seller within approximately the same period of time. Actual competition in the sale of the seller's goods may then be inferred even though one or both of the customers have other outlets which are not in geographical proximity to outlets of the other customer.[21]

While we do not comment on other issues involved in the examiner's findings that the remaining suppliers did not violate Section 2(d) of the amended Clayton Act when making payments to respondent, our silence is not to be construed as approval of the findings themselves or of the legal standards used in reaching these findings.

For the aforementioned reasons, an order will issue closing the proceedings. Should it appear that violations similar to those dealt with by the evidence herein have not been surely stopped, thus indicating that our conclusions with respect to respondent's good faith are misplaced, the Commission will reopen the proceeding and utilize the record as presently constituted together with the evidence of such future violations as a basis for further proceedings and, if appropriate, the issuance of an order to cease and desist.

Final Order

This matter having been heard by the Commission on appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint, and upon briefs and argument in support thereof and in opposition thereto, and the Commission having concluded for the reasons stated in the accompanying opinion that the proceeding should be closed without the issuance of an order to cease and desist:

It is ordered, That the proceeding be, and it hereby is, closed.

In the Matter of

K-V BUILDERS, INC., ET AL.

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

Docket C-1003. Complaint, Oct. 20, 1965—Decision, Oct. 20, 1965

Consent order requiring a St. Louis, Mo., residential siding and roofing company to cease making deceptive savings and guarantee claims and other misrepresentations in advertisements, as indicated in the order below.

[21] 329 F.2d at 708.

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 K-V Builders, Inc., a corporation, and Seymour Halpern, Harold Halpern, and Melvin Halpern, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. K-V Builders, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 5555 Manchester Street, in the city of St. Louis, State of Missouri.

Respondents Seymour Halpern, Harold Halpern, and Melvin Halpern are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of residential siding, roofing and other products to the public.

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

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have, by statements and representations in advertisements in various publications, in direct mail advertising, and by direct oral solicitations made by respondents or their salesmen or representatives, represented, directly or by implication:

(1) That purchasers who agree to allow the use of their homes for display or advertising purposes after the installation of respondents' products will receive a special discount or reduced price

from respondents' usual and regular price and thereby be afforded a saving.

(2) That purchasers who agree to allow the use of their homes for display or advertising purposes will receive a bonus for each sale made or prospect furnished as a result of such use.

(3 That purchasers can be assured of receiving enough bonus money from the use of their homes as models or display homes to reimburse them for all, or a great part, of the cost of their purchase.

(4) That siding material sold by respondent will never need painting and never require maintenance.

(5) That aluminum siding materials sold by respondents are manufactured by Alcoa, Kaiser or Reynolds Aluminum Companies.

(6) That respondents are manufacturers or that their salesmen are representatives of various advertising companies or manufacturers.

(7) That respondents' products, and the application or installation of them, are unconditionally guaranteed.

(8) That free merchandise or gifts will be given to persons complying with certain conditions, such as listening to a salesman, purchasing an aluminum siding job, or the like.

PAR. 5. In truth and in fact:

(1) Respondents do not have a regular price at which their products or services are openly and actively offered for sale in good faith, for a reasonably substantial period of time, in the recent, regular course of their business, but the prices charged for their said merchandise or services differ from customer to customer in order to meet the exigencies of a particular prospective sale, and respondents do not afford a saving from an established price to purchasers to whom such inductions are offered. In fact, respondents seldom, if ever, actually use the homes of their purchasers for display or advertising purposes, and representations that such homes would be so used were made for the purpose of inducing a sale of respondents' products or services.

(2) Respondents do not provide a bona fide plan for the use of their customers' homes for display or advertising purposes, but make such representations for the purpose of inducing the purchase of respondents' products or services. Respondents seldom, if ever, actually use their customers' homes as display or model homes, and in rare cases where such homes may be so used, customers do not receive the bonuses in accordance with respondents' promises and representations.

(3) Purchasers do not receive enough, if any, bonus money to offset the cost of their purchases.

(4) Products sold by respondent will require painting and maintenance.

(5) Aluminum siding sold by respondents is not manufactured by either Alcoa, Kaiser or Reynolds Aluminum Company.

(6) Respondents are not manufacturers, nor are they or their salesmen, representatives of advertising companies or manufacturers.

