did not concur and has filed a statement of non-concurrence.

Statement of Non-concurrence

BY MACINTYRE, *Commissioner:*

I do not concur in the action of the Commission in adopting and entering the order it is entering in this case. I do not concur because the order has now been so revised as to make it inadequate and ineffective. Those of us who hold views as to why this is so or is not so could continue to write volumes about the matter. This I shall not do. Future events will demonstrate eloquently the inadequacy and ineffectiveness of the Commission's order to cease and desist in this case.

The Commission found and the Court affirmed the finding that the respondent discriminated in price with destructive results to its competitors. Indeed, it is beyond dispute that respondent utilized these discriminatory practices with the result of eliminating a substantial amount of competition in the primary line of commerce in which respondent is engaged. Included among its discriminations were those by which respondent charged substantially higher prices in some areas than it charged in other areas where it was seeking to eliminate competition. The order the Commission is issuing will not be effective in preventing such discriminations in the future.

I am unaware of any instance in which either I or others have urged the proposition that price discriminations are *per se* illegal. I do not advance such proposition here. At the same time, I shall not permit such red herring to color and obscure my proper perspective as to the necessity of an adequate remedy to prohibit the illegal practices documented in this proceeding. It is believed that the Commission should be capable and willing to formulate an order which, without outlawing any and all price differentials, would present a prospect of greater effectiveness than the order the Commission is entering here.

CONCURRING OPINION

BY ELMAN, *Commissioner:*

In a decision rendered on January 3, 1963, the Commission held that Forster had violated Section 2(a) of the Clayton Act by engaging in predatory price discrimination. In particular, the Commission found that Forster, the nation's dominant manufacturer of woodenware, had attempted to destroy or cripple its principal skewer competitor, Farmington Dowel Products Company; a small new competitor in the Pittsburgh clothespin market, Penley Brothers; and certain small competitors in the sale of ice cream spoons. The Commission entered a sweeping and drastic cease and desist order which, I noted in dissent, "restricts respondents' freedom to compete to a wholly unjustifiable degree." On appeal, the Court of Appeals upheld the Commission's finding of a *prima facie* violation of Section 2(a), but disagreed with the standard of law applied by the Commission in rejecting Forster's defense of meeting competition in good faith and remanded the case to the Commission for reconsideration of that defense. 335 F. 2d 47 (1st Cir. 1964). At the same time, the court suggested, without elaborating, that the "order might well be clarified and perhaps somewhat modified." *Id.*, at 56-57.

In its opinion on remand, the Commission holds that the meeting-competition defense has not been established and enters a cease and desist order that, in line with the Court of Appeals' expressed desire that it be clarified and modified, differs in important respects from the old order. The Commission's discussion of the meeting-competition defense seems to me questionable on many points. However, the issue whether Forster was meeting in good faith the equally low prices of firms like Farmington and Penley has in effect been foreclosed by the Commission's earlier determination, not disturbed by the Court of Appeals, that Forster's price discriminations were intended to destroy or cripple these very firms. Forster's predatory conduct toward them was the very antithesis of the "good faith" that must be shown for the meeting-competition defense to prevail.

The cease and desist order entered by the Commission on remand represents a marked improvement over the original order. The difficulties encountered in drafting practical and effective orders under the Robinson-Patman Act are nowhere more pronounced than in territorial price discrimination cases. On the one hand, the public interest in fair and effective competition requires an order that will surely stop a seller found to have engaged in unlawful

territorial price discrimination from using territorial price differences as a method of destroying, crippling, or disciplining weak competitors. But the same public interest requires equally that the seller be left free to engage in vigorous and effective price competition. We want to fence in a seller found to have engaged in unlawful territorial price discrimination sufficiently to assure that there will be no recurrence of such conduct *(F.T.C.* v. *National Lead Co.,* 352 U.S. 419, 431), but we do not want to fence him in so tightly as to deprive him of all initiative and flexibility in price competition, and make him a sluggish, passive competitor; such a result, which weakens not strengthens competition, is opposed to the objectives of the Robinson-Patman Act.

The task of striking a proper balance, so as to avoid unduly restricting a respondent's ability to compete but still assure the cessation of the illegal practice, is a difficult and delicate one. It requires the kind of flexibility and imagination in the formulation of remedies that the Commission, as an expert administrative agency, is uniquely equipped to provide.

The order originally entered by the Commission in this case was inflexible, unimaginative, and even irrational in the sweep and stringency of its prohibitions. It provided that Forster could not sell to any purchaser, of whatever type (e.g., wholesaler, jobber, retailer, or ultimate consumer) and wherever located, at a price higher than Forster charged any other purchaser, of whatever type and wherever located, if, in the market where the lower price was charged, Forster was competing with another seller who "then and thereafter" had a "substantially" smaller total annual volume of woodenware sales than Forster's total annual volume of—apparently—all products. The order thus would have required Forster to establish a single, uniform price to all purchasers in all areas of the country. The apparent limitation in the order permitting Forster to cut prices where it faced competition from a larger woodenware seller was illusory, there being no such sellers. Under the order, Forster could have deviated from a uniform national price only where it was prepared to prove that a lower price was justified as a good-faith effort to meet a competitor's equally low price or was cost-justified under the stringent standards of that defense.

To be sure, this order, had it been upheld, would have prevented Forster from ever again engaging in predatory price discrimination. But it would also have prevented Forster from:

(1) Raising its price in any geographical area without simultaneously raising it everywhere (Forster could hardly have proved

that its price in every other market was justified under either the cost-justification or meeting-competition defenses);

(2) Granting legitimate functional discounts (for example, under the order Forster could not have charged a wholesaler a different price from a retailer, or a retailer a different price from the ultimate consumer);

(3) Initiating a price reduction in any market that was not simultaneously made effective throughout the nation, no matter how abnormal the price level in that market due to inefficient or monopolistic sellers, how slight the reduction, or how high above the prevailing price Forster's price would have been *after* the reduction, or whether Forster's competitors in the market were all large and diversified firms much more powerful than it (the order was applicable if a competitor's woodenware sales were smaller than Forster's total sales of all products; the competitor's total sales of all products could of course be much greater); or

(4) Entering new markets or expanding its market share in markets where its sales volume was small (both of which practices typically involve initially charging a low but temporary promotional price) without regard, again, to whether such an exercise of competitive initiative was likely to help or to hurt competition.

In addition, the order was full of vague and ambiguous terms—especially "then and thereafter" and "substantially smaller."

An antitrust cease and desist order that reduces the largest seller in an industry to competitive impotence, wholly depriving it of flexibility and initiative in pricing and confining it to a strictly defensive posture in every market, is justifiable, if at all, only if there is no alternative form of order that would adequately protect the public against a recurrence of the unlawful conduct without so severe an anticompetitive impact. As the Commission has come to realize, that is not the case here. The original order, moreover, violated the cardinal principle that the remedy should be suited to the unlawful practice, and not include unrelated practices. *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426, 433; *F.T.C. v. Henry Broch & Co.*, 368 U.S. 360, 366. The practice forbidden by the order was that of selling the same product in different geographical areas at different prices, but the unlawful practice involved in this case is not that—it is the practice of using area price differences to destroy competitors; it is *predatory* area price discrimination.[1] The Commission did not find that area price differences *as such*

[1] See *Anheuser-Busch, Inc. v. F.T.C.*, 289 F.2d 835, 843 (7th Cir. 1961); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313, 1339-48 (1965).

are in this industry a source of actual or probable competitive injury whenever and wherever a Forster might use them. The case was focused, rather, on Forster's predatory price discriminations. There is no basis in this record for assuming that all area price differences established by Forster are likely to be predatory, and for forbidding such differences across the board.[2]

An order reasonably limited to the actual unlawful practice in which Forster was found to have engaged, and which would adequately safeguard the public interest in vigorous and effective competition by large as well as small firms, should differentiate between those area price differences that are likely to injure competition and those that are not. I do not believe such an order is beyond the Commission's capacity to formulate; and here, as in *Lloyd A. Fry Roofing Co.*, F.T.C. Docket 7908 (decided this date) [p. 217 herein] the Commission has made great strides in the right direction. In the first place, the Commission has modified the original order to include the qualification imposed by the court in *Maryland Baking Co.* v. *F.T.C.*, 243 F. 2d 716 (4th Cir. 1957), and by the hearing examiner in his initial decision in this case, limiting the order's ban to discrimination between purchasers at the same functional level. This obviates my objection (2) (see p. 213, *supra)* to the original order. In the second place, the order does not ban all price differences between such purchasers, but only differences that result in Forster's undercutting *all* of its smaller competitors in a particular local market; this goes far to meet my objection (1). Moreover, it seems relatively unlikely that Forster should find it necessary to undercut *all* of its smaller competitors in order to penetrate a new market or shake up a market where competition has slackened (objections (3) and (4)). And as I noted in connection with the same form of order in *Lloyd A. Fry, supra* (concurring opinion, p. 269):

[2] The Commission has many times pointed out that it does not regard all area price differences as dangerous to competition. Thus, in *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 303, the Commission stated: "if the order was worded so as to require respondent to maintain uniform prices this, if anything, would be contrary to market realities. Respondent's prices vary in the different markets in which it sells, resulting in differences which, with the exception of the price discriminations charged in the complaint, are not in issue in this proceeding." See also *Maryland Baking Co.* v. *F.T.C.*, 243 F.2d 716, 719 (4th Cir. 1957); Commission Policy Toward Geographic Pricing Practices, Trade Reg. Rep. ¶ 10412 (9th ed. 1948); Reply Brief for the F.T.C., p. 8, *F.T.C.* v. *Anheuser-Busch, Inc.* (No. 389, October Term 1959), 363 U.S. 536, quoted in *Quaker Oats Co.*, F.T.C. Docket 8112 (decided Nov. 18, 1964), pp. 4-5 [66 F.T.C. 1131, 1193]: "The Commission has recognized that there is a crucial difference 'between normal and legitimate pricing activities designed to obtain a larger share of business in a marketing area and those which represent a punitive or destructive attack on local competitors and impair the vitality and health of the process of competition.' "

[I]t is implicit in the order that it does not preclude Fry from making price reductions in a market where competitors maintain a uniformly high, monopolistic price, or from making temporary promotional price reductions necessary for entry into a concentrated local market. In other words, the order should not, and I believe will not, be read as forbidding area price differences where Fry can show that they promote—and not, as in this case, retard—vigorous and healthy competition.

The weakness of the Commission's order is that it does not specify the circumstances under which a deep price reduction by Forster undercutting all of its competitors in a particular market would not be forbidden because it would not be injurious to competition. One alternative to the Commission's order would be an order drafted in the language of Section 2(a). Such an order would make liability turn squarely on competitive effect, but would be far too vague to be practically enforced or complied with. It would require Forster, before initiating any price cut, to guess its probable competitive effects. A wrong guess would result in a violation of the order and lay Forster open to heavy monetary penalties. With liability so uncertain and unpredictable, Forster would dare not initiate price reductions except on a uniform nationwide basis.

Much better than a boilerplate order, better even, I believe, than the Commission's new order, would be one that expressly forbade Forster to engage in predatory area price discrimination, that is, area discrimination designed to injure, cripple, discipline, or destroy a competitor. Such an order would not be altogether free from uncertainty (cf. *Bakers of Washington, Inc.*, F.T.C. Docket 8309 (decided February 28, 1964), dissenting opinion, p. 5) [64 F.T.C. 1079, 1146], but it would establish a familiar and reasonably clear standard for determining Forster's compliance with the order. Interpreted in the light of the Commission's two opinions, it would have substantial value in deterring the kind of obviously destructive, unfair, and unjustifiable tactics toward weaker competitors which this record reveals and which, after all, is the practice the Commission has found unlawful.

The important thing is that the Commission give serious and continuing thought to more responsive and effective remedies than orders simply forbidding area price differences. I have noted the Commission's sometime failure[3] to appreciate that the objective

[3] See my separate opinions in *Vanity Fair Paper Mills, Inc.*, 60 F.T.C. 568, 579-84, *aff'd*, 311 F.2d 480 (2nd Cir. 1962); and *Quaker Oats Co.*, 60 F.T.C. 798, 812-20. For recent court decisions on this theme, see e.g., *Joseph A. Kaplan & Sons, Inc.* v. *F.T.C.*, 347 F.2d 785, 789-791 (D.C. Cir. 1965); *Country Tweeds, Inc.* v. *F.T.C.*, 326 F.2d 144, 148-49 (2d Cir. 1964), and cases cited therein.

of a cease and desist order is not to forbid as much as possible, but to effectuate and foster the purposes of the statute being enforced—which, in the case of the Robinson-Patman Act, are the promotion of competition and the prevention of monopoly. My concern is not, of course, that a Commission order might impair the profitability of the subject firm. Having violated the law, a respondent must expect fencing in by the Commission. My concern, and it is, I believe, the Commission's as well, is with the health of the competitive process. An order that crippled Forster's ability to compete might satisfy a desire to see respondents punished for their unlawful conduct, but punishment is not our business, and a punitive and vindictive order—which the Commission has to its credit now renounced—would needlessly impair the basic objective of fostering fair competition.

Final Order

This matter having been remanded to the Commission by the United States Court of Appeals for the First Circuit for further proceedings not inconsistent with the court's opinion of July 29, 1964 [335 F. 2d 47, 7 S.&D. 943], and the Commission having complied therewith:

It is ordered, That respondent Forster Mfg. Co., Inc., a corporation, and its officers and the individual respondent Theodore R. Hodgkins, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale or distribution in commerce of woodenware products, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality:

> By selling such products to any purchaser at a price which is lower than the price charged any other purchaser at the same level of distribution, where such lower price undercuts the lowest price offered to that purchaser by any other seller having a substantially smaller annual volume of sales of woodenware products than respondents' annual volume of sales of those products.
>
> As used herein, the term "woodenware products" means wooden skewers, clothespins, ice cream spoons, and other wooden products sold by respondents.

It is further ordered, That respondents Forster Mfg. Co., Inc., and Theodore R. Hodgkins, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which

they have complied with the order to cease and desist set forth herein.

Commissioner Elman concurred and has filed a concurring opinion. Commissioner MacIntyre did not concur and has filed a statement of non-concurrence.

IN THE MATTER OF

LLOYD A. FRY ROOFING COMPANY ET AL.

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

Docket 7908. Complaint, May 20, 1960—Decision, July 23, 1965

Order requiring the nation's largest producer of asphalt roofing products located in Summit, Ill., to cease discriminating in price among its customers of asphalt saturated felt and asphalt strip shingles in violation of Sec. 2(a) of the Clayton Act by using anticompetitive territorial price cuts to discipline small independent local competitors; the Commission dismissed the charge that respondent had sold said products at below cost prices with the intent of injuring competition in violation of Sec 5 of the Federal Trade Commission 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, as amended by the Robinson-Patman Act (15 U.S.C. § 13), and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45), and it appearing to the Commission that a proceeding by it in respect thereof would be to the interest of the public, hereby issues its complaint stating its charges with respect thereto as follows:

COUNT I

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

PARAGRAPH 1. Respondent Lloyd A. Fry Roofing Company (sometimes hereinafter referred to as Fry or respondent corporation) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its prin-

cipal office and place of business located at 5818 Archer Road, Summit, Illinois.

PAR. 2. Respondents Lloyd A. Fry, Sr., chairman of the board of respondent corporation, and Lloyd A. Fry, Jr., president of respondent corporation, are individuals and the majority stockholders in Lloyd A. Fry Roofing Company. They formulate, direct and control the acts, policies and practices of respondent corporation, and have their offices and principal place of business at 5818 Archer Road, Summit, Illinois. They are, personally and officially, primarily responsible for the adoption and use of the acts and practices herein alleged to be unlawful, and the methods, acts, and practices hereinafter alleged with respect to respondent corporation are also alleged as to said individuals.

PAR. 3. The respondent corporation, Fry, is now, and for many years has been, engaged in the manufacture, distribution and sale of aphalt roofing products and dry felt. It sells these products for use, consumption or resale within the various States of the United States.

Fry's products are sold and distributed under the brand names "Invincible" and "Genasco." Fry also manufactures asphalt roofing products under the private labels of some of its wholesale distributors and other customers, such as Sears, Roebuck & Co.

Fry's sales are and have been substantial. Its net sales during the fiscal year ended October 31, 1958, were $50,823,413.

PAR. 4. Fry is the largest asphalt roofing manufacturer in the United States, owning and operating nineteen plants in fifteen States of the United States. In addition, dry felt is manufactured in fourteen plants in eleven States by Fry's Volney Felt Mills Division.

PAR. 5. In the course and conduct of its business, Fry has been, and is now, engaged in commerce, as "commerce" is defined in the Clayton Act. It transports or causes to be transported its roofing products from the State of manufacture to purchasers located in other States. There is and has been a constant stream of trade and commerce in these products between and among the various States of the United States.

PAR. 6. In the course and conduct of its business in commerce, Fry is now, and has been, in substantial competition with other corporations, individuals, partnerships and firms engaged in the manufacture, sale and distribution of asphalt roofing products.

PAR. 7. In the course and conduct of its business in commerce, and particularly during and since 1956, Fry has discriminated in

price between and among different purchasers of its asphalt roofing products of like grade and quality. This it has done by selling to some purchasers at prices higher than those charged other purchasers.