(7) Respondents' guarantee is not unconditional, and it fails to set forth the nature and extent of the guarantee, and the manner in which the guarantor will perform thereunder.

(8) Respondents do not give gifts or free merchandise to persons in accordance with their promises or offers, but use such offers and promises as a means of obtaining names of prospective purchasers of their products.

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

PAR. 6. In the conduct of their business and at all times mentioned herein, respondents have been in competition, in commerce, with corporations, firms and individuals in the sale of residential siding, roofing and other products, of the same general kind and nature as that sold by respondents.

PAR. 7. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices 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 and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

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 K-V Builders, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 5555 Manchester Street, in the city of St. Louis, State of Missouri.

Respondents Seymour Halpern, Harold Halpern and Melvin Halpern are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents K-V Builders, Inc., a corporation, and its officers, and Seymour Halpern, Harold Halpern, and Melvin Halpern, individually and as officers of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of residential siding, roofing, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, that:

   (a) Merchandise or services are sold at a discount or reduced price, unless such price constitutes a reduction from an actual bona fide price at which the merchandise or services have been offered for sale to the public, for a reasonably substantial period of time, in the recent, regu-

lar course of respondents' business, or misrepresenting, in any manner, the savings available to purchasers or prospective purchasers of respondents' merchandise or services.

(b) Purchasers will receive bonuses or other compensation, unless respondents provide an opportunity or program whereby customers can qualify for such bonuses or other compensation, and provide such bonuses or compensation, in every instance, to those qualifying therefor.

(c) Purchasers will receive enough bonus money from the use of their homes as models to offset the cost of respondents' merchandise, or misrepresenting in any manner the compensation realized by purchasers under respondents' bonus program.

(d) Aluminum siding sold by respondents is manufactured by Alcoa, Kaiser or Reynolds Aluminum Companies unless respondents are able to establish the truth of any such representation, or misrepresenting in any way the identity of the manufacturer or source of any of respondents' products.

(e) That the products sold by respondents will never require painting or maintenance, or misrepresenting in any manner the efficacy, durability or efficiency of respondents' products.

(f) Respondents are representatives of advertising companies or that they are manufacturers or representatives of manufacturers.

(g) That any of respondents' products, "job" or installations are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

2. Using the word "free" or any other word or words of similar import or meaning in connection with sale, offering for sale or distribution of respondents' products or services, in advertisments or other offers to the public, as descriptive of an article of merchandise, or service:

(a) When all the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave no reasonable probability that the terms of the offer might be misunderstood.

(b) When, with respect to any article of merchandise or service required to be purchased in order to obtain the "free" article or service, the offerer either (i) increases the ordinary and usual price of such merchandise or service or (ii) reduces the quality or (iii) reduces the quantity or size thereof.

3. Offering gift merchandise to persons complying with certain conditions unless, in every instance, such merchandise is given to the persons complying with such conditions.

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

DIPLOMAT HAIR GOODS COMPANY ET AL.

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

Docket C-1004. Complaint, Oct. 20, 1965—Decision, Oct. 20, 1965

Consent order requiring a Waukegan, Ill., dealer in hair pieces, wigs and toupees to cease falsely advertising the quality, construction and appearance of its products, misrepresenting to prospective salesmen the terms of their employment, and disseminating such false advertising matter in the United States mails.

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 Diplomat Hair Goods Company, a corporation, and Earl H. Martin and Hope S. Martin, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Diplomat Hair Goods Company is a corporation organized, existing, and doing business under and by virtue of the laws of State of Illinois, with its principal office and place of business located at 2425 West Washington Street in the

city of Waukegan, State of Illinois. Said corporation has done and is doing business under its own name and also under the name The Diplomat Company.

Respondents Earl H. Martin and Hope S. Martin are officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of hair pieces, wigs, and toupees which come within the classification of cosmetics as "cosmetics" are defined in the Federal Trade Commission Act.

PAR. 3. Respondents cause the said hair pieces, wigs, and toupees, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said hair pieces, wigs, and toupees in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce with corporations, firms and individuals in the sale of hair pieces, wigs and toupees of the same general kind and nature as that sold by respondents.