Among and typical of the discriminations alleged are transactions relating to 15-pound and 30-pound asphalt saturated felt, in 60-pound rolls (sometimes hereinafter referred to as asphalt felt), and 210-pound asphalt shingles (12-inch standard 3-tab strip shingles, sometimes hereinafter referred to as shingles). These products Fry has sold to customers in certain geographical areas of the United States at prices substantially higher than those charged others of its customers outside such geographical areas.

In the sale of the aforesaid products, particularly during and since 1956, Fry has adopted and used a pricing system and pattern resulting in lower prices in the Southeastern and Southwestern areas of the United States than in other areas. This it has accomplished through a series of price lists and price bulletins establishing various systems of area and zone pricing, and though the application of varying discounts to an ostensibly uniform price.

For example, from August to October 1956, Fry charged certain customers in Illinois $6.40 per square for shingles while, for products of like grade and quality, it charged certain customers in Arkansas $5.50 per square. On asphalt felt, during the same period, certain customers in Illinois were charged $2.43 per roll, while, for products of like grade and quality, certain customers in Mississippi were charged $2.07 per roll.

Similarly, in September and October 1958, certain customers in Arkansas and Tennessee were charged $1.78 per roll for asphalt felt, while, for products of like grade and quality, certain customers in Wisconsin were charged $2.34 per roll. In the sale of shingles during the same period, certain customers in Arkansas were charged $5.30 per square, while, for products of like grade and quality, certain customers in Wisconsin were charged $6.60 per square.

These examples are illustrative of the pricing practices of respondents, and other price lists and bulletins, and sales made pursuant thereto, during the period 1956 to date reflect a similar pattern of discrimination.

PAR. 8. The effect of these discriminations in price, as alleged in Paragraph Seven of this complaint, has been or may be to divert to Fry, or to Fry's customers, substantial business from competitors; and such discriminations are and have been sufficient to divert substantial business from competitors to Fry, or to Fry's customers, in the future.

Where business has not been actually diverted, competitors have been required to meet, directly or indirectly, the discriminatory prices of Fry, with the result, actual or potential, of substantially impairing their profits and consequently lessening their ability to compete.

Thus, the effect of the aforesaid discriminations in price, as alleged in Paragraph Seven of this complaint, has been or may be substantially to lessen competition or to tend to create a monopoly in the lines of commerce in which Fry, its customers and its competitors are engaged, or to injure, destroy, or prevent competition with respondent Fry or its customers.

PAR. 9. The foregoing discriminations in price by respondents are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

COUNT II

Charging violation of Section 5 of the Federal Trade Commission Act, the Commission alleges:

PAR. 10. Paragraphs One through Six of Count I hereof are incorporated herein by reference and made a part of this Count as fully and with the same effect as if set forth herein verbatim, except that the reference to the Clayton Act in Paragraph Five of Count I is eliminated herein, and reference to the Federal Trade Commission Act is substituted therefor.

PAR. 11. In the course and conduct of its business in commerce, and particularly since 1956, respondent Lloyd A. Fry Roofing Company has sold or offered to sell and is selling or offering to sell asphalt roofing products at below cost prices or at unreasonably low prices with the intent, purpose and effect of injuring, restraining, suppressing, and destroying competition in the sale of such products in the Southeastern and Southwestern areas of the country.

For example, in the sale of 15-pound and 30-pound asphalt saturated felt, during and subsequent to March 1958, Fry sold to certain customers in Mississippi, Tennessee and Arkansas at delivered prices of $1.63 per roll. It is alleged that such price was an unreasonably low price or was below Fry's cost of manufacture, sale and delivery, and that sales at such price were made for the purpose and with the intent and effect aforesaid.

PAR. 12. The effect and result of the pricing practices of respondent, as alleged in Paragraph Eleven hereof, have been or may be substantially to lessen competition in the distribution and sale of asphalt roofing products, to the injury and prejudice of the public,

and to the injury and prejudice of Fry's competitors, as aforesaid; and such pricing practices constitute unfair methods of competition and unfair acts or practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Bernard M. Williamson, Mr. Bernard Turiel, and *Mr. Allan Finkel* for the Commission.

Mr. Burton Y. Weitzenfeld, Mr. James R. Fruchterman, Mr. James T. Dougherty, and *Mr. Herbert I. Rothbart,* Attorneys for the respondents, Kahn, Adsit & Arnstein, 120 South La Salle Street, Chicago 3, Ill.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

APRIL 1, 1964

INDEX

		Page
I.	The Complaint	222
II.	The Answer	222
III.	Hearings	223
IV.	Proposed Findings	223
V.	Identity and Business of Respondents	223
VI.	The Products	224
VII.	Classification of Fry Roofing Customers	225
VIII.	The Pricing System Employed by Fry Roofing	226
	A. Introduction by Fry Roofing of the Zone Delivery Pricing System of February 19, 1956	226
	B. Meetings of the Major Manufacturers Prior to Their Adoption of the Fry Roofing Price Plan of February 19, 1956	229
IX.	Price Changes from 1956 to 1960	232
	A. August 14, 1956—Extension of Extra Discounts on Purchases in the Southwest and Southeast	232
	B. The 5% Secret Annual Rebate to Selected Customers as of November 1, 1956	233
	C. Basic Price Changes of November 1, 1956	233
	D. Two Columns in Designated Zones	235
	E. Various Additional Price Changes in 1957, 1958, 1959 and 1960	236
	F. Conclusion on Price Changes	236
X.	Concerning the Charge that Fry Roofing Sold Asphalt Roofing Products at Below Cost or at Unreasonably Low Prices	237
XI.	Companies Complaining of Fry Roofing's Prices	241
	A. Volasco Products Company	241
	B. The Ohio Paper Company	243
	C. The Piedmont Company	245
XII.	Summary, Conclusions and Order	247

SUPPORTING REFERENCES

"Tr." refers to the official transcript.

CX refers to Commission Exhibits.

RX refers to Respondents' Exhibits.

The references are placed at the end of each paragraph in the order in which the particular statements which they support are made in the paragraph.

I. The Complaint

1. The complaint in this proceeding, issued on May 20, 1960, charges in Count I that the respondents named above, in the course and conduct of their business in commerce, during and since 1956, discriminated geographically in the price charged different purchasers of their asphalt roofing products of like grade and quality, in violation of Section 2 of the Clayton Act, as amended. The pertinent parts of that Act invoked by the complaint are as follows:

> Sec. 2. (a) 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. The complaint further alleges in Count II that respondents have sold or offered to sell asphalt roofing products at below cost prices or at unreasonably low prices with the intent, purpose, and effect of injuring, restraining, suppressing, and destroying competition in the sale of such products in the southeastern and southwestern areas of the United States, in violation of Section 5 of the Federal Trade Commission Act. Section 5 of the Act just referred to provides, in part, that: "Unfair methods of competition in commerce, * * * are hereby declared unlawful."

II. The Answer

3. Respondents' answer, filed August 1, 1960, admits the corporate existence and business operations of the respondents and certain geographic price differences, but denies any predatory intent, and denied that any of their prices or policies have violated Section 2(a) of the Clayton Act, as amended, or Section 5 of the Federal Trade Commission Act as alleged in the complaint.

III. Hearings

4. Hearings were held in Washington, D.C., New York, New York, Chicago, Illinois, Atlanta, Georgia, Dayton, Ohio and Knoxville, Tennessee. The record consists of 2,480 pages of transcript and numerous exhibits.

IV. Proposed Findings

5. Opposing counsel submitted proposed findings as to facts, proposed conclusions and a proposed order. In addition, they submitted replies to the opposition's proposals. All proposals have been considered by the hearing examiner, and those not incorporated in this initial decision, either verbatim or in substance, are hereby rejected.

V. Identity and Business of Respondents

6. Respondent Lloyd A. Fry Roofing Company, hereinafter sometimes referred to as Fry Roofing, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 5818 Archer Road, Summit, Illinois (Answer).

7. Fry Roofing is now and for many years has been engaged in the manufacture, distribution, and sale of asphalt roofing products and dry felt. It sells such products under the brand names of "invincible" and "Genasco" for use, consumption and resale within the various states of the United States. It also manufactures asphalt roofing products under private labels for some of its wholesale distributors and other customers, particularly Sears, Roebuck and Company (Answer).

8. Respondents Lloyd A. Fry, Senior, and Lloyd A. Fry, Junior, are individuals and majority stockholders in the Fry Roofing Corporation and are respectively the chairman of the board of the respondent corporation and president of that corporation. Together they formulate, direct and control the acts, policies and practices of the respondent corporation. Their offices and principal place of business is the same as that of the Fry Corporation, 5818 Archer Road, Summit, Illinois (Answer).

9. Fry Roofing operated 19 strategically located asphalt roofing plants throughout the United States during the period of 1956 through 1960 as follows:

Summit, Illinois	Brookville, Indiana
Kearny, New Jersey	Houston, Texas
Compton, California	Stroud, Oklahoma
Memphis, Tennessee	San Leandro, California
Detroit, Michigan	York, Pennsylvania
Waltham, Massachusetts	Morehead City, North Carolina
Portland, Oregon	Jacksonville, Florida
Minneapolis, Minnesota	Irving, Texas
Robertson, Missouri	Fort Lauderdale, Florida
N. Kansas City, Missouri	

10. Since 1960, Fry Roofing has expanded its operation by opening new plants in Atlanta, Georgia, Lubbock, Texas, and Oklahoma City, Oklahoma. As of July 1962, Fry Roofing had a new plant under construction in Meridian, Ohio (Tr. 2446, 2447, CX 1454A-F, CX 1455B).

11. Fry Roofing, although not the largest corporation engaging in the manufacture of asphalt roofing products, operates the largest number of such plants in the industry and is the largest producer of asphalt roofing products. In 1958, Fry Roofing's share of the market in the sale of asphalt saturated felt amounted to 14.20%. For the same year, Fry's market share in the sale of other asphalt roofing products amounted to 10.81% (Tr. 275-76, CX 1458 and 1387A-T).

12. Although there are about 34 companies engaged in the manufacture of asphalt roofing products, the major national manufacturers of that product, in addition to Fry Roofing, together with the number of plants which they were operating in June 1961, are as follows:

Name of Company	*No. of Plants*
The Ruberoid Co.	11
Certain-teed Products Corporation	8
Johns-Manville Corporation	7
The Flintkote Company	6
Allied Chemical Corporation, Barrett Division	6
The Philip Carey Manufacturing Co.	5
Bird & Son, Inc.	4
State Gypsum	Not Shown
Logan-Long	" "

(Tr. 276-78, 49, CX 1513A and B)

VI. The Products

13. The basic materials used in the manufacture of asphalt roofing products are felt, asphalt and mineral granulars. In the making of asphalt saturated felt dry felt is first processed into

saturated felt by dipping in liquid asphalt, a product derived from petroleum. After saturation, the product is cooled and rerolled. In the manufacture of shingles the felt is heavier and the coating of the saturant has a higher viscosity and higher melting point than that used in the making of saturated felt. From the coating vat the product moves to a drum where granulars of slate rock are pressed into the coating as the product is wrapped around a large drum. Finally, the sheet is cut into shingles. More machinery and more processes are involved in the making of shingles than in the making of the simpler saturated felt product (Tr. 15, 2004-24).

14. There are, generally, two major classifications of asphalt saturated felt. Commercially, the 15-pound saturated felt product has 432 square feet per roll, and the 30-pound saturated felt has 216 square feet per roll. Both of these products are sold in 60-pound rolls (Tr. 15). Asphalt saturated felt and shingles are the principal products sold by Fry Roofing and by the other companies in the asphalt roofing industry. The evidence in this proceeding is confined principally to asphalt saturated felt and to a lesser extent to asphalt shingles. The largest volume of shingles produced and sold by Fry and the largest volume sold in the industry is what is commonly referred to as the 12-inch standard strip shingle. This shingle is sold in bundles which cover 108 square feet. (Tr. 16, 39-40, CX 5).

VII. Classification of Fry Roofing Customers

15. Mr. Lloyd A. Fry, Jr. testified that a wholesale distributor of Fry Roofing products was a business entity which bought from Fry Roofing and which in turn sold to retail lumber dealers, roofing contractors, and roofing applicators. A retail dealer he described as a business entity which carried an inventory of roofing products for sale to the general buying public. He admitted that there was some competition between a dealer and a wholesaler. He testified that Sears, Roebuck and Company was a retail outlet for Fry Roofing products, but that it purchased its roofing material at a wholesale price. The annual purchases of asphalt roofing products from Fry Roofing by Sears, Roebuck and Company have been approximately $5 million for each of the years 1956 through 1960 (Tr. 2412-13, CX 1356-60).

16. An officer of C. M. McClung and Company of Knoxville, Tennessee, which is one of Fry Roofing's major purchasers in the Knoxville area, testified that his company sells asphalt roofing products to applicators, building contractors and industrial ac-

counts. These are the type of accounts to which retail dealers would normally sell asphalt products (Tr. 1627-28, 1635, 2412, 2413).

VIII. The Pricing System Employed by Fry Roofing

17. We begin our consideration of the pricing system employed by Fry Roofing during the period from 1956 through 1960 with the admitted fact that prior to February 1956 Fry Roofing sold its line of asphalt roofing products at prices which were 5% to 7% below the published prices of other major national manufacturers of asphalt roofing products. Mr. Fry, Sr. defended such practices with the explanation that Fry Roofing did not employ salesmen as did the other major manufacturers and consequently Fry could pass on the savings thus obtained to its distributors. Furthermore, he stated, and testimony throughout the record support his statement, that published prices are frequently not the real price charged—that published prices are varied to meet competitive needs (Tr. 280-81, 696-97).

18. In the discussion of Fry Roofing's pricing system, two types of products are used for illustrative purposes, namely, 15 and 30-pound asphalt saturated felt and 12-inch standard strip shingles. Asphalt saturated felt is sold in rolls weighing 60 pounds, standard strip shingles are sold in bundles which cover 108 square feet (CX 5).

A. Introduction by Fry Roofing of the Zone Delivery Pricing System of February 19, 1956

19. In February 1956, Fry Roofing issued an announcement stating that, effective February 19, 1956, it would employ a revised schedule of prices involving the use of a zone delivery system which system would apply to all the territory of the United States east of the Rocky Mountains (CX 2A).

20. The new merchandising plan of February 19, 1956, assigned to each county in each state a zone number. The zone numbers ranged from 1 to 20 with zone 1 being the lowest price zone and the other zones progressively higher in price, with zone 20 having the highest price. All counties where an asphalt roofing plant was operated, regardless of the ownership of the plant, were designated as zone 1. Zones 2 through 20 were counties in which there was no roofing plant. A particular number assigned to an individual county depended upon a freight factor representing an average freight cost from the nearest asphalt roofing plant to the county seat of the county in question regardless of the ownership of such plant.

21. The delivery price under this Fry Roofing zoning system appears to have been computed by taking a predetermined base price for each product sold and adding to that base price a freight factor of ten cents per hundredweight in order to arrive at the delivery price for zone 1. The freight factor employed was not an actual freight charge but an estimated average of a freight charge. This basis for determining the price of zone 1 was established, in part, as a competitive factor despite the fact that Fry Roofing did not operate a roofing plant in all of the counties which were assigned the zone 1 price.

22. The assigning of zone numbers and prices to zones 2 through 20 was determined by adding a freight factor to the basic price based upon an average of the lowest transportation rate from any factory point to the county seat of the county in question regardless of the ownership of the particular asphalt roofing plant (Tr. 113-18). Typical of the range of Fry Roofing prices under this new system were the prices in various zones for 12-inch standard strip shingles and for the 15- and 30-pound asphalt saturated felt in 60-pound rolls, as follows:

Zone No.	*Shingles*	*Asphalt Felt*
1	$6.50	$2.55
2	6.55	2.57
3	6.61	2.58
4	6.66	2.60
5	6.71	2.61
10	7.17	2.74
15	8.12	3.01
20	9.76	3.48

For a pictorial explanation of this pricing system, see CX 1389.

23. To the already complicated pricing system described was added other complicating factors. Purchasers were divided by Fry Roofing into two categories, namely, "purchasers for resale to customers" and "approved distributors." Purchasers for resale to customers included buyers, such as, wholesalers, retail dealers, roofing contractors, reserve supply companies, mail order houses, and manufacturers of prefabricated houses, who purchased and carried a stock of Fry Roofing products for resale. Approved distributors included individuals, corporations, or other business entities engaged in the distribution of Fry Roofing products to retail dealers and roofing contractors. Approved distributors were required to maintain a sales organization to actively serve the trade within their area. Furthermore, they were required to maintain adequate warehouse stock of Fry Roofing products (CX 2E).

24. Purchasers for resale to consumers purchasing in minimum truckload or carload quantities received their purchases less a 10% trade discount. Approved distributors who purchased in minimum truckload or carload quantities assigned to the approved distributor's warehouse also received the same 10% trade discount. In addition, an approved distributor would qualify for an additional 6% so-called functional discount if such purchases involved truckload or carload shipments consigned to customers of the distributors who were purchasers for resale to consumers. This additional 6% functional discount was not available to a distributor if the purchased material was shipped directly to the distributor's warehouse (CX 2F). Fry Roofing's pricing plan provided that the 6% functional discount would not be reflected on Fry Roofing's invoices but would be accumulated and paid to the approved distributors at the end of each month (CX 2F). In order for a distributor to qualify for the functional discount he had to make a statement at the end of each month with regard to purchases consigned to the distributor's customer as follows:

> I certify that this shipment has been sold to a purchaser for resale in accordance with your definition. (CX 2L)

Under this Fry Roofing plan an allowance of ten cents per hundredweight was also granted to purchasers, purchasing a minimum of 20,000 pounds of roofing material, who received delivery at Fry Roofing manufacturing plant (Tr. 120).