PAR. 5. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of certain advertisements concerning the said hair pieces, wigs and toupees, by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in newspapers, pamphlets, and brochures, for the purpose of inducing and which were likely to induce directly or indirectly the purchase of said hair pieces, wigs and toupees; and have disseminated and caused the dissemination of, advertisements concerning said products by various means, including but not limited to the aforesaid media and oral presentations for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR 6. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

SALESMAN WANTED—Must be bald or balding, to represent The Diplomat Co. makers of the revolutionary permanent hair piece for men. Tremendous appeal, hundreds of leads. Full or part time on a commission basis. Write to The Diplomat Co., 2425 W. Washington Street, Waukegan, Illinois, 60089. Enclose photo, if possible.

BALD? RECEDING?

FEEL AND LOOK YEARS YOUNGER IN SECONDS WITH A DIPLOMAT HAIR PIECE Revolutionary—Permanent Undetectable No Net No Glue—Looks and Feels Like Your Own Hair! For the first time an absolutely undetectable hair piece. Play in it—sleep in it—swim in it in complete confidence. Completely secure, new principle allows for every degree of baldness—as easy to put on as your hat.

PAR. 7. By and through the use of the statements and photographs appearing in said advertisements as set out in Paragraph Six above, and by oral statements made during alleged employment interviews or sales presentations, and by statements and photographs appearing in pamphlets and brochures disseminated as aforesaid, respondents have represented and are now representing directly or by implication that:

1. The purpose of their "Salesman Wanted" advertisements is to obtain sales agents or representatives.

2. Sales training is provided to new sales employees or representatives, including the opportunity to observe demonstrations by an experienced sales representative of respondents, of the measurement, sales, and fitting techniques employed in the sale of hair pieces, wigs or toupees; such demonstrations being made during actual calls on prospects to induce the purchase of hair pieces, wigs or toupees.

3. All persons depicted with a full head of hair in advertising brochures, photographs or artists' renditions, used in sales solicitations are wearing hair pieces, wigs or toupees manufactured, offered for sale, and sold by respondents.

4. Photographs shown on advertising brochures or newspaper advertisements used in sale solicitations are original, unaltered and not retouched.

5. The hair pieces, wigs or toupees manufactured, offered for sale, and sold by respondents are "undetectable" and remain securely affixed and undamaged or unharmed regardless of the activity engaged in by the wearer.

6. A fitting, trimming, grooming or customized hair styling will be provided by respondents to the purchaser of a hair piece, wig or toupee coincident with or shortly after delivery thereof.

PAR. 8. In truth and in fact:

1. Such advertisements are not bona fide offers of employment but are made for the purpose of interesting prospects in the purchase of respondents' hair pieces, wigs and toupees.

2. Sales training, including the opportunity to observe demonstrations, by an experienced sales representative of respondents, of the measurement, sales and fitting techniques employed in the sale of hair pieces, wigs or toupees during the actual calls on prospects to induce the purchase of hair pieces, wigs or toupees, is not afforded in each instance to new sales employees or representatives.

3. Some of the persons depicted with a full head of hair in advertising brochures are not wearing hair pieces, wigs or toupees manufactured, offered for sale, and sold by respondents.

4. Some photographs of persons depicted in advertising brochures as wearing hair pieces, wigs or toupees are retouched to make the hair line appear more natural than is actually the case or are altered to make a person with a full head of hair appear to be bald or balding.

5. The hair pieces, wigs or toupees manufactured, offered for sale, and sold by respondents are not "undetectable" and will not remain securely affixed, undamaged or unharmed regardless of the activity engaged in by the wearer.

6. A fitting, trimming, grooming, or customized hair styling is not provided by respondents to each purchaser of a hair piece, wig or toupee coincident with or shortly after delivery thereof.

Therefore, the representations referred to above were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

Respondents' advertisements are misleading in a further material respect and constitute "false advertisements" by reason of failure to reveal facts material in the light of representatons made therein. In advertising that employment as a salesman is being offered, respondents fail to reveal the material fact, that applicants for such positions are required to purchase an expensive hair piece, wig or toupee before they would allegedly be considered for such positions. Applicants for employment do not expect to be required to make a capital investment or substantial purchase as an employment prerequisite.