25. Illustrative of the competitive character of the Fry Roofing pricing system is the fact that Knox County, Tenn., Lauderdale County, Miss., Pulaski County, Ark., and Ouachita County, Ark., and each of the counties wherein any plant of a major roofing manufacturer was located, were all assigned as zone 1 counties. Fry Roofing did not operate a roofing plant in any one of the counties named. Thus it appears that this lowest zone price was designed to compete with the other manufacturers of asphalt roofing which did operate in those counties and in the other counties designated as zone 1. The names of the companies which operated in the counties listed above are as follows:

Name of Company	*City & State*	*County*
Volasco Products Co.	Knoxville, Tenn.	Knox
Leopard Roofing Manufacturing Co.	Meridian, Miss.	Lauderdale
Southern Asphalt Roofing Corp.	Little Rock, Ark.	Pulaski
Bear Brand Roofing, Inc.	Bearden, Ark.	Ouachita
Elk Roofing Manufacturing Co.	Stephens, Ark.	Ouachita
Marvel Roofing Products, Inc.	Albuquerque, N.M.	Bernalillo

(CX 2L-Z)

B. Meetings of the Major Manufacturers Prior to Their Adoption of the Fry Roofing Price Plan of February 19, 1956

26. Prior to the promulgation of the Fry Roofing zone delivery price system of February 19, 1956, officials of the major manufacturers of asphalt roofing products met at the Westchester Country Club late in 1955 or early 1956. Some of the social functions of this meeting were attended by Mr. Fry, Jr. Subsequently, but prior to February 19, 1956, a second meeting was held by the same group of officials in the Blackstone Hotel in Chicago. Executive officials of the Ruberoid Company, The Flintkote Company, Certain-teed Products Corporation, The Celotex Corporation and other companies were in attendance. Again, Mr. Fry, Jr. attended some of the social functions of the meeting but did not attend any of the other meetings of the organization. Fry Roofing was not a member of the organization of roofing manufacturers (Tr. 2416-19).

27. Immediately prior to the February 19, 1956, price change, Mr. Fry, Jr. held a meeting with his various plant managers in a Chicago hotel. Among those present at this meeting was Mr. John Musico, manager of Fry Roofing's plant in Brookfield, Indiana. In addition to the plant managers of Fry Roofing, executive officials of two or three other manufacturing companies were present, including representatives of Ford Roofing Company and Midix Asphalt Corporation. The two or three companies who had representatives present were all in fact customers of Fry Roofing. Copies of the new merchandising plan were distributed to the Fry Roofing plant managers but not to the officials of the other corporations present. It is a circumstance, but without major significance, that the same printer who prepared the price list for Fry Roofing also prepared the price schedules for the corporations whose representatives attended the meeting in question (Tr 2412, 2421-24).

28. Mr. John Musico, previously referred to as one of the Fry Roofing managers present at the Chicago meeting, wrote a letter to C. M. McClung and Company, Inc. in which he stated:

> I know by this time that you have the new merchandise plan which I understand the entire Industry has adopted and it is with my very honest opinion that this will clean up all this mess and I am sure will be somewhat embarrassing to someone to fill all the orders that they may have and extend payment until April 10th.
>
> I readily agree with you that your salesman should be furnished an answer to this type thing and is certainly entitled to it.
>
> In view of the merchandise plan I do not think any further investigation is necessary, I am of the firm opinion that the Roofing Industry's House

should be, and will be clean, for the first time, as certainly there is no room for any such chiseling. (CX 1505)

29. In a merchandising bulletin dated February 17, 1956, which was distributed by the Johns-Manville Company to its various plants, that company announced that effective February 20, 1956, it would be employing a new pricing system. This bulletin stated, in part, as follows:

> It is our feeling that this completely new concept of merchandising Asphalt Roofing Products, which has been established by several of the largest producers in this Industry, has a great deal of merit.

In a subsequent bulletin to the trade dated February 20, 1956, Johns-Manville Company announced the adoption of a system of pricing which was a replica of the Fry Roofing system. Attached to that bulletin was the new pricing plan and the price list schedule (CX 1909A, 1509D-Q).

30. Similar action to that taken by Johns-Manville was taken by Bird & Son, Inc. on February 20, 1956 (CX 1510A-M). Allied Chemical Corporation issued the same merchandising plan and price schedule to become effective on February 25, 1956. Certain-teed Products Corporation also sent a bulletin to its customers dated February 20, 1956, with an announcement to the same effect. The Ruberoid Company also adopted the same plan effective as of February 20, 1956 (CX 1510A-M, CX 1511A-M, 1512A, 1491A-H).

31. Another circumstance tending to show that Fry Roofing was the price leader in the establishing of the pricing system of February 19, 1956, was the fact that in Fry Roofing's announcement of February 19, 1956, Blount County, Tennessee (which is adjacent to Knox County, a zone 1 county), was apparently through error established as a zone 7 county; and this same error was made in the price lists issued by Ruberoid, Flintkote, Johns-Manville, Barrett Division of Allied Chemical, and Certain-teed Products (CX 2W, CX 1491G, Tr. 1166-68, CX 1508A-J, CX 1509K, CX 1509D, CX 1510, CX 1512G).

32. Thereafter, on April 9, 1956, Fry Roofing issued a revised price list which changed the classification of Blount County, Tenn. from zone 7 to zone 2. A few days later, on April 13, 1956, Mr. Musico, a Fry Roofing plant manager, wrote to House-Hassen Hardware Co. as follows:

> I refer to your letter of April 9th and no doubt by this time you have received our new schedule and changes in our County Zone Outline.
>
> You will note that Blount County is now Zone 2 which puts it in line and I am sure you will find all other manufacturers quoting on this same basis.

If you find anything quite to the contrary please try to pick up some tangible evidence and we will handle same. (CX 1507)

33. During the same month of April 1956, Mr. Fry, Jr., president of the respondent corporation, wrote a letter to Mr. I. B. Bryant, Poaslee-Coulbert Corporation, a substantial purchaser, which revealed a purpose of controlling the competitive activities of a number of small asphalt roofing products manufacturers in the southwest United States. The letter stated, in part, as follows:

This will acknowledge receipt of your letter dated April 24th regarding the letter you have received from Erst Long with respect to certain prices being quoted on Asphalt Felt by Bear Brand at Bearden, Arkansas.

I am well aware of the activities of these small Arkansas manufacturers and I assure you that we are watching them very closely. As usual, they are taking advantage temporarily of an attempt to stabilize an industry which is long overdue for some stabilization from the viewpoint of the wholesalers, dealers, and roofers. These people are opportunists and are much like the backwood saw mill operator who hauls a load of lumber into any given market and announces that he is a dealer.

Nevertheless, I agree that they are a thorn in the side and in due time will be dealt with.

Please advise Mr. Long that I would appreciate his patience and support of the new Merchandising Plan and Price Plan for a bit longer because there is a great deal of low-price materials in the territory which was purchased prior to the increase. The market will continue to be unsettled until those inventories have turned. I believe that this will be accomplished within thirty days. At that time, if the menagerie is not changed there, we will take corrective action. (CX 1506).

Mr. Fry, Jr. testified that his reference in the above letter to taking "corrective action * * * if the menagerie is not changed" was his way of saying that he would meet competition (Tr. 2459).

34. The term "animals" and the term "menagerie" were employed by Fry Roofing and the roofing industry to refer to certain manufacturers of asphalt roofing products who used the names of animals in the trade names of their products, such as Bear Brand, Elk Roofing, and Leopard Roofing (Tr. 709-10).

35. On June 15, 1956, Fry Roofing modified its pricing schedule to the prejudice of the "menagerie," the small manufacturers of asphalt roofing in the Southwest. This change in price to the prejudice of the southwest section of the United States was effected by subdividing the area east of the Rocky Mountains into areas A and B. In area A the price of asphalt roofing products was increased by approximately 3 to 5%. In area B, however, the former lower price was maintained. Area B comprised the States and parts of States in the Southwest, namely, New Mexico, Oklahoma,

Texas, Louisiana, Arkansas, Missouri, Kansas, and Colorado; whereas the remaining section of the United States east of the Rocky Mountains was classified as area A. The result of this division of the area east of the Rockies into areas A and B was that zone A-1 had a list price for asphalt saturated felt of $2.62 per roll, whereas zone B-1 had a delivered price for the same product of $2.55 a roll (CX 1390).

36. Concerning this price rise which excluded the Southwest, Mr. Fry testified that "It would have been ridiculous to raise the price down there when you were being undersold by as much as Mr. Gassaway indicated to me" (Tr. 2294).

37. Mr. Fry, Jr. testified that it was usual for one manufacturer to follow the lead of another in a price change; and the exhibits show that at least one manufacturer did follow the June 15, 1956, price change (Tr. 2442, CX 1492).

38. Counsel supporting the complaint has requested, upon the basis of the above facts, that we find that Fry Roofing and the other manufacturers of roofing material have conspired to fix and control prices. That we cannot do. Not only is there no issue of conspiracy in this case, but the facts do not show a conspiracy. They show rather that Fry Roofing initiated a pricing system on February 19, 1956, and that a number of roofing companies adopted the same pricing system. The evidence shows also that there is a tendency in the roofing industry for one competitor to adopt the price changes of other competitors. The evidence does not, however, show an agreement either expressed or implied to fix and maintain uniform prices and, in fact, uniform prices were not maintained during the period in question.

IX. Price Changes from 1956 to 1960

A. August 14, 1956—Extension of Extra Discounts on Purchases in the Southwest and Southeast

39. On August 14, 1956, Fry Roofing extended an additional trade discount of 5% to "purchasers for resale to consumers" on straight truckload and carloads of 15 and 30-pound asphalt saturated felt not including perforated felt and on similar quantities of 210 feet strip shingles shipped into the States of Arkansas, Texas, Oklahoma, New Mexico, and those portions of the States of Louisiana, Missouri, and Kentucky which were within area B. The same 5% discount was also extended on the strip shingles shipped in carload lots into the State of Mississippi and one county in Tennessee (CX 5AA). Mr. Fry, Jr. testified that their discount was

issued to meet the competition of the Ruberoid Company and there appears to be no evidence in the record to contradict Mr. Fry on that point.

B. The 5% Secret Annual Rebate to Slected Customers as of November 1, 1956

40. Beginning with the fiscal year commencing on November 1, 1956, Fry Roofing instituted a practice of granting a 5% annual secret rebate to selected customers. The favored customers were notified of the rebate verbally by Mr. Fry, Jr. either in person or by telephone. In order further to maintain the secrecy of the rebate, the payments were made by a cashier's check issued from various banks rather than an ordinary check by Fry Roofing (Tr. 101-2, 2444).

41. Among the customers of Fry Roofing who were granted the 5% secret rebate were Sears, Roebuck and Company, and the International Paper Company (Tr. 1244-45, CX 1451 F&D). Moreover, all of Fry Roofing's customers in eastern Tennessee were granted the 5% rebate for the fiscal years ending 1957, 1958, 1959 and 1960. These customers were Hibbler-Bond Company, Holston Builders Supply Company, House-Hassen Hardware Company, C. M. McClung and Company, and Mills and Lupton Supply Company (CX 1451E).

42. Mr. Fry, Jr. explained that the 5% was granted to his distributor accounts because of misclassification by his competitors as a means of combating it and that it remained secret for the rather obvious purpose of keeping the knowledge from Fry's competitors who upon learning of the 5% could have extended it to their retail dealer customers thereby nullifying its functional purpose and for the added reason that some manufacturers had an announced policy of selling 5% below published distributor prices, frequently to retail dealers (Tr. 1029, 968).

C. Basic Price Changes of November 1, 1956

43. Effective as of November 1, 1956, Fry Roofing announced a revision of its zone delivery pricing system. The classification of the area east of the Rocky Mountains, which had been divided into areas A and B as of June 15, 1956, was further divided into four areas designated as areas A, B, C and D. Each area was assigned a separate schedule of list prices for the zones therein, ranging from 1 to 20 (CX 6A-Z2).

44. Under this new system of zoning, area A prices were the highest and applied to the north-most States except those in New

England. Area-B zone's prices were the next highest and were applicable to the New England States and the mid-tier of States. Area-C zone's prices were the third highest and prevailed in the southeast States. Area-D prices were the lowest and prevailed in the southwest States. (See CX 1391 for a pictorial guide for this system of pricing.)

45. The zone 1 delivered list prices on asphalt saturated felt in each of the four areas were as follows:

Area A—$2.43 per roll	Area C—$2.17 per roll
Area B— 2.36 per roll	Area D— 2.13 per roll

The zone 10 delivered list prices of asphalt saturated felt in each of the four areas were as follows:

Area A—$2.61 per roll	Area C—$2.35 per roll
Area B— 2.54 per roll	Area D— 2.31 per roll

46. Under this new schedule of pricing, the trade discount was 3%. Approved wholesalers or distributors received a discount of 8% (CX 6C&F).

47. Prior to the November 1, 1965, change in the Fry Roofing merchandising plan, a distributor, in order to qualify for the functional discount, was required to have the goods purchased consigned directly to the distributor's customer. Furthermore, the distributor had to certify that the customer was a purchaser for resale in accordance with Fry Roofing's definition. As of November 1, 1956, no such requirements were imposed. All distributors were given the 8% discount regardless of the destination of the goods purchased, including purchases where shipments were made directly to the warehouse of the distributor (CX 6C).

48. With the November 1, 1956, price change, Fry Roofing amended its policy of granting the functional discount by means of credit memoranda at the end of each month by reflecting the functional discounts on the face of the sales invoices. Commission's Exhibit 1471A-D contains tabulations of invoices showing sales of 12-inch standard strip shingles and 15- and 30-pound asphalt saturated felt by the Lloyd A. Fry Roofing Company in selected areas pursuant to the pricing plan which became effective on November 1, 1956 (CX 6C, Tr. 2425-28).

49. The pricing zone areas as established on November 1, 1956, were of short duration. On December 26, 1956, the plan was again revised and the four different zone areas were reduced to only two areas, designated as A and B, with the discount structure remaining the same (CX 9A-P).

50. Mr. Fry, Jr. testified that the November 1, 1956, price list was not dictated by improper aggressiveness but rather by business considerations. He further testified that it was not directed at the independents such as Velasco and cited in support of such statement the fact that Knoxville was placed in B area, next to the highest area. Also placed in the same category were such remote areas from Knoxville as the New England states and most of the states on the East Coast. The fact that the independents who testified were located in areas C and D, lower priced areas, and that they compete with respondent and other major manufacturers, and contributed to the lower level of prices in those areas tends to show that the November 1 price change was motivated by competitive conditions and does not warrant a finding that the price change was made with a predatory intent (RX 758A-K, Tr. 2308-13).

D. Two Columns in Designated Zones

51. On February 4, 1957, Fry Roofing made a further change in its zone pricing system by the use of two columns in its table of prices for each county. One column showed the basic price for asphalt roofing only whereas the other column showed the prices for other roofing products. By this means many counties in States of the southwest area of the United States were assigned a lower B price for asphalt saturated felt and at the same time a higher A area price for other roofing products. This system was applied in the area covered by Velasco Products Company which produced only asphalt saturated felt. Mr. Fry, Jr. testified that the two column price system was adopted from Certain-teed Company which used that system before Fry Roofing did so (Tr. 2331). An illustration of the two column system is as follows:

	Column 1 (Standard Strip Shingles)		*Column 2 (Asphalt Saturated Felt Only)*	
Zone No.	*Area A*	*Area B*	*Area A*	*Area B*
1	$6.60	$6.21	$2.39	$2.17
2	6.65	6.26	2.40	2.18
3	6.71	6.32	2.42	2.20
4	6.77	6.38	2.44	2.22
5	6.83	6.44	2.45	2.23
10	7.26	6.88	2.58	2.36
14	7.76	7.36	2.78	2.56

(CX 1392 & CX 1393)

E. Various Additional Price Changes in 1957, 1958, 1959 and 1960

52. During the period including the early part of 1957 to the early part of 1960, Fry Roofing made at least ten changes or supplements to its pricing system (CX 1516, 1519, 1397, CX 35B-M, 73, 77-123, 163-64, 1447-48, 1464B-E, 1445, p. 952). On January 27, 1960, Fry Roofing announced a revision of its merchandising plan under which there would be a freight equalization charge. This charge was to be added as a separate item on the invoice. It would be computed on the basis of the lowest shipping rate from either Fry Roofing's own shipping point or the nearest competitor's factory point to the county wherein the shipment was being consigned. Under this plan transportation charges were prepaid for the purchaser's account (CX 1444, pp. 602-59). Under this system of February 1, 1960, the f.o.b. plant list price for a 60-pound roll of 15 and 30-pound asphalt saturated felt was $1.95. By deducting the 7% functional discount allowed, the list prices to wholesale distributors became $1.81. Under this plan a shipment of 4,000 pounds from Memphis, Tennessee to Knox County, Tennessee would entail no freight charge. This result occurred because Velasco products Company operated its plant in Knox County, Tennessee and accordingly Fry Roofing considered Knox County as a shipping point for the purpose of computing the so-called equalization freight charge (CX 1444, pp. 602-59).

53. Without changing the system of pricing described above, Fry Roofing on June 20, 1960, reduced the list prices on asphalt saturated felt to $1.81 per roll f.o.b. plant (CX 1444, p. 379).