PAR. 9. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 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 Diplomat Hair Goods Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 2425 W. Washington Street, Waukegan, Illinois. Said corporation has done and is doing business under its own name and also under the name The Diplomat Company.

Respondents Earl H. Martin and Hope S. Martin are officers of said corporation. Their business address is the same as that of said corporation, and their home address is 2003 Columbia Bay Drive, Lake Villa, Illinois.

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

PART I

It is ordered, That respondents Diplomat Hair Goods Company, a corporation, trading under its own name or the name The Diplomat Company, or any other name or names, and its officers, and Earl H. Martin and Hope S. Martin, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of hair pieces, wigs, or toupees, or other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication that:

(a) Employment is being offered when in fact the purpose or effect of such representation is the solicitation of sales of such products.

(b) Employment is being offered without clearly and conspicuously disclosing that a capital investment or a purchase of such a product, or products, is required.

(c) Sales training or any form of training for employees or representatives will be or is supplied to such empolyees or representatives unless the respondents are able to establish that such training is supplied in every instance.

(d) Persons appearing in photographs used in advertising materials are wearing hair pieces, wigs, or toupees manufactured, offered for sale, and sold by respondents when in fact such persons are not wearing a hair piece, a wig or a toupee manufactured, offered for sale, and sold by respondents.

(e) Photographs or other visual depictions accurately portray or are a faithful reproduction of the appearance of persons wearing hair pieces, wigs or toupees unless respondents are able to establish that such photographs or other visual depictions have not been retouched, altered or changed in any manner and that they accurately represent the appearance of such persons wearing such products.

(f) Hair pieces, wigs or toupees advertised, offered for sale, or sold are undetectable and/or remain securely affixed, undamaged, and unharmed, regardless of the activity engaged in by the wearer.

(g) A fitting, trimming, grooming, customized hair styling, or any other service will be provided to the purchaser of a hair piece, wig, or toupee unless the respondents are able to establish that each purchaser receives such services.

2. Misrepresenting in any manner the construction, quality, or appearance of such hair pieces, wigs, or toupees.

PART II

It is further ordered, That respondents Diplomat Hair Goods Company, a corporation, and its officers, Earl H. Martin and Hope S. Martin, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of hair pieces, wigs, or toupees do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation or misrepresentation prohibited in Paragraphs 1 and 2 of Part I of this Order.

2. Disseminating or causing the dissemination of any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any hair piece, wig, or toupee in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation or misrepresentation prohibited in Paragraphs 1 and 2 of Part I of this Order.

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

JAY NORRIS COMPANY TRADING AS NORRIS NUTRITIONS ET AL.

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

Docket C-1005. Complaint, Oct. 21, 1965—Decision, Oct. 21, 1965

Consent order requiring Lynbrook, N. Y., distributors to cease representing falsely in advertisements that their "V-tabs" vitamin-mineral preparation

was a new medical discovery with sustained release effect, and to cease misrepresenting in any manner the effectiveness of such preparation.

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 Jay Norris Company, a corporation, trading as Norris Nutritions, and Joel N. Jacobs, Mortimer Williams, and Bernard Jacobs, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jay Norris Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 273 Merrick Road, in the city of Lynbrook, State of New York. The said corporate respondent conducts its business under the name of Norris Nutritions.

Respondents Joel N. Jacobs, Mortimer Williams and Bernard Jacobs are officers of the corporate respondent. These individuals formulate, direct and control the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. The address of respondent Joel N. Jacobs is 453 Links Drive E., Oceanside, New York; the address of respondent Mortimer Williams is 72 E. Henrietta Street, Oceanside, New York; and the address of respondent Bernard Jacobs is 1 East Broadway Street, Long Beach, New York.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the sale and distribution of a preparation containing ingredients which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondents for said preparation, the formula thereof and direction for use are as follows:

Designation: "V-tabs"

Formula:

Each Tablet Contains:	
Rutin	50 mg.
Para Amino Benzoic Acid	10 mg.
Calcium Carbonate	50 mg.
Ferrous Sulfate	30 mg.
Vitamin B-1	25 mg.