F. Conclusion on Price Changes

54. During the period from 1956 to February 1960, Fry Roofing issued many different price lists and made many changes in its prices and its discounts. On occasion Fry Roofing was undoubtedly the first to make price changes and various witnesses referred to Fry Roofing as the price leader. On a national scale, Fry Roofing may have deserved such a description. Certainly Fry Roofing initiated the territorial price system of February 19, 1960.

55. The evidence does not show, however, that Fry Roofing was responsible for all the price changes in the southeast and southwest sections of the United States during the period in question. Mr. Robert F. Deerfield, an official of the Ruberoid Company, testified that his company published price lists to meet Fry Roofing's prices. He also testified that his company sold at prices below

those published on its price list (Tr. 1217, 1436-37). Moreover, he testified that in the asphalt roofing industry no one knew from day to day what prices were actually being charged by competitors. The record shows five instances during the years in question when Ruberoid lowered its prices on asphalt roofing before Fry Roofing lowered its prices (Tr. 2303, CX 1495, RX 762I-O, RX 763F, CX 1446, p. 998).

56. Mr. Richard Carter, a wholesaler at Nashville, Tennessee, and a former customer of the Ohio Paper Company, testified that he did not know why roofing companies published price lists—that new prices were in the market place before the ink was dry on the old prices. He stated that he purchased asphalt saturated felt by obtaining quotations from three or four companies and "may the best man win" (Tr. 1587).

57. The record shows that the small so-called independent manufacturers, having less to offer in the way of a variety of products, normally sought to attract business by selling their products at 5% or more below the prices at which the national companies sold the same products (Tr. 1431-34).

58. The record shows that during the years 1957 to 1960 great confusion prevailed in the southeast and southwest sections of the United States in the selling of asphalt roofing products. Approximately 20 companies competed for the business in that area. The evidence concerning prices during that period fails to show that Fry Roofing prices rather than the prices of some of the other 19 companies was responsible for the numerous price changes in that area. Certainly the evidence fails to establish that Fry Roofing's prices had the effect of substantially lessening competition nor did they tend to create a monopoly for Fry Roofing in any line of roofing products.

X. Concerning the Charge that Fry Roofing Sold Asphalt Roofing Products at Below Cost or at Unreasonably Low Prices

59. Because of the allegation in the complaint that Fry Roofing sold asphalt roofing products at below cost or at unreasonably low prices with the intent and effect of injuring competition in the sale of such products in the southeastern and southwestern areas of the United States, we must determine whether Fry Roofing did, in fact, so sell its products at such prices with the intent and effect alleged.

60. In an effort to determine the cost to Fry Roofing in producing asphalt saturated felt at its Brookville, Indiana plant for

the year ending October 31, 1958, counsel supporting the complaint presented two cost studies prepared by witness George Krug, president of Velasco Products Company, a small manufacturing company producing asphalt saturated felt in Knoxville, Tennessee. Mr. Krug, at the time he testified in the present proceeding, was engaged in litigating a triple damage suit against the corporate respondent because of its alleged violations of the antitrust provisions of the Clayton Act. We recognize, therefore, that Mr. Krug, by force of those circumstances, was a prejudiced witness. The material upon the basis of which he made his two cost studies was procured from the respondent during the course of the private litigation through the discovery process (Tr. 460-73, CX 1441, 1418).

61. The record shows that Mr. Krug received a BS degree from the University of Wisconsin in 1934. In 1939 he passed the Wisconsin examination for certified public accountants and has held a number of responsible positions in business and with accounting firms (Tr. 330-31).

62. Two cost studies by Mr. Krug were presented by counsel supporting the complaint. The first study purports to show the cost of producing asphalt saturated felt at respondents' Brookville, Indiana plant and of delivering it in Knoxville, Tennessee when produced with other products during the same work shift (CX 1409).

63. The second estimate purported to show the costs of producing asphalt saturated felt when only felt was being manufactured during a work shift. This cost estimate also included a sum of $.348 for the expense of delivering the product in Knoxville, Tennessee. Under the first estimate the cost was stated as $2.21 per roll and under the second estimate as $1.94 per roll (CX 1409-10).

64. Both cost studies contain a number of obvious errors. Both estimates are based upon the assumption that 19 men were employed in the manufacture of asphalt saturated felt whereas the evidence shows, and counsel supporting the complaint recognizes in his proposed findings as to the facts, that no more than seven men were so employed. The evidence shows further that possibly the number should be reduced to five or six. In fact, counsel supporting the complaint in his proposed findings has created a new estimate in which he proceeds on the assumption that the labor cost should be figured on the basis of the labor of seven men instead of 19 men.

65. The cost estimate also contains an allowance of $.348 to provide for the cost of transporting the felt from the Brookville plant to Knoxville, Tennessee. We fail to find, however, any evidence in the record to substantiate the alleged accuracy of such an estimate. Counsel supporting the complaint recognized this deficiency when the estimates were offered in evidence and promised to supply the particular deficiency later by proof that the figure for transportation of $.348 was correct. Such deficiency has not, however, been supplied.

66. We should observe that the two cost estimates were based upon a payroll of the Brookville plant dated July 19, 1960. We are left to speculate as to whether the cost of labor was the same in 1958 as it was in 1960.

67. Mr. Krug made his two cost estimates from respondents' records and without having visited the Brookville plant or any of respondents' plants and without any personal knowledge of the type of machinery used by Fry Roofing and without personal knowledge of the overall operational details of the Fry Roofing plant. Mr. Stephen Finney, a partner in the firm of Touche, Ross, Bailey & Smart of Chicago, studied Mr. Krug's cost estimates and the exhibits upon which they are based and testified that in his opinion the two cost studies were inaccurate.

68. Because of the various deficiencies in Mr. Krug's cost studies and aside from any question of his lack of objectivity or prejudice, we cannot accept them as reasonably accurate estimates of Fry Roofing's cost of producing and delivering saturated felt in Knoxville, Tennessee in the year 1958. Counsel supporting the complaint apparently foresaw such a conclusion because they have, as we have already stated, substituted a cost study of their own in which the labor figure used by Mr. Krug is eliminated and estimates which they state are more accurate substituted. These remade estimates contain, however, other errors and cannot be accepted as reasonably accurate cost estimates.

69. As a supplement to the cost study prepared by Mr. Krug, counsel supporting the complaint has directed our attention to a number of letters and statements in the record for the purpose of showing that Fry Roofing was selling their products at an unreasonably low price or below cost during 1957 and 1958.

70. In a letter lated May 9, 1957, Lloyd A. Fry, Jr. wrote to Mr. E. E. Mance of the Ford Roofing Products Company and stated in part as follows:

> This competition in the southwest has forced us to go to cost, and in my opinion, further developments will probably occur that will force the market

down further. Please be advised that until further notice we will be unable to grant your company the affiliated manufacturers discount on shipments consigned to Oklahoma, New Mexico, Texas, Arkansas, Louisiana, Mississippi, and Shelby County, Tennessee. (CX 1423)

71. In this letter, Fry, Jr. further indicated that with regard to the southeastern states the "manufacturer's discount" of 10% which was being extended to Ford Roofing would be reduced to 5%. Consequently, the manufacturer's discount given to Ford Roofing was eliminated on shipments into the Southwest and was reduced from 10% to 5% on shipments into the Southeast.

72. On August 22, 1957, E. E. Mance wrote to Fry, Sr. asking for the reinstatement of the 10% manufacturer's discount (CX 1424). On August 26, 1957, Fry, Jr. responded to this letter stating that he had reviewed the financial figures and was able to reinstate the full 10% manufacturer's discount in all areas on shipments made after August 1, 1957 (CX 1425).

73. On March 5, 1958, Mr. Fry, Jr. wrote to Mr. Mance stating as follows:

Based on the revised schedules, I am sure you realize that there will be *no* opportunity for profit, and dependent on tonnage, most likely a substantial loss will result. (CX 1426A)

In this letter it is stated that the manufacturer's discount was being reduced to 5%.

74. Sometime in March 1958, Mr. Mance met with Mr. Fry, Jr. and Sr. and discussed with them the problem of discounts. Concerning this matter, he testified as follows:

I was advised by them at that time that they again were invoking the second paragraph of our contract, that they were down to cost or lower, and that I was lucky to get even the 5 percent that they were allowing me.

Well, ultimately they reestablished the manufacturer's discount, effective September 1, 1958, when they had a change in their price policy, pricing.

Mr. Fry, Jr. testified that he did not tell Mr. Mance that Fry Roofing was selling below cost (Tr. 2399, 703).

75. All of the above quoted letters and statements must be considered in the light of the particular problem which confront the declarent at the time the statement was made. In most instances the Frys were seeking to justify their prices or their refusal to give the requested discount. We think, therefore, that we should not accept those statements as admissions that Fry Roofing was selling at below cost or at unreasonably low prices during 1958. Moreover, all of the statements reflect the pressure of competition

but they do not reflect an intent on the part of Fry Roofing to attempt to destroy a competitor or competition.

76. As an additional support for their contention that Fry Roofing sold roofing products at below cost or at unreasonably low prices, counsel supporting the complaint cited the profit and loss statements of the Fry Roofing division for that year asserting a loss of $191,001 before taxes and a loss of $700,001 after taxes.

77. The record shows that Fry Roofing has the Fry Roofing Division which manufactures and sells roofing products and the Volney Felt Mills Division which manufactures and sells felt, about 90% of which it sells to the Roofing Division. The remaining 10% is sold to outside consumers of felt (Tr. 8-9, 22-29).

78. Respondents maintain profit and loss statements for each division. The statement for the Roofing Division reflects a cost for dry felt and the statement for the Volney Felt Mills Division shows the profits for the sale of that product. In order to reflect the true facts of whether Fry Roofing made a profit or a loss, the profit and loss statements of the two divisions must be considered together. When they are so considered the corporate respondent is shown to have made a profit before taxes in 1958 of $970,767 (CX 1356-60, 1366-70).

79. In view of the above facts, we must conclude that the evidence fails to show that Fry Roofing, during the period in question, sold its products or asphalt saturated felt at a loss or at an unreasonably low price. Moreover, the evidence fails to show that any of those sales were made with the predatory intent of injuring competition or a competitor.

XI. Companies Complaining of Fry Roofing's Prices

A. Volasco Products Company

80. Volasco Products Company, hereinafter referred to as Volasco, was organized by Mr. George C. Krug, its president, in May 1955 for the purpose of manufacturing and selling a general line of asphalt roofing products. Mr. Krug studied the market areas and concluded that Knoxville, Tennessee was a desirable location for an asphalt roofing manufacturing plant because it would have a radius of 200 miles in which there were no existing competing roofing plants. In addition, Knoxville offered transportation by river, by rail, and by good highways (Tr. 334-53).

81. Also, prior to entering into the asphalt roofing business, Mr. Krug testified that he made a study of the prices at which asphalt saturated felt and other roofing products were being sold

by the national or major manufacturers of such products; and as a result of that study, Mr. Krug found that during the year 1955, prior to Volasco's sale of asphalt saturated felt, that asphalt saturated felt was sold in the Knoxville area for approximately $2.44 per roll (Tr. 353-55). When Volasco entered the business of manufacturing and selling asphalt felt Mr. Krug explained that he expected that Fry Roofing and the other major manufacturers of roofing products would meet the price which Volasco would ask for its products. He was surprised, however, with the territorial price plan introduced by Fry Roofing in February 1956 whereby Fry Roofing's prices and the prices of the other national manufacturers selling in the Knoxville area were substantially lower than the price that Volasco was charging for its products (Tr. 426-27).

82. In March of 1958 the delivered price established by Fry Roofing for the Knoxville area was $1.63 per roll of asphalt saturated felt. This price was exclusive of the cash discount made available to Fry Roofing's purchasers and the additional annual secret rebate of 5%. Taking these two factors into consideration, the net price that Fry's purchasers were paying for a roll of asphalt saturated felt as of March 3, 1958, was $1.52 per roll of asphalt saturated felt (CX 76, 112, 1451).

83. That Volasco's volume of sales decreased during the years 1956, 1957 and 1958 is not disputed by the respondents. The crucial question, however, is whether Fry Roofing was responsible for its losses. Although Mr. Krug imputes such responsibility to Fry Roofing, he does not testify that particular customers quit Volasco and transferred their business to the respondent corporation. Moreover, counsel supporting the complaint did not present a single witness who testified that he ceased buying from Volasco in order to buy from Fry Roofing. Respondents did, however, present a number of witnesses who gave their reasons for withdrawing their business from Volasco.

84. Two witnesses testified that they had purchased asphalt saturated felt from Volasco but ceased purchasing from that company because of the inferior quality of its felt. They had not, however, transferred their business to Fry Roofing. Mr. R. Frank Berry, the independent sales representative of Volasco, testified that he had received complaints about the quality of Volasco's felt and that the defects in the Volasco product was one reason for a drop in Volasco's sales volume after 1957 (Tr. 1542, 1551, 1612, 1726, 1651-67).

85. Also contributing to Volasco's loss of sales was its entry into the roof application business in the fall of 1958. Two witnesses, Mr. David L. Johnson and Mr. Foy Gilliland, who had previously purchased felt from Volasco, testified that Volasco's entry into the application business in competition with them was their reason for terminating their purchases from Volasco. Mr. Berry also testified that Volasco received complaints from roofers who objected to Volasco's competition with them and retaliated by refusing to buy from Volasco (Tr. 409, 1578, 1726, 1662).

86. Volasco not only competed with its roofer trade by going into the application business but also alienated wholesalers by selling directly to their customers. Mr. Honeycutt of Dealers Supply Company, a wholesaler, advanced that reason for his discontinuance of purchases from Volasco (Tr. 1686).

87. Another factor contributing to Volasco's problems was the lack of an adequate bond guaranteeing built-up roofs made with Volasco's felt. Such bonds are required under some construction contracts. Volasco had no bond till 1958 and then its bond was not issued by an insurance company and was not generally acceptable within the roofing trade. Mr. Berry testified that the inability to provide a satisfactory and acceptable bond was a significant impediment, affecting his ability to sell Volasco felt (Tr. 558, 1611, 1613, 1663).

88. Still another reason for the loss of business by Volasco was the refusal of Mr. Krug to absorb the expense of preparing a private label for C. M. McClung and Company (Tr. 1789-90).

89. The record fails to disclose the market share of the respondent corporation and its competitors in the area in question. It fails also to show diversion of sales or customers of Volasco to Fry Roofing but shows rather such diversion to companies other than Fry Roofing. In view of those facts, and of all the facts of the record, we conclude that Volasco's difficulties and loss of sales have not been shown to have been due to Fry Roofing's prices, but rather to its own internal problems and to vigorous competition in general.

B. The Ohio Paper Company

90. The Ohio Paper Company with its manufacturing plant located at Miamisburg, Ohio, has been engaged for many years in the manufacture of dry felt and asphalt saturated felt. The dry felt it sells to other manufacturers of asphalt roofing products whereas it sells the asphalt saturated felt to wholesalers and retail building supply companies. Its present market includes Kentucky,

Missouri, Illinois, Indiana, Ohio and parts of Pennsylvania. Mr. Clifton S. Jackson, vice president and general sales manager of the Ohio Paper Company, explained that formerly his company sold a considerable amount of asphalt saturated felt in Tennessee, Georgia, North and South Carolina, and some in Virginia (Tr. 714, 727).

91. He also explained that because his company was small and did not sell a general line of roofing products it was necessary, in order to attract business, to sell asphalt saturated felt at a price 5% below that of the major companies (Tr. 718-19).

92. Sales of asphalt saturated felt by Ohio Paper in the Atlanta area in Georgia amounted to 26,106 rolls in 1955 (Tr. 857). In 1956 sales were reduced to 24,094 rolls and by 1957 sales were down to 3,350 rolls. In 1958 Ohio Paper made no sales in the Atlanta area (CX 1428A).

93. Sales in Virginia by Ohio Paper in 1955 were in excess of 2,100 rolls of asphalt saturated felt. In 1956 and 1957 sales were reduced to 1,400 rolls for each of those years. In 1958 all sales were lost (CX 1428A).

94. In South Carolina sales of asphalt saturated felt in 1956 were in excess of 2,000 rolls; by 1958 sales were down to 1,400 rolls and in 1959 Ohio Paper showed no sales of asphalt saturated felt in South Carolina (CX 1428A).

95. In 1955, Tennessee sales by Ohio Paper of asphalt saturated felt amounted to 42,065 rolls (CX 1428, Tr. 858). For 1956 sales went down to 19,280 rolls. In 1957 sales amounted to 24,592 rolls. In 1958, when prices were drastically reduced by Fry Roofing, virtually all sales of asphalt saturated felt in the State of Tennessee were lost. Only 2,925 rolls of asphalt saturated felt were sold by Ohio Paper in Tennessee. In 1959 no sales whatsoever were made by Ohio Paper in the State of Tennessee (CX 1428A, B & C).

96. The vice president and sales manager of Ohio Paper Company testified that the company withdrew from selling in the territories of eastern Tennessee, Virginia, North Carolina, and the Atlanta, Georgia area because Fry Roofing was responsible for bringing down prices to extremely low levels in these territories. He further testified that sales in these territories by Ohio Paper would have meant substantial losses to the company (Tr. 736).

97. The above facts relating to the Ohio Paper Company show that there was relentless competition in the area served by that company during 1956 to 1958, of which respondents were active participants. The facts show further that the small, so-called inde-

pendent, companies, as well as the large, national companies, were engaged in that vigorous competition. Although Fry Roofing was undoubtedly a chief factor in the competitive struggle in the area served by the Ohio Paper Company, the evidence does not warrant the conclusion that Fry Roofing was, during the period in question, a consistent price leader. Furthermore, the evidence shows that Fry Roofing did not gain a substantial number of customers from the Ohio Paper Company. Furthermore, evidence does not warrant the conclusion that Fry Roofing's prices were made with the intent to injure the Ohio Paper Company as distinct from the intent to preserve for itself a substantial share of the market.

C. The Piedmont Company

98. The Piedmont Company was incorporated as a Georgia corporation on December 3, 1957, for the purpose of manufacturing and selling asphalt roofing products, particularly asphalt shingles and asphalt saturated felt. It was located at Douglasville, about 20 miles from Atlanta, Georgia. At the time of its formation the closest manufacturing plant of a major manufacturer of asphalt roofing products was Birmingham, Alabama, where a plant of the Barrett Division of the Allied Chemical Corporation was located. The closest Fry Roofing plant was in Jacksonville, Florida, a distance of approximately 314 miles (Tr. 891, 1026).

99. Before Piedmont began the sale of its asphalt saturated felt in August 1958, Fry Roofing lowered its price on that commodity in the Atlanta area. Fry Roofing's various price changes for asphalt saturated felt during the time Piedmont was in business are as follows:

January 2, 1958	Price reduced from $1.76 to $1.60 per roll
March 3, 1958	Further reduction to $1.52 per roll
September 1, 1958	An increase to $1.65 per roll
March 24, 1958	Price increase to $1.83 per roll
June 1, 1959	Price reduced to $1.75 per roll
February 1, 1960	Increase to $1.68 per roll, *plus freight*

100. An official of The Piedmont Company testified that his company delayed the initiation of sales and distribution of asphalt saturated felt in order to perfect its product and also because in 1958 the price was so low there seemed to be no possibility of a profit. He testified as follows:

> We could not make any money on felt. The price was so low that we would just be spinning our wheels, and we decided that what we would do was not build up a big business in felt but to keep it to make shingles with, which we thought we had a chance of making some money. (Tr. 985)

101. Doctor C. B. F. Young, president of The Piedmont Company, testified concerning his company's problems as follows:

> We were having our problems at the company and these were being solved. There were differences of opinion among the officers. These were being ironed out. And the price—the price we were getting for our product was getting stronger. In April, we lost very little money; January, February, and March, we didn't do well. April, we lost very little money, but in May we made money. And then—we had not solved all of our problems, but we had a fighting chance. And then the bottom dropped out of prices on us. I believe it went down some 15 percent. And this, in my opinion, was the thing that ruined The Piedmont Company. (Tr. 933-34.)
>
> * * * * * * *
>
> In my opinion, it was the one thing that ruined the little company. We had a fighting chance up until the instant that the prices were lowered, but, after that, there wasn't any use in us trying to operate. It was hopeless. I think we could have solved the problems that arose in manufacturing; I think we could have solved—and we did pretty well with all our differences among the directors. But when the price dropped 15 percent, there was nothing we could do with it except ride with the winds. (Tr. 934)

102. In June 1959, Piedmont lost approximately $50,000 in volume and had a net loss of $16,000 in the month of July 1959. It was completely out of funds and forced to close in August 1959 (Tr. 1032).

103. In September 1959, the creditors met with officials of Piedmont and requested a financial statement; and in 1960 the plant was sold to Elk Roofing Company. Piedmont showed a net loss of $116,000 for the time it was in operation (CX 1433C).

104. The testimony of the witnesses from The Piedmont Company show that The Piedmont Company was organized by a group of men who had no previous experience in the manufacture and sale of asphalt roofing products. Their venture was uncapitalized and a loan which they procured from the Small Business Administration was used largely to pay off their obligations rather than to advance the program of the company. The testimony shows that there was much bickering among the company officials, that the building erected for the plant was poorly constructed and that one of its walls collapsed during a high wind before operation of the plant began. There was also considerable trouble incurred in putting the machinery into operation. The company was further hampered because of its inability to furnish bond of its products (Tr. 1092). Aside from the opinions expressed by Piedmont officials, there is no substantial evidence correlating Piedmont's difficulties and failure to Fry Roofing's prices.

XII. Summary, Conclusions and Order

105. As previously stated, Count I of the complaint charges that Fry Roofing has discriminated in price between different purchasers of its asphalt roofing products of like grade and quality and that the effect of such discrimination has been or may be substantially to lessen competition or tend to create a monopoly in the lines of commerce involved. In order to sustain that charge counsel supporting the complaint must show proof that Fry Roofing's prices actually caused injury to competition or facts upon which a reasonable conclusion of probable injury to competition may be predicated. The mere fact of selling at "different prices in different markets" is not unlawful *(Anheuser-Busch, Inc.* v. *Federal Trade Commission,* 289 F. 2d 835 (1961)). Pertinent to our evaluation of the competitive facts in the present case is the statement by the Supreme Court in the case of the *Federal Trade Commission* v. *The Sun Oil Company,* 371 U.S. 505, 527, wherein the Court, in citing Commissioner Elman's dissenting opinion in the American Oil Company case, states that:

> In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis. In cases in which the economic facts so indicate, carefully drawn area submarkets may be the proper measure of competitive impact among purchasers.

106. The evidence in our present case shows that approximately 15 to 20 different asphalt roofing companies were actively engaged in selling asphalt saturated felt in the area with which we are concerned. The record is silent, however, as to the relative market share of any of the numerous competitors so engaged. The record shows further that at all times with which we are concerned the struggle among the various competitors was intense. The record shows also that at times respondents lowered their prices and that such low prices or even lower ones were occasionally granted by competitors. The record also shows that on other occasions respondents' prices were higher than those of a number of its competitors. On the other hand, the testifying officials of the three companies complaining of Fry Roofing prices failed to point to a specific sale which their companies lost to respondents because of price. Nor were any of them able to point to a specific customer who ceased to do business with them and purchased from respondents because of respondents' pricing tactics.

107. We conclude that the record presents no proof of actual injury to competition with respondents and that there is no reliable, probative and substantial evidence of a reasonable probability of such injury resulting to competition from respondents' pricing practices.

108. Count II of the complaint charges that the respondents sold asphalt roofing products at below cost or at unreasonably low prices with the intent, purpose and effect of injuring and destroying competition. The evidence fails to establish that Fry Roofing prices were, in fact, below its cost. The evidence also fails to show that its prices were established with the intent of injuring competition or that they had an injurious effect upon such competition.

109. In view of the above findings, it is concluded that the record does not establish by reliable, probative and substantial evidence that respondents have engaged in unlawful discrimination in price in violation of Section 2(a) of the Clayton Act, as amended, or that the respondents have engaged in unlawful methods of competition and unfair acts or practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. Accordingly,

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

OPINION OF THE COMMISSION

JULY 23, 1965

BY REILLY, *Commissioner:*

Respondents have been charged in a complaint issued May 20, 1960, with territorial price discrimination in violation of Section 2(a) of the amended Clayton Act and with selling below cost in violation of Section 5 of the Federal Trade Commission Act. The matter is before the Commission on the appeal of counsel supporting the complaint from an initial decision holding that neither charge had been sustained.

The corporate respondent herein is the largest producer of asphalt roofing products in the United States, owning and operating 19 plants in 15 States during the period relevant to the complaint. The asphalt roofing industry consists of approximately 34 companies, the majority of which are one or two plant operations. Four firms, including respondents' sell their products nationally and five others sell in all areas east of the Rocky Mountains. The principal industry products and the only products involved in this proceeding are asphalt saturated felt and asphalt strip shingles. Asphalt saturated felt, referred to as asphalt felt or felt, resembles tar

paper and is composed of two ingredients, absorbent dry felt and liquid asphalt. Asphalt strip shingles contain asphalt and felt, but the production thereof requires more machinery and processes as well as the use of additional raw materials. The felt is sold in 60 lb. rolls and the shingles in bundles which cover 108 square feet, referred to as a square. Evidence with respect to respondents' pricing practices in the sale of both products was offered in support of the 2(a) charge but evidence in support of the Section 5 count was confined to respondents' sale of the asphalt saturated felt.

Stated briefly, respondents (hereinafter sometimes referred to collectively as Fry) are charged in Count I of the complaint with selling asphalt felt and asphalt shingles in certain geographical areas at lower prices than they sold such products in other areas. And it is further alleged that the effect of such price discriminations "has been or may be to divert to Fry, or to Fry's customers, substantial business from competitors" and "where business has not been actually diverted, competitors have been required to meet directly or indirectly, the discriminatory prices of Fry with the result, actual or potential, of substantially impairing their profits and consequently lessening their ability to compete."

Count II, which is based on substantially the same allegations of fact as set out in Count I, charges respondents with selling roofing products "at below cost prices or at unreasonably low prices with the intent, purpose and effect of injuring, restraining, suppressing, and destroying competition in the sale of such products in the southeastern and southwestern areas of the country." The specific example of this practice given in the complaint was the sale of 15 and 30 lb. asphalt felt (in 60 lb. rolls) in 1958 at the delivered price of $1.63 per roll in Mississippi, Tennessee, and Arkansas.

Prior to 1956, the major manufacturers of asphalt roofing products, with the exception of Fry, sold their products f.o.b. plant with freight equalized to the point of destination from the nearest asphalt roofing plant. If a competitor's plant was located closer to the customer than the seller's plant, the seller would absorb the difference between his actual freight cost and what that cost would be if shipment was made from the competitor's factory. Beginning in 1949, Fry sold at zone delivered prices[1] and until February 1956 its published prices were consistently 5% to 7% below the published prices of the other major manufacturers.

[1] Fry's pricing system differed from the other majors only in that Fry determined in advance the freight cost to each zone or point of destination instead of computing a delivered price each time a sale was made. Fry also equalized freight from the plant of the nearest competitor.

On February 19, 1956, Fry placed in effect a revised schedule of prices applicable to the territory east of the Rocky Mountains. Continuing to use the zone delivered price system, Fry assigned zone numbers ranging from 1 to 20 to each county in each State throughout this area. The lowest price zone was the basing point or county in which an asphalt roofing plant, either Fry's or a competitor's, was located. The zone number for each county was determined by the freight cost to that county from the basing point. Consequently, the prices in zones 2 through 20 were progressively higher than zone 1, with zone 20 having the highest price. For example, the price of a square of 12 inch shingles and a 60 lb. roll of asphalt felt in zone 1 were $6.50 and $2.55 respectively in zone 20, the prices were $9.76 and $3.48 respectively.

Fry's customers were separated into two categories, namely, "Purchasers for Resale to Customers" (which included wholesalers, retail dealers, and roofing contractors) and "Approved Distributors." Both classes of customers received a 10% trade discount when purchasing in minimum truckload or carload quantities and the "Approved Distributors" received an additional 6% functional discount on minimum truckload and carload shipments consigned to "Purchasers for Resale to Customers." Another discount or allowance of 10¢ per cwt. was granted under this plan on minimum quantities of 20,000 lbs. to purchasers taking delivery at a Fry plant.

During the period relevant to the complaint (1956-1960) Fry made 22 changes in its prices on asphalt felt and shingles in the southeastern and southwestern parts of the United States. Some represented increases, others decreases. These changes were effected through the publication of price lists and by bulletins which modified or amended the price lists. Except for a secret rebate granted to certain customers, Fry adhered to its published prices. Consequently, it is clear from the record, and this point is not disputed, that Fry sold its asphalt shingles and felt in certain geographic areas at lower prices than it sold such products in other areas. The record further shows that Fry's prices were consistently lower in certain areas than in others, although the amount of the differential varied from time to time.

As stated above, the complaint specifically alleged that respondents' discriminations had the effect of lessening or impairing the ability of other roofing manufacturers to compete with Fry or Fry's customers. There is no allegation of substantial injury to competition generally other than that which would result from

injury to individual competitors. Although evidence was offered by complaint counsel to show that three companies sustained injury as a result of Fry's discriminations, we will consider in this opinion only the evidence relating to the alleged anticompetitive effects of Fry's pricing practices in an area in which two of these companies, Volasco Products Company and The Ohio Paper Company, were doing business.[2]

Volasco Products Company was organized in May 1955 for the purpose of manufacturing and selling a general line of asphalt roofing products. Its plant, located in Knoxville, Tennessee, was approximately 300 miles from the nearest roofing plant operated by another manufacturer. In September 1955 this firm began producing asphalt saturated felt and made its first sales of this product the following month.[3] At this time, Fry, The Ruberoid Company, Johns-Manville Corporation, Certain-teed Products Corporation, The Philip Carey Manufacturing Company, The Flintkote Company, Logan-Long, The Barrett Division of Allied Chemical Corporation, and Bird and Son, all major or multi-plant concerns, and The Ohio Paper Company, an independent, were selling asphalt felt in the Knoxville market area. Fry's products were being sold in eastern Tennessee through five distributors, Hibbler-Bond Company, Holston Builders Supply Company, House-Hassen Hardware Company, C. M. McClung and Company, and Mills and Lupton Supply Company.[4]

When Fry adopted its new pricing plan on February 19, 1956, Knoxville was made a factory point for pricing both felt and shingles although Volasco did not manufacture the latter product. All of the other major roofing companies adopted Fry's merchandising plan and their published delivered prices on asphalt felt were therefore identical to Fry's. The Ohio Paper Company however consistently sold at 5% below the majors' published prices in the Knoxville area.

Both prior to and for some time after Fry's February 1956 price change Volasco was a viable competitor in the production and sale of asphalt felt in and around Knoxville. Because of its natural freight advantage it was able to sell profitably to dealers within a hundred miles of Knoxville in less than carload shipments at prices substantially lower than Fry's delivered prices in similar quantities

[2] The third firm, The Piedmont Company located in Douglasville, Georgia, was engaged in the manufacture and sale of asphalt roofing products for a period of one year.

[3] Volasco did not manufacture asphalt shingles although there is testimony by one of the organizers of the firm that he had originally planned to produce this product.

[4] Fry also sold to Sears, Roebuck & Co.

in that area. Fry's 1956 pricing plan had the effect of substantially raising the prices at which Fry and the other majors were selling asphalt felt (as well as asphalt shingles) in the Knoxville area. Although Volasco's president, Krug, testified that his firm attempted to adhere to the majors' prices when it entered the market, it is clear from the documentary evidence that Volasco was selling at lower prices in February 1956 and during the months of March and April of that year. Fry at this time was selling felt at $2.55 a roll subject to a trade discount of 10% on minimum carload and truckload shipments.[5] Volasco however was selling felt direct to dealers in less than truckload quantities at prices ranging from about $2.01 to about $2.14 a roll. In May Volasco increased its prices to about $2.25 a roll and sold at that level until November. On June 15, 1956, Fry raised its price of asphalt felt in Knoxville by about 3%. On August 14, 1956, however, Fry reduced its price (by extending an additional 7½% trade discount) allegedly in response to lower prices quoted by The Ruberoid Company.

On November 1, 1956, Fry made a radical change in its pricing format. Under the plan introduced on February 19, a distributor could receive a functional discount only on goods shipped directly to the distributor's customer. As of November 1, all distributors were given an 8% functional discount on all purchases including those where shipment was made directly to their own warehouse.[6] In addition, Fry not only absorbed freight from its plant in Brookville, Indiana, to Knoxville as it had under its earlier plans, it reduced its base price on felt 7¢ a roll below its price in certain other areas and also granted a 5% secret rebate to selected wholesalers, including those located in the Knoxville area. As a result, Fry's net delivered price in Knoxville was $2.02 a roll. Prior to November, Volasco's sales of felt had been steadily increasing and for the period July through October, it had averaged about 10,000 rolls per month. In November its sales dropped to 6560 rolls. While this decline may have been caused in part by the normal curtailment of building construction during the winter season, it is noted that Volasco's average monthly sales for the period March through July of the following year were only about 5700 rolls.

For a brief period (February 4 to March 16, 1957) Fry reduced its prices[7] to $1.86 a roll in Knoxville, allegedly to meet the lower

[5] The 6% functional discount was not granted on purchases made by the customer for his own account.

[6] The record shows that while distributors or wholesalers of roofing products sell to dealers they also compete with dealers in the resale of such products to roofing applicators, building contractors, and others who purchase roofing products for their own use.

[7] The prices specified herein are net prices reflecting all discounts and the 5% rebate.

price of a competitor. Fry's price was increased to $1.94 on March 16, reduced to $1.84 in May, increased to $1.94 in June and reduced to $1.89 in July. In January 1958 Fry's price was reduced to $1.70 and later that month to $1.61. In March 1958 its price dropped to $1.52 a roll.[8]

Volasco's president, Krug, testified that Volasco's cost of manufacturing, including administrative costs (but not including selling costs), was $1.70 to $1.75 per roll of felt and that felt was selling in Knoxville at Volasco's cost in late 1957. This testimony is uncontradicted. The record further shows that Volasco's sales of felt declined sharply in late 1957. The record also shows that during 1958 Fry consistently undersold Volasco, that when Fry was selling at $1.52 a roll Volasco sold at $1.728, sometimes with a 5¢ "pick-up" allowance, and on a few occasions at $1.62, with the "pick-up" allowance. Krug testified in this connection:

> * * * When it [price] got down to the $1.62 level we of course weren't even interested in selling felt at that price. We would sell to people who had been buying from us. We didn't turn down a customer. We tried to stick with our established customers but we did not solicit new accounts, or work actively to obtain orders at that price level that was below our cost, substantially.[9]

The record further shows that Fry's prices were maintained at or about Volasco's cost throughout the remainder of the period relevant to this complaint.

As stated above, The Ohio Paper Company also sold asphalt felt in eastern Tennessee (as well as in other southeastern states). This company adhered to a policy of quoting a price exactly 5% less than the majors, and the reason for this policy, according to Mr. Jackson, the General Sales Manager, was that "our product is approximately ten percent of the roofing business; and therefore anyone who buys from us must buy solid truckloads of that one item, whereas if they buy it from a roofing manufacturer, they can buy 90 percent of something with ten percent of saturated felt."[10] Mr. Jackson also testified that his firm stopped doing business in Tennessee, Virginia, North Carolina and the Atlanta, Georgia, area in January of 1958 and that it did so because "prices were so low you could do nothing but make a loss."[11]

In dismissing the Section 2(a) charge, the hearing examiner held in effect that there was no causal connection between Fry's price

[8] The record shows that at this time Fry's prices for felt ranged up to 40% higher in certain northern States.

[9] Tr. 424.

[10] Tr. 719.

[11] Tr. 736.

discriminations and whatever injury Volasco and The Ohio Paper Company may have sustained, since Fry was not solely responsible for the low prices causing the alleged injury. The issue thus presented on this part of the appeal is whether Fry's price discriminations resulted in competitive injury cognizable under Section 2(a) for, of course, there is nothing inherently or *per se* unlawful in the territorial or area price differences.

Complaint counsel contend that the examiner has made only a superficial analysis of the facts pertaining to Fry's price cuts in the relevant area and to the competitive impact of such reductions. They point out first of all that the examiner discontinues his analysis with the price change of February 4, 1957, and makes only passing references to the price discriminations occurring in late 1957 and 1958 which, according to complaint counsel, were the ones which caused competitive injury.

Apparently the examiner was of the opinion that complaint counsel were relying primarily on evidence relating to the pricing plan introduced by Fry in February 1956 to prove the Section 2(a) charge. It also appears that he was under the impression that when Fry adopted the February 1956 merchandising plan it reduced its prices in the areas in which the injury allegedly occurred. This was an egregious error and casts doubt upon the accuracy of all the examiner's findings with respect to the competitive impact of Fry's price discriminations.

In this connection the examiner has made the following finding:

> * * * When Volasco entered the business of manufacturing and selling asphalt felt Mr. Krug explained that he expected that Fry Roofing and the other major manufacturers of roofing products would meet the price which Volasco would ask for its products. *He was surprised, however, with the territorial price plan introduced by Fry Roofing in February 1956 whereby Fry Roofing's prices and the prices of the other national manufacturers selling in the Knoxville area were substantially lower than the price that Volasco was charging for its products.* (Emphasis added.) Initial Decision, par. 81.

While it is true that Krug did testify that he was surprised when Fry and the other major manufacturers undercut his prices, he was referring, not to the February 19, 1956, price change, but to subsequent price reductions, particularly the one initiated by Fry on March 3, 1958. The record is quite clear that Volasco's prices were lower than those of the major manufacturers for a period of time after the February 1956 price change.

Contrary to the hearing examiner's finding, Fry did not cut prices in February 1956; it increased them substantially in eastern Tennessee and in numerous other areas. Moreover, the evidence is

clear that Fry had no desire to undercut its competitors by this price change but was interested primarily in raising and stabilizing the prices of asphalt roofing products.

During the early 1950's the industry's capacity to produce far exceeded the demand for roofing products. This problem was further complicated by the entry of small independent manufacturers into the industry. These firms, located for the most part in the southeastern and southwestern sections of the country, were able to and did compete vigorously with the majors in those areas where they had a natural freight advantage. Also coming into existence at this time in the South were the cash-and-carry stores, large retail outlets selling building materials, including roofing products, at discount prices. These firms demanded and received in many instances prices lower than those at which other dealers purchased. By 1956 price competition among roofing manufacturers had become intense.

The conditions existing during this period were described as follows by Lloyd A. Fry, Jr., in a "Foreword" to the merchandising plan introduced by Fry in February 1956: "The majority of building materials were marketed in a manner satisfactory to the various classes of trade, with the lone exception of asphalt roofing products, which were subject to violent peaks and valleys with respect to pricing, and frequent changes of policy on the part of manufacturers."[12] He ascribed this condition to "lack of confidence in each other" and further stated in the "Foreword" "With the thought in mind that all channels of distribution are in business to make a profit, for which there is no substitute, unless consolidation is gained by not having to pay taxes, we humbly submit this merchandising plan as our answer to 'Distribution—Everybody's Problem.' "

Apparently the other major manufacturers of asphalt roofing materials were favorably impressed with Fry's "answer" to "Everybody's Problem" since each of them adopted Fry's pricing plan the day after it became effective.[13] As a result, all of the major producers quoted identical prices in all areas of the country east of the Rocky Mountains. A Fry official optimistically predicted that this collective approach to the problem would have a salutary

[12] CX 2D.

[13] One of Fry's competitors, in announcing the adoption of the plan, commented "It is our feeling that this completely new concept of merchandising Asphalt Roofing Products, which has been established by several of the largest producers in this Industry, has a great deal of merit." This same competitor also pointed out that "The effect of these changes will be to increase prices substantially * * *." CX 1509A.

effect on the industry. On February 23, 1956, this official wrote as follows to a Fry customer:

I refer to your letter of February 17th and your salesman, Mr. Ralph Rule's, Letter which I am attaching.

Again we are lilly white, we severed relations with the Moore-Handley Hdwe. Co. about a year ago.

I have heard rumors that they were having a big Spring Festival and were offering fancy prices on all lines.

I know by this time you have the new merchandising plan which I understand the entire Industry has adopted and it is with my very honest opinion that this will clean up all this mess and I am sure will be somewhat embarrassing to someone to fill all the orders that they may have and extend payment until April 10th.

I readily argee with you that your salesman should be furnished an answer to this type thing and is certainly entitled to it.

In view of the new merchandise plan I do not think any further investigation is necessary.

I am of the firm opinion that the Roofing Industry's House should be, and will be clean, for the first time, as certainly there is no room for any such chiseling.[14]

The record shows, however, that the Fry representative was wrong in this prediction since he failed to take into consideration the small independent producers' response to the merchandising plan. There is evidence, in this connection, that various independents, especially in the southern part of the country, would not adopt the majors' pricing schedule but continued to sell below the majors' published prices. On April 27, 1956, Fry, Jr., commented on the activities of certain of these small manufacturers in a letter to a distributor, the Peaslee-Gaulbert Corporation of Louisville, Kentucky:

This will acknowledge receipt of your letter dated April 24th regarding the letter you have received from Erst Long with respect to certain prices being quoted on Asphalt Felt by Bear Brand at Beardon, Arkansas.

I am well aware of the activities of these small Arkansas manufacturers and I assure you that we are watching them very closely. As usual, they are taking advantage temporarily, of an attempt to stabilize an industry which is long overdue for some stabilization from the viewpoint of the wholesalers, dealers, and roofers. These people are opportunists and are much like the backwood sawmill operator who hauls a load of lumber into any given market and announces that he is a dealer.

Neverthless, I agree that they are a thorn in the side and in due time will be dealt with.

Please advise Mr. Long that I would appreciate his patience and support

[14] CX 1505A, 1505B.

of the new Merchandising Plan and Price Plan for a bit longer because there is a great deal of low-price materials in the territory which was purchased prior to the increase. The market will continue to be unsettled until those inventories have turned. I believe that this will be accomplished within 30 days. At that time, if the menagerie is not changed there we will take corrective action.[15]

Certainly it cannot be said that the writer of this letter was anxious to cut prices or to engage in price competition. To the contrary, he was hopeful that the independents would raise their prices to match those of the majors and that "corrective action" would be unnecessary.

The record also clearly establishes that the other major producers were willing to follow Fry's price leadership.[16] Of the 9 manufacturers doing business in eastern Tennessee only 2 did not adopt Fry's pricing format. Volasco sold felt at a considerable margin under Fry and the other majors and The Ohio Paper Company continued to sell at 5% below the majors' price. Despite this competition, Fry adhered to its pricing plan and even raised its price in Knoxville in June 1956. Although Fry reduced its prices in August, allegedly to meet competition, it was not until November of 1956 that it took action which might be regarded as "corrective."

There is some dispute as to whether other majors reduced their prices in Knoxville prior to Fry's August price change. One thing is clear however, it was Volasco's presence in Knoxville which directly or indirectly caused the discriminatory price reductions of all the majors in that area and generated the destructive price competition we are concerned with. Each of them had made Knoxville an involuntary basing point for determining delivered prices in order to meet Volasco's competition and there is evidence that the same major concerns maintained considerably higher prices in other areas where they were competing with one another but not with Volasco.[17]

As stated above, Fry drastically altered its sales program in the Knoxville area on November 1, 1956, giving a flat 8% discount to distributors on all purchases, absorbing freight from the Brook-

[15] CX 1506. The word "menagerie" was used by Fry, Jr., to refer to certain manufacturers of asphalt roofing products who used the names of animals in the trade names of their products, such as Bear Brand, Elk Roofing, and Leopard Roofing.

[16] It is immaterial, for the purposes of this decision, whether there was collusion among the majors in arriving at identical delivered prices (as contended by complaint counsel). Nor is it necessary to find that the majors individually accepted an invitation by Fry to quote identical prices. What is significant, however, is that the competitive mood of the large manufacturers was such that they were willing individually to match each other's higher prices.

[17] They were also selling at lower prices in other areas but, as in Knoxville, they were faced with price competition from small local concerns.

ville plant and granting a 5% secret rebate. As a result Fry's net price for a roll of saturated felt dropped to $2.02. The following tabulation compares Fry's subsequent price behavior in the Knoxville and Chicago markets.

15- and 30-pound SATURATED FELT

	Chicago		*Knoxville*	
Date	*(a) Net Price*	*(b) Net Price*	*(a) Net Price*	*(b) Net Price*
11-1-56	$2.20	$2.09	$	$2.02
12-26-56	2.13	2.02	....	2.02
2-4-57	2.16	2.05	....	1.86
3-16-57	2.23	2.12	....	1.94
5-6-57	2.23	2.12	....	1.84
6-3-57	2.23	2.12	....	1.94
7-18-57	2.22	2.11	....	1.89
8-19-57	2.22	2.11	....	1.89
1-2-58	2.22	2.11	....	1.70
1-27-58	2.22	2.11	....	1.61
3-3-58	1.86	1.77	....	1.52
9-1-58	2.03	1.93	....	1.65
3-24-59	2.10	2.00	....	1.83
6-1-59	1.87	1.78	....	1.75*
8-24-59	1.80	1.71	....	1.75*
9-14-59	1.80	1.71	....	1.66*
10-1-59	1.87	1.78	....	1.66
2-1-60	1.77	1.68	....	1.68

(a) Net Price includes 2% cash discount.

(b) Net Price includes 2% cash discount and 5% annual rebate.

*These prices do not reflect the so-called pick-up allowance of 20¢ per cwt. (12¢ per roll of asphalt saturated felt) which was being extended on deliveries to Knoxville, Tennessee, from June 23, 1959, through October 1, 1959. Actually the net delivered prices amounted to $1.62 and $1.54 per roll during the period of time in question.

In the circumstances shown to exist, it is not surprising that the examiner was able to find that Volasco had not been injured by Fry's price change of February 19, 1956. It was not until considerably later that Fry began making substantial price reductions.

Complaint counsel have also taken exception to the examiner's holding that Volasco's "difficulties" were caused primarily by "internal problems" rather than by the low prices of its competitors. In this connection, respondents called several of Volasco's former customers to testify that they stopped buying from Volasco because of the inferior quality of that firm's felt or because of Volasco's inability to provide an adequate bond guaranteeing "builtup" roofs

made with its felt. The examiner seems to conclude from this testimony that the quality of Volasco's felt and its failure to provide a bond were such important considerations to purchasers of roofing products that they would not buy felt from Volasco at any price. But this reasoning ignores the fact that the purchasers who testified were willing to buy the same quality felt without a bond from Volasco when that company was selling at a lower price than its competitors.[18] It was not until after Fry and the other majors were selling at or about Volasco's price that the quality of the felt and the failure to provide a bond became significant factors in the purchasers' decision not to buy from Volasco. Consequently we do not agree with the examiner that even the few purchasers called by respondents discontinued buying from Volasco for reasons having nothing to do with price. To the contrary, we believe that the testimony of these witnesses strongly supports the contention of complaint counsel that the product of an independent producer such as Volasco cannot command as high a price as the major brands. See *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (1929), wherein the court held that " 'Lucky Strikes' was a much more expensive cigarette than appellee's brand, and, if sold at as low or a lower price, it would be practically impossible for a weaker competitor to continue."

The examiner also found that Volasco's "difficulties" and loss of sales were caused by Volasco's entry into the roof application business in the fall of 1958. Various witnesses testified that Volasco's customers objected to Volasco's competition with them and retaliated by refusing to buy from Volasco. The examiner implies that this decision by Volasco to go into the application business was an arbitrary one reflecting poor business judgment. Respondent suggests that Volasco was motivated by "greed" when it made this decision. While we agree with the examiner that Volasco's decision to become a roof applicator may have alienated certain of its customers, we are of the opinion that this decision was one of the effects and not one of the causes of Volasco's problem. After March 3, 1958, Volasco's problem, as we see it, was how to stay in business when the largest producer in the industry was selling felt at about 10% below Volasco's cost. Under the circumstances, becoming an applicator was simply a matter of business survival.

The examiner has also held that complaint counsel failed to show that Volasco lost sales to Fry rather than to the other majors selling

[18] The examiner also ignores the testimony of buyers, including one of Fry's distributors, that Volasco's felt was of a satisfactory quality.

in the Knoxville area and that consequently there is no casual connection between the injury sustained by Volasco and Fry's discriminatory prices.[19] In so holding, the examiner seems to take the position that a price discrimination cannot have the prescribed effect on competition unless there is a showing that trade is diverted from the alleged victim to the discriminator.[20] We do not agree. While diversion of trade or loss of customers are factors to be considered in determining whether a discrimination will have the prescribed effect on competition, they cannot be equated with such competitive injury. As the 7th Circuit held in *Anheuser-Busch, Inc.* v. *F.T.C.*, 289 F. 2d 835 (1961), "§ 2(a) is not concerned with mere shifts of business between competitors." It is concerned with injury to the health or vigor of competition, including injury to a single firm's ability to compete.[21] *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115; *Atlas Bldg. Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (1959); *Maryland Baking Co.* v. *F.T.C.*, 243 F. 2d 716 (1959); *E. B. Muller & Co.* v. *F.T.C.*, 142 F. 2d 511 (1944). In *Porto Rican American Tobacco Co.*, *supra*, brought under the original Clayton Act, the court found injury from evidence that the plaintiff was required to sell at a loss in order to meet the defendant's lower discriminatory price.[22]

Another reason given by the examiner for dismissing the 2(a) charge was the failure of complaint counsel to prove that Fry was

---

[19] With respect to the effect of Fry's price cuts on Ohio Paper Company, the examiner held that "In 1958, when prices were drastically reduced by Fry Roofing, virtually all sales of asphalt saturated felt in the State of Tennessee were lost" [by Ohio Paper Company] but that there was no nexus between Fry's price discriminations and Ohio's injury because "Fry Roofing did not gain a substantial number of customers from the Ohio Paper Company" and because "the evidence does not warrant the conclusion that Fry Roofing was, during the period in question, a consistent price leader." Initial Decision, page 245.

[20] Certainly, the examiner did not mean that Volasco was not affected by Fry's prices since he found that Fry was "undoubtedly a chief factor in the competitive struggle" in eastern Tennessee. Moreover, the evidence is uncontroverted that there was intense price competition among all roofing manufacturers selling felt in the Knoxville area and that each of them was affected by the others' prices. If this competition did not exist, it would be difficult to account for the pricing systems employed by Fry and the other majors whereby they used the plant locations of small independent manufacturers as involuntary basing points for the purpose of establishing delivered prices.

[21] As stated in the House Judiciary Committee Report on the Patman bill: "The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury can the larger, general injury result." (H. R. Rep. 2287, 74th Cong., 2d Sess.) See also *Forster Mfg. Co., Inc.* v. *F.T.C.*, 335 F. 2d 47 (1964) wherein it was held that a finding of primary line injury can be made on the basis of evidence that there may be a substantial impairment of the vigor or health of the competitors affected by the price discrimination.

[22] The court specifically found in this connection:
"There were four manufacturers * * * competing for business in Puerto Rico—three United States firms and the appellee * * *. The appellee's capital was about $6,000,000. The appellant had an annual income of four times this capital, or $22,000,000, and a par value capitalization of $186,000,000. The other United States competitors were also very strong financially. Under

responsible for all the price changes in the Knoxville area which caused Volasco's "difficulties." We do not agree that the evidence fails to show that Fry was responsible for the price reductions in question. The examiner found that Fry reduced its prices on several occasions to meet the lower published prices of its competitors, particularly those of The Ruberoid Company.[23] But the examiner failed to take into consideration the fact that Fry made a price move on November 1, 1956, which had the effect of forcing prices downward and which was designed to permit Fry to consistently undersell its competitors. First of all, Fry deviated from its February 19, 1956, plan by granting a functional discount on all purchases made by "distributors" even though these customers were competing with dealers in the resale of roofing products. Secondly, it granted a secret rebate of 5% to all of its distributors doing business in the Knoxville area. Fry was thus able by this maneuver to undercut its competitors while maintaining the same published prices. This evidence, together with the testimony of competitors that Fry was the price leader and further evidence that Fry initiated the price change of March 3, 1958, which reduced prices to the lowest level reached in the Knoxville area, constitutes, in our opinion, at least a prima facie showing of Fry's responsibility for the price reductions.

We are also of the opinion that the hearing examiner was wrong as a matter of law in holding that Fry's discriminatory price reductions could not have the prescribed effect on competition unless Fry alone was responsible for the low prices prevailing in the Knoxville area. A seller whose price discriminations have injured a rival's ability to compete with him cannot escape liability simply because the rival's ability to compete with other firms has been substantially impaired by similar discriminations. For example, sellers A, B and

---

appellant's competitive methods, appellee was obliged to reduce his price from 12¢ to 10¢ per package, and to the jobber at 95¢, which was a bare factory cost, making a loss of from $150,000 to $180,000 per year * * *. If this competition, resulting in such loss, continued, it is fair to assume that the appellee could not continue in business, and its elimination as a competitor was certain. Thus, the appellant's discrimination will substantially lessen competition."

[23] Even this finding appears to be of doubtful accuracy since the examiner failed to discuss the evidence on this point and may not have considered all of it. For example, the examiner held that Fry reduced its published price to meet Ruberoid's price change of July 18, 1957, even though there is persuasive evidence in the record that Ruberoid made this price change to meet Fry's lower prices. In this connection, an official of Ruberoid testified that this particular price change was made July 25, 1957, retroactive to July 18, 1957, to meet an earlier price reduction by Fry. Also in the record is a Ruberoid bulletin addressed to sales managers, dated July 25, 1957, and captioned "NEW PRICES & MERCHANDISING PLAN—ASPHALT ROOFING PRODUCTS—EFFECTIVE JULY 18, 1957." This bulletin specifically states "By this time, you have had an opportunity to study the new Fry Price List, particularly the County Table Listings." And "To be competitive, we obviously have to adopt the Fry prices and County Table Listings immediately." CX 1494A.

C individually discriminate in price for the purpose of destroying a local competitor, D, and each of them undersells D by the same margin. As a result D is forced out of business. No one of the discriminators would be solely responsible for the low prices in the area in which D was doing business and it may not be possible to show that the discrimination of any single one of them had caused the ultimate injury to D. If we follow the hearing examiner's reasoning in this case there would be no causal connection between A, B or C's price discriminations and D's injury since none of them would be solely responsible for the low prices which caused the injury. But Section 2(a) does not require such a showing. It is sufficient if it is established that competition with any one of the price discriminators may be substantially injured.

It is important to note that respondents claimed in their answer[24] that their price discriminations were justified under the 2(b) proviso and introduced evidence to show that their lower prices were made in good faith to meet competition.[25] In order to establish this defense it was not necessary for respondents to prove that they in fact met competitive prices. *F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 759. They were required to show only the existence of facts which would lead a reasonable and prudent man to believe that the granting of a lower price would in fact meet the equally low price of a competitor. *Id.* at 760. Respondents however have not only failed to make this showing but have adduced evidence which supports the conclusion that they knew that their lower prices undercut those of their competitors. In this connection, respondents attempted to establish that certain of their competitors issued price lists at various times during the relevant period which had the effect of lowering prices and that Fry revised the quoted prices to meet these reductions. They state in this connection:

> Fry's price changes were effected through the publication of price lists. At times Fry published price lists that were followed by other manufacturers. At times other manufacturers published price lists that were followed by Fry. The record, for example, discloses that on five occasions Ruberoid published price lists prior to respondent and that four of these five changes represented price decreases. Other companies that published price lists prior to those

[24] The answer avers as an affirmative defense that "In each instance complained of wherein respondents charged customers in one area a lower price than customers in another area, for goods of like grade and quality, the lower price was offered and given in good faith to meet competition."

[25] The hearing examiner of course made no ruling on this defense since he held that a prima facie case had not been made out. As stated above however in holding that Fry was not responsible for the low prices in the Knoxville area, he found that Fry had reduced its prices on a number of occasions in response to price cuts by its competitors.

published by respondent include Johns-Manville, Certain-teed and Bird. These, too, represented decreases."

As stated above however, beginning November 1, 1956, and continuing throughout the relevant period, Fry gave a secret 5% rebate to its customers located in the Knoxville area. Consequently, whenever Fry changed its price list to match that of another manufacturer it knew or had reason to believe that it was underselling its competitors by 5%.

Complaint counsel have taken exception to other findings by the hearing examiner concerning respondents' discriminatory pricing practices, but in view of the disposition we propose to make of this phase of the case, we find it unnecessary to rule on them.

We are of the opinion that the examiner erred in holding that a finding of injury attributable to Fry's discriminatory prices cannot be made in the absence of proof that trade was diverted to Fry or that Fry was responsible for all of the price changes in the area in which the discriminations occurred. We believe that the showing that Fry, as the price leader and dominant competitive factor in the sale of roofing products in the area served by Volasco and Ohio Paper Company, has discriminated in price by selling asphalt felt in that area at prices below the price at which these two smaller firms could profitably operate and has maintained its prices at or about this level for more than two years, while selling at substantially higher prices elsewhere, is sufficient to establish a violation of Section 2(a). There is in our opinion a reasonable possibility that the ability of Volasco and Ohio Paper Company to compete with Fry will be substantially impaired as a result of Fry's territorial price discriminations. We also find that Fry's discriminatory price cuts were not made defensively but for the purpose of disciplining small independent concerns who sold below the prices established by Fry and followed by the other major producers. Because of the disparity in size between Fry and these independents and Fry's demonstrated ability to sell for prolonged periods at or below their cost, we believe there is a reasonable possibility that the independents will either be eliminated by Fry's discriminatory practices or so debilitated that they will be unable to provide any meaningful or effective competition in the sale and distribution of asphalt roofing products.

We also find on the basis of this record that the major manufacturers of asphalt roofing products were willing to eliminate price competition among themselves by adopting identical zone delivered pricing systems. The record also shows that after the

adoption of Fry's pricing plan by the majors, price competition in the sale of asphalt felt in the Knoxville area emanated principally, if not exclusively, from Volasco who sold substantially below the majors' delivered prices in this area and from Ohio Paper Company who consistently sold at 5% under the majors. In view of Fry's announced intention of stabilizing prices and the adherence of the other majors to the plan adopted by Fry for this purpose, it is obvious to us that Volasco and Ohio Paper Company represented the only important source of price competition in the sale of roofing products in eastern Tennessee and that the removal of these firms as viable competitors, which we consider to be most likely,[26] will certainly have an adverse effect on price competition generally in this market and will substantially injure, destroy or prevent competition with Fry in the marketing of industry products.

For the purpose of this prognostication it is not necessary that we rely on the finding that Fry acted with predatory intent. The Act speaks of the effect of the discrimination, not the intent of the discriminator. As stated by the court in *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (1955), in response to the holding of the district court that intent was necessary to taint a price discrimination with illegality "Of course, intent is not an essential factor to a Section 2(a) violation, although, if the intent to destroy were found to exist, it might tend to render the injury probable." See also *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, and *Anheuser-Busch, Inc.* v. *F.T.C.*, *supra.* In the former decision the Supreme Court commented that predatory intent may be relevant because it "bears upon the likelihood of injury to competition," and in the latter decision the 7th Circuit, in referring to the holding in *Corn Products*[27] that Section 2(a) is designed to reach discriminations in their incipiency, made the following statement with respect to the relevance of predatory intent:

> The application in the case at bar of this language would require a projection to ascertain the future effects of the price reductions made by AB. The reliability of this projection would depend in part upon whether weight is given to the nature of the activity of the party engaged in the alleged discriminatory action * * *. If * * * the projection is based upon predatoriousness or buccaneering, it can reasonably be forecast that an adverse effect on competition *may* occur. In that event, the discriminations in their incipiency are such that they *may* have the prescribed effect to establish a violation of Section 2(a). If one engages in the latter type of pricing activity, a reasonable probability may be inferred that its wilful misconduct may substantially lessen, injure, destroy or prevent competition * * *. (Emphasis in original.)

[26] Ohio Paper Company has already withdrawn from this area.

[27] *Corn Products Refining Co.* v. *F.T.C.*, 324 U.S. 726.

In the matter presently before us we are not looking at a discrimination in its incipiency but at a practice which has continued for a period of several years. Whether or not Fry acted with an unlawful intent, and we believe it did, does not alter in any manner the actual adverse effects of its behavior. See *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 346 F. 2d 661 (1965). Nor is it necessary in the circumstances shown to exist to rely on Fry's motivation to predict the outcome of its discriminatory pricing. Whatever its reason, we have no doubt on the basis of this record that unless inhibited by order Fry will continue to engage in the practice of undercutting its local competitors in any area in which it is doing business regardless of the effect on competition.

Complaint counsel have proposed an order to cease and desist which would prohibit respondents from discriminating directly or indirectly in the net price of roofing products of like grade and quality, by selling such products to any purchaser at a net price which is lower than the price charged any other purchaser. Such an order would in the circumstances of this case be too stringent and would have little relationship to the practice found to be unlawful. By its terms respondents would be forced to sell at one delivered price throughout the country and could risk deviation from that price only in those instances where they are prepared to establish one of the affirmative defenses permitted by Section 2. Moreover, the order would prohibit respondents from compensating any customer for performing a redistribution function although there is no evidence that discounts granted by respondents *solely for that purpose*[28] had the anticompetitive effect proscribed by the statute. The discriminatory prices found to be unlawful were those which might cause the debilitation of smaller and weaker competitors and, insofar as possible, the order is directed at territorial price discriminations having this probable effect.

We agree with complaint counsel that the order should encompass respondents' pricing of both asphalt felt and asphalt shingles and that it should include the entire area in which respondents are doing business. Although the evidence upon which our finding of a 2(a) violation is predicated relates only to respondents' sale of felt in the Knoxville, Tennessee, area there is ample evidence in the record to establish that respondents' discriminatory pricing practices are not confined to this product or to a particular geo-

[28] Under its February 19, 1956, plan, respondents granted a 6% functional discount to "Approved Distributors" on carload shipments consigned to "Purchasers for Resale to Consumers." In order to obtain this discount the distributor was required to certify that the shipment had been sold to a Purchaser for Resale in accordance with Fry's definition.

graphic area. The record shows in this connection that respondents have engaged in systematic price discriminations in selected areas in the sale of both asphalt felt and asphalt shingles. Furthermore, the evidence relating to respondents' use of such practices in furtherance of their attempt to "stabilize" prices in the roofing industry is applicable to other areas in which they are confronted with local competition in the sale of both felt and shingles.

Complaint counsel's appeal from the examiner's dismissal of the Section 5 charge is denied. The principal basis for this holding by the examiner was the failure of counsel to prove through cost studies prepared by Krug, president of Volasco, that respondents were in fact selling below cost. We find nothing in complaint counsel's brief or in the record to convince us that the examiner was in error in so ruling.[29] Since this essential allegation was not sustained, the charge will be dismissed. The examiner's conclusions as to the purpose and effort of respondents' pricing practices are rejected.

To the extent indicated herein, the appeal of complaint counsel is granted; in all other respects it is denied. Our order providing for appropriate modification of the initial decision is issuing herewith.

Commissioners Dixon and Jones did not participate, the latter for the reason that oral argument was heard prior to her taking the oath of office.

Commissioner Elman concurred and has filed a concurring opinion.

Commissioner MacIntyre's views are set forth in a separate statement.

CONCURRING OPINION

JULY 23, 1965

BY ELMAN, *Commissioner:*

In the antitrust lexicon some practices, like price fixing, are illegal *per se*. These are practices which experience has shown are so likely in the general run of cases to be injurious or destructive that the courts will not permit inquiry into their effect on competition in a particular case. Hence, where a *per se* restraint is charged, the only proof required is that the practice was followed.

[29] Our holding that Fry violated Section 2(a) is not based on a finding that Fry sold below cost. As stated by the court in *Volasco Products Company* v. *Lloyd A. Fry Roofing Company, supra,* "It was not necessary that the plaintiff prove that the defendant sold below cost. It was sufficient to show price discrimnation in violation of the statute. *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 546-553."

In refreshing contrast to a view that has at times enjoyed support within the Commission, the Commission now acknowledges that, "of course, there is nothing inherently or *per se* unlawful" about area or territorial price differences (Commission opinion, p. 254). The antitrust laws do not compel a national seller, irrespective of competitive circumstances and effects, to charge a single, uniform price in every market throughout the country. Recognizing that competitive conditions may vary from market to market, and not wishing to put national sellers in a strait jacket, Congress in Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, forbade such price "discriminations" only where they damage, or are likely to damage, competition. *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536. Unlike a *per se* restraint, the effect on competition of an area price difference is not merely relevant, but crucial. To be sure, where it is shown that the intent behind an area price difference is anticompetitive or "predatory"—to cripple, destroy, or discipline weaker competitors—the Commission and the courts may properly dispense with elaborate inquiry into the background, market setting, and probable effects of the practice. But where such intent is absent, the record must, as in any Clayton Act case, contain enough facts as to the condition of the relevant market and the character of the challenged practice to provide a basis for judging its probable competitive impact.

Analysis of area price differences has often foundered on two misconceptions, from which the Commission's opinion in this case is happily free. The first is the erroneous and mischievous notion that the Robinson-Patman Act is not a part of the antitrust laws, but is an anti-antitrust law designed to halt vigorous price competition when it becomes so vigorous as to hurt a competitor—even a solitary, marginal, inefficient one. No court has accepted this reading of Section 2(a). See, *e.g.*, *Borden Co.* v. *F.T.C.*, 339 F. 2d 953 (7th Cir. 1964); *Anheuser-Busch, Inc.* v. *F.T.C.*, 289 F. 2d 835 (7th Cir. 1961), and cases cited therein. The Supreme Court has expressly rejected interpretations of the Act that would "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 63. The antitrust laws, including the Robinson-Patman Act, are not designed to shield an inefficient competitor from competition. Their basic purpose is to preserve a competitive system in which the more efficient competitor will win business, and the less efficient will lose. Section 2(a) of the Clayton

Act expressly makes illegality depend on a showing of injury to *competition* or tendency to monopoly.

There may, to be sure (as the third clause of the competitive-injury proviso of Section 2(a) was intended to make clear), be a statutory violation even though only a single competitor is involved, so long as the "requisite adverse effects on competition" are present. *Quaker Oats Co.*, F.T.C. Docket 8112 (decided November 18, 1964), p. 4 [66 F.T.C. 1131, 1193]. For example, where the seller charged with violation has only one competitor in the relevant market, whom his price tactics are designed to eliminate, or several competitors whom his pricing is designed to pick off one by one, injury to a competitor may properly be equated with injury to competition. See, e.g., *Maryland Baking Co.* v. *F.T.C.*, 243 F. 2d 716 (4th Cir. 1957); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936).

The second basic misconception is the unverified assumption, explicitly rejected by the Commission here, that area price differences are always an unnatural and sinister form of competition, and therefore should be treated as *prima facie* unlawful wherever encountered. I suspect that in many industries, especially those involving multi-plant sellers, the opposite is true: it is the uniform nationwide price that is abnormal. Suppose that seller X has 100 plants scattered throughout the nation. While all the plants sell the same product, they may have different labor costs, different freight costs, different demands, and different competitors—to name a few of the factors, not necessarily related to abuse of monopoly or market power, that may make for different prices in different geographical areas. In these circumstances, to make the fact of area price difference alone tantamount to proof of illegality, and punish such a seller by entering an order calculated to force it to establish and maintain a single nationwide price for its products, would be economically as well as legally indefensible. This approach the Commission, to its credit, has now emphatically rejected.

Respondent is the nation's largest producer of asphalt roofing products. The remaining producers include large, diversified firms, like Johns-Manville—the majors of the industry—and small one- or two-plant firms like Volasco and Ohio (the competitors allegedly injured by Fry's area pricing)—the independents. Fry and the other majors have assiduously endeavored to stabilize prices in the industry at a high level; the independents have repeatedly spoiled these efforts by underselling the majors. Fry expressed its intent to discipline such pesky competitors, and thereafter com-

menced the round of drastic discriminatory price reductions in the eastern Tennessee area involved in this case. The only independents in eastern Tennessee were Volasco and Ohio; and they were the only firms in the area that had refused to adhere to the industry-wide pricing system introduced by Fry.

The Commission finds both unlawful intent and unlawful effect. In undercutting Volasco and Ohio, Fry acted with the purpose of punishing these firms for having shown competitive independence. Such anticompetitive intent should alone be sufficient to condemn Fry's discriminatory pricing. But there is more. Since the predictable effect of Fry's deep and prolonged undercutting of these small competitors is to destroy or at least to cow them as effective competitors, and since these are the only firms that have shown competititive vigor and independence in the eastern Tennessee region, it is probable that Fry's price tactics, unless stopped, will seriously impair the health and vigor of competition in that region.

The cease and desist order entered by the Commission is designed to prevent recurrence of the unlawful conduct without unduly restricting Fry's ability to compete. The order does not require Fry to establish a uniform nationwide price; nor does it prevent Fry from undercutting competitors in selected local markets. It only prevents Fry from undercutting *all* of its smaller competitors in a particular market, as it did in eastern Tennessee. I think it is fair to assume, in light of the facts developed in this case, that in a market where Fry's price is below that of its lowest-price competitor, its price is likely to represent not the result of superior efficiency but an attempt to discipline an upstart independent. Moreover, it is implicit in the order that it does not preclude Fry from making price reductions in a market where competitors maintain a uniformly high, monopolistic price, or from making temporary promotional price reductions necessary for entry into a concentrated local market. In other words, the order should not, and I believe will not, be read as forbidding area price differences where Fry can show that they promote—and not, as in this case, retard—vigorous and healthy competition.

SEPARATE STATEMENT

JULY 23, 1965

BY MACINTYRE, *Commissioner:*

I have subscribed to and joined in the finding that respondents have violated Section 2(a) of the Clayton Act, as amended. My position in that respect is predicated upon the Commission's find-

ings as to the facts here which I have approved and adopted. However, I do not concur in the conclusions set forth in the opinion of the majority dealing with the question of whether respondents violated Section 5 of the Federal Trade Commission Act by selling below cost or at unreasonably low prices for the purpose of injuring or destroying competition. Likewise, I do not concur in that part of the Commission's decision denying complaint counsel's appeal from the hearing examiner's dismissal of the Section 5 charge.

It is beyond dispute that respondents utilized discriminatory pricing practices with the result of eliminating a substantial amount of competition in the primary line of commerce in which respondents are engaged. Included among those discriminations are those by which respondents charged substantially higher prices in some areas than respondents charged in other areas where they were seeking to eliminate competition. The order the Commission is issuing will not be effective in preventing such discriminations in the future.

The proposition that price discriminations are *per se* illegal is not involved here. There is need to keep the real issue in focus, namely, when we are faced with discriminations in price destructive of competition, should we effectively enjoin such discriminations? It is my view that the Commission has not faced up to and disposed of that issue through the application of an adequate remedy prohibiting the illegal practices documented in this proceeding. The Commission should formulate an order that, without outlawing any and all price differentials, would offer a prospect of greater effectiveness than the order it is entering here.

Final Order

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision; and the Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part the aforementioned appeal, and having determined that the initial decision should be in part adopted and in part set aside:

It is ordered, That paragraphs 1 through 25 of the initial decision be, and they hereby are, adopted by the Commission. The remainder of the initial decision is set aside.

It is further ordered, That respondents Lloyd A. Fry Roofing Company, a corporation, Lloyd A. Fry, Sr., and Lloyd A. Fry, Jr.,

individually and as officers of said corporation, and other officers, representatives, agents and employees of said corporation, directly or through any corporate or other device, in connection with the sale of offering for sale of asphalt saturated felt and asphalt strip shingles in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling such products to any purchaser at a price which is lower than the price charged any other purchaser at the same level of distribution, where such lower price undercuts the lowest price offered to that purchaser by any other seller having a substantially smaller annual volume of sales of asphalt roofing products than respondents' annual volume of sales of those products.

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

Commissioners Dixon and Jones did not participate, the latter for the reason that oral argument was heard prior to her taking the oath of office. Commissioner Elman concurred and has filed a concurring opinion. Commissioner MacIntyre's views are set forth in a separate statement.

IN THE MATTER OF

NORMAN M. MORRIS CORPORATION

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

Docket C-920. Complaint, July 26, 1965—Decision, July 26, 1965

Consent order requiring a New York City importer and distributor of "Omega" and "Tissot" watches, to cease discriminating among its competing customers in the payment of advertising and promotional allowances, in violation of Sec. 2(d) of the Clayton Act.

COMPLAINT

The Federal Trade Commission has reason to believe that the above-named respondent has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C., Title 15, Section 13), as amended; and therefore, pursuant to

Section 11 of said Act, it issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Norman M. Morris Corporation is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 375 Park Avenue, New York 22, New York. Respondent is principally engaged in the business of importing and selling watches under the "Omega" and "Tissot" brands, two of the most popular watch brands in the United States. Respondent is the sole United States importer of such products, and its gross sales during each of the years 1959 and 1960 were approximately $5,000,000.

PAR. 2. Respondent has sold and distributed and now sells and distributes its products in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to customers throughout the United States, many of which are engaged in substantial competition with each other in the resale of products purchased from respondent.

PAR. 3. Respondent's products are sold to consumers principally by retail jewelry and department stores. In each local trading area, all retailers handling respondent's products are engaged in substantial competition with each other in the resale of respondent's products as well as in the resale of products of other suppliers. Such competition is characterized particularly by substantial expenditures by many such retailers for advertising in local media of general circulation, such as newspapers, radio and television, as well as for other forms of advertising, such as direct mailings, distribution of promotional material at point of sale, and maintenance of elaborate displays at point of sale. Respondent encourages retailers handling its products to feature such products in their advertising by furnishing assistance in the form of a published cooperative advertising plan. Under the terms of such plan, respondent reimburses retailer customers for half their cost, up to 5% of their purchases, for newspaper, radio and television advertisements featuring "Omega" brand watches exclusively.

PAR. 4. In addition to the advertising assistance described in Paragraph Three hereof, respondent has also paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent. Such payments were not made available on proportionally equal terms to all other

customers of respondent competing in the distribution of such products.

PAR. 5. As a specific example of the practices alleged herein, respondent has paid substantial sums of money for advertising its products in the "Robert Carp" jewelry catalogs, which are distributed by thirty-three of respondent's retail jewelry store customers located in thirty-three different cities in twenty-three States and the District of Columbia. Such catalogs are distributed free of charge to the public by direct mailing by such retailers, and, when so distributed, bear the imprint of the particular retailer distributing them. Distributing retailers use such catalogs as a method of promoting their own sales generally and as a method of promoting their own sales of the products advertised therein specifically. Payments for such advertising by respondent and by other suppliers have the effect of subsidizing a substantial portion of the cost of production of such catalogs, thus making such advertising available to distributing retailers for substantially less than its actual cost of production.

In each of the years 1959 and 1960, respondent paid $1,750 for advertising in such catalogs which were distributed during the Christmas season, a prime retail sales period for respondent's products. Such payments were outside the scope of respondent's published cooperative advertising plan in that catalogs were expressly excluded by the terms of the published plan, in that catalog advertising did not provide the exclusive advertisement required by the terms of the published plan, in that the criteria of the published plan limiting the amounts of respondent's money payments were not applied to the catalog advertisements, and in that payments for such catalog advertising were made in addition to payments made under the terms of the published plan directly to retailers distributing such catalogs in connection with other advertising services and facilities furnished by or through such retailers.

As a further example of the practices alleged herein, respondent has failed to administer its published cooperative advertising plan in such a manner that the terms of such plan are applied to all customers. Under the terms of the plan, respondent's maximum payment to customers for cooperative advertising is 50% of the cost of such advertising or 5% of the customer's annual purchases, whichever is lower. Several customers have been paid by respondent, for cooperative advertising, sums greatly in excess of 5% of their annual purchases. For example, S. Kind, a retail jewelry store in Philadelphia which is one of the distributors of the "Robert

Carp" catalogs, made purchases from respondent in 1959 totalling $3,141 and received cooperative advertising payments directly from respondent during that year totalling $1,243.20.

Payments for catalog advertising, or the benefits thereof, were not made available on proportionally equal terms to many of respondent's other customers who competed in the distribution of respondent's products with customers distributing such catalogs. Payments for cooperative advertising, made by respondent under its published cooperative advertising plan, were not made available on proportionally equal terms to all of respondent's other customers competing in the distribution of respondent's products with those customers which received payments under such plan in excess of 5% of their purchases from respondent.

Many of such other customers, during the Christmas season, distributed other catalogs, and many of such other customers regularly engaged in substantial advertising in other forms during the Christmas season and throughout each year.

PAR. 6. The acts and practices of respondent, as alleged above, are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Norman M. Morris Corporation is a corporation organized and existing under the laws of the State of New York,

with its principal office and place of business located at 375 Park Avenue, New York 22, 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 Norman M. Morris Corporation, a corporation, and its officers, directors, employees, agents, and representatives, directly or through any corporate or other device, in, or in connection with, the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Clayton Act, as amended, of watches or any other products, do forthwith cease and desist from:

> Paying or contracting for the payment of anything of value to or for the benefit of any customer as compensation or in consideration for any services or facilities consisting of advertising or other publicity in a catalog, newspaper, broadcast or telecast or in any other advertising medium, furnished or distributed, directly or through any corporate or other device, by such customer, in connection with the processing, handling, sale, or offering for sale of any products manufactured, imported, sold, or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

It is further ordered, That the respondent herein 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 this order.

IN THE MATTER OF

MODELLI IMPORTS, LTD., ET AL.

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

Docket C-921. Complaint, July 26, 1965—Decision, July 26, 1965

Consent order requiring a New York City importer of wool products to cease violating the Wool Products Labeling Act by falsely labeling sweaters as 100% virgin wool, when in fact, said sweaters contained

substantially different fibers and amounts than represented and by failing in other respects to comply with statutory and regulatory requirements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of 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 Modelli Imports, Ltd., a corporation, and Jack Sosland, and Oscar Zinn, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of 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 Modelli Imports, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondents Jack Sosland and Oscar Zinn are officers of the corporate respondent and control, direct and formulate the acts, practices, and policies of the corporate respondent.

Respondents are importers of wool products with their office and principal place of business located at 1410 Broadway, New York, New York.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped 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 within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were sweaters stamped, tagged, labeled or otherwise identified as containing 100% virgin wool, whereas in truth and in fact, said sweaters contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded in that they were not stamped, tagged, labeled or otherwise iden-

tified 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 sweaters with labels on or affixed thereto, which failed to disclose the name or registered identification number of the manufacturer of the wool product or the name of one or more persons subject to Section 3 with respect to such wool products.

PAR. 5. The acts and practices of the respondents 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, 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 Modelli Imports, Ltd. 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 at 1410 Broadway, in the city of New York, State of New York.

Respondents Jack Sosland and Oscar Zinn, are officers of the said corporation and their address is the same as that of the 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 Modelli Imports, Ltd., a corporation, and its officers, and Jack Sosland, and Oscar Zinn, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing into commerce, or offering for sale, selling, transporting, distributing or delivering for shipment in commerce, wool sweaters or any other wool product, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939:

1. Which are falsely or deceptively stamped, tagged, labeled or otherwise identified as to the character or amount of the constituent fibers contained therein.

2. Unless each such product has securely affixed thereto, or placed thereon, a stamp, tag, label or other means of identification correctly 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 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

ROBERTS SUNGLASSES, INC., ET AL.

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

Docket C-922. Complaint, July 27, 1965—Decision, July 27, 1965

Consent order requiring an Englewood, N. J., distributor of sunglasses to cease misrepresenting the optical qualities of its sunglasses by such practice as stating on labels that said products possess "6 Base Lenses" when such was not the fact.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Roberts

Sunglasses, Inc., a corporation, and George Roberts, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Roberts Sunglasses, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey.

Respondent George Roberts is the president of the corporate respondent.

The individual respondent formulates, directs and controls the policies, acts and practices of said corporate respondent. The office and principal place of business of the respondents is located at 138 South Van Brunt Street, Englewood, New Jersey.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the sale and distribution in commerce of sunglasses.

Respondents cause, and have caused, said sunglasses to be shipped from their aforesaid place of business in the State of New Jersey to purchasers thereof located at their respective places of business in various other States of the United States.

Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade of said sunglasses in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents at all times mentioned herein have been, and now are, in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of sunglasses.

PAR. 4. In the course and conduct of their business as aforesaid, respondents have made, and are continuing to make, representations respecting said product. Said representations appear on labels attached to the product, displayed and sold to the purchasing public. Typical of said representations contained in the labels is the statement that sunglasses sold by respondents possess "6 Base Lenses."

PAR. 5. Through the aforesaid statement respondents represent directly or indirectly that said sunglasses are equipped with lenses with a plus six diopter curve and a minus six diopter curve.

PAR. 6. In truth and in fact, the curvature of the lenses in said sunglasses varies from a curve of six diopter plus and six diopter

minus. Therefore, the foregoing representation made by the respondents was and is false, misleading and deceptive.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive representations has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such representation was and is true and into the purchase of a substantial number of sunglasses because of such erroneous and mistaken belief.

PAR. 8. The aforesaid act and practice of respondents, as herein alleged, was and is all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitutes an unfair and deceptive act and practice and an unfair method of competition in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Roberts Sunglasses, Inc., is a corporation organized and existing under the laws of the State of New Jersey with its office and principal place of business located at 138 South Van Brunt Street, Englewood, New Jersey.

Respondent George Roberts is an officer of said corporation and his 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 Roberts Sunglasses, Inc., a corporation, and its officers and George Roberts, individually and as an officer of said corporation, and respondents' agents, representatives and employees directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of sunglasses in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or indirectly, that:

> The lenses of their sunglasses have a given diopter curve unless such is the fact: *Provided however*, That in the case of ground and polished sunglass lenses a tolerance not to exceed minus or plus 1/16th diopters in any meridian and a difference in power between any two meridians not to exceed 1/16th diopter and a prismatic effect not to exceed 1/8th diopter shall be allowed.

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

PETER PAN YARN 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-923. Complaint, July 28, 1965—Decision, July 28, 1965

Consent order requiring New York City importers, wholesalers and retailers of wool products, to cease misbranding and falsely advertising wool yarn or other wool products in violation of the Wool Products Labeling Act by such practices as falsely labeling and advertising certain yarns as "100% Mohair," when said yarns contained other woolen fibers, and using the term "mohair" in lieu of "wool" to describe fibers which are not entitled to such designation, and to cease violating the Federal Trade Commission Act by falsely representing the fiber content of said products on invoices.

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 Peter Pan Yarn Corp. and King Arthur Yarn Corp., corporations, and Morris Batansky, individually and as an officer of said corporations, 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. Respondents Peter Pan Yarn Corp. and King Arthur Yarn Corp. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York. Their offices and principal place of business are located at 623 Broadway, New York, New York.

Individual respondent Morris Batansky is an officer of both of said corporations. Respondent formulates, directs and controls the acts, policies and practices of both of said corporations. His address is the same as that of said corporations.

Respondents are importers, wholesalers and retailers of wool products.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have 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 within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

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

PAR. 4. Certain of said wool products were further misbranded in that they were not stamped, tagged, labeled or otherwise identi-

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

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

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in that the term "mohair" was used in lieu of the word "wool" in setting forth the required fiber content information on labels affixed to wool products when certain of the fibers so described were not entitled to such designation, in violation of Rule 19 of the aforesaid Rules and Regulations.

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

PAR. 7. Respondents are now, and for sometime last past have been, engaged in the advertising, offering for sale and sale of textile products to the general public. In the course and conduct of their business respondents now cause and have caused their said textile products to be offered for sale by means of advertisements in catalogues and brochures distributed in interstate commerce, which catalogues and brochures are intended to induce and have induced the sale of said textile products. In the course and conduct of their business the respondents have caused their said products, when sold, to be shipped from their place of business in the State of New York to purchasers located in various other States of the United States and maintained, 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. Among and typical of the statements and representations

contained in the aforesaid catalogues and brochures, but not all inclusive thereof, is the following:

100% Mohair

PAR. 9. By and through the use of the aforesaid statements and representations of respondents, respondents represented directly or by implication, that the aforesaid yarn was composed of 100% Mohair, whereas in truth and in fact the yarn contained fibers other than Mohair fibers.

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

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous mistaken belief.

PAR. 11. 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 "Mohair" whereas in truth and fact the product contained substantially different fibers than represented.

PAR. 12. 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 and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, 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. Respondents Peter Pan Yarn Corp. and King Arthur Yarn Corp. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their offices and principal place of business located at 623 Broadway, New York, New York.

Respondent Morris Batansky is an offcer of both of said corporations, and his address is the same as that of said corporations.

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 Peter Pan Yarn Corp. and King Arthur Yarn Corp., corporations, and their officers, and Morris Batansky, individually and as an officer of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing into commerce, or offering for sale, selling, transporting, distributing or delivering for shipment in commerce, wool yarn or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939:

1. Which are falsely or deceptively stamped, tagged, labeled or otherwise identified as to the character or amount of the constituent fibers contained therein.

2. Unless such products have securely affixed thereto or placed thereon a stamp, tag, label or other means of identification correctly showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Which have affixed thereto labels which use the term "mohair" in lieu of the word "wool" in setting forth the required information on labels affixed to wool products unless the fibers described as mohair are entitled to such designation and are present in at least the amount stated.

It is further ordered, That respondents Peter Pan Yarn Corp. and King Arthur Yarn Corp., corporations, and their officers, and Morris Batansky, individually and as an officer of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of yarn or any other textile products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in yarn or any other textile products in advertisements or 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

BEATRICE FOODS CO., INC., ET AL.

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

Docket 7599. Complaint, Sept. 28, 1959—Decision, July 29, 1965

Order adopting in part the findings of fact in the initial decision of the hearing examiner and dismissing the complaint which charged a major dairy products company with headquarters in Chicago, Ill., with granting discriminatory discounts to certain retail grocery stores and discriminatory promotional allowances to others.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents Beatrice Foods Co., Inc., and Eskay Dairy Company, Inc., have violated and are now violating the provisions of subsections (a) and (d) of Section 2 of the Clayton Act, as amended (15 U.S.C., Sec. 13), hereby issues its complaint, charging as follows:

COUNT I

PARAGRAPH 1. Respondent Beatrice Foods Co., Inc., hereinafter referred to as "Beatrice," is a corporation organized and existing under the laws of the State of Delaware with its principal office