Vitamin B-2	12 mg.
Calcium Pantothenate	3 mg.
Biotin	0.1 mcg.
Potassium Iodide	50 mcg.
Magnesium Sulfate	500 mcg.
Manganese Sulfate	500 mcg.
Potassium Chloride	500 mcg.
Zinc Sulfate	500 mcg.
Copper Sulfate	500 mcg.
Inositol	5 mg.
1-Lysine	3 mg.
Soy Lecithin	2 mg.
Yeast Hydrolysate	10 mg.
Malt Diastase	5 mg.
Rose Hips Powder	5 mg.
Red Bone Marrow	2 mg.
Vitamin A	10.000 USP/u
Vitamin D	1.000 USP/u
Vitamin E	3.6 I.U.
Vitamin B-12 USP	5 mcg.
Alfalfa Powder	500 mcg.
Watercress Powder	500 mcg.
Parsley Powder	500 mcg.
Citrus Bioflavanoid Comp.	2 mg.
Vitamin C	150 mg.
Hesperidin Complex	5 mg.
Niacinamide	75 mg.
Soy Protein Yeast Conc.	80 mg.

(Providing the following
Animo Acids;)

Lysine	
Cysteic Acid	Histidine
Threonine	Arginine
Glutamic Acid	Aspartic Acid
Glysine	Serine
Cystine	Proline Acid
Methionine	Alanine
Leucine	Valine
Isoleucine	Nucleic Acid
Phenylalanine	Tyrosine
Tryptophan	Alloisolucine

Directions: Adults: 1 tablet daily or as directed by physician.

PAR. 3. Respondents cause the said preparation, when sold, to be transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparation in commerce as "commerce" is defined

in the Federal Trade Commssion Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of their said business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning said preparation by the United States mails, and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, circular letters and pamphlets, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of the said preparation; and have disseminated, and caused the dissemination of, advertisements concerning the said preparation by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of the said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

new found * * * pep and energy, for adults and it lasts ALL DAY LONG. V-tabs were developed by a leading U.S. Pharmaceutical Laboratory in answer to a crying need by millions of people like yourself. A single TABSULET power packed, with all the latest vitagenic factors proven necessary for energy, pep, vitality, and that general feeling of youth and well being. This tablet is more potent than any of the well known ordinary vitamin preparations and it has the added, and most important feature of all, timed action. V-tabs are Sustained Release bullets. This means that your tabsulet taken only once a day is made to slowly release its benefits over a longer period of time (all day). If you suffer from a vitamin deficiency that is draining your strength, making you feel older than you really are, V-tabs can help you. They can make you feel younger, more energetic, quickly, and for a longer period of time. You begin to get the benefits shortly after you swallow the tablet, and as these hundreds of tiny multifactor pellets slowly dissolve in the system you continue to feel the benefits of this timed energy. Not only for a few hours but all day, the evening through the night, V-tabs work for you all the time.

* * * * * * *

this is a laboratory fresh packed sample TRY IT NOW.

Feel it begin to work—TODAY, TONIGHT, TOMORROW. Then order your supply of V-tabs—and begin feeling better, stronger, more energetic, from now on. We have so much faith in this brand new, scientific laboratory discovery that we have gone to the expense of sending out hundreds of these laboratory fresh samples for people just like you to try. Just you try the sample tabsulet right now. See if V-tabs can help you, just like it is helping thousands of other people. We think that you will feel the difference

the very first day. Then order your supply of V-tabs right away so you can begin to get the benefits of new scientific sustained release tablet.

* * * * * * *

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented and are now representing, directly and by implication:

1. That V-tabs, because of its sustained release feature, provides greater nutritional benefits to the user than other preparations of similar content which do not have this feature.

2. That V-tabs immediately supplies new energy to the human body and continues to provide new energy for 24 hours.

3. That V-tabs is a new medical and scientific discovery and achievement.

4. That the use of V-tabs will be of benefit in the treatment and relief of lack of pep, energy and strength, loss of vitality, and loss of a sense of well-being.

5. That the use of V-tabs will enable a person to appear and feel younger.

PAR. 7. In truth and in fact:

1. V-tabs' sustained release feature does not cause V-tabs to provide greater nutritional benefits to the user than other preparations of similar content which do not provide sustained release action.

2. V-tabs does not immediately supply new energy to the human body, nor does it continue to provide new energy for 24 hours.

3. V-tabs is not a new medical or scientific discovery or achievement.

4. The use of V-tabs will not be of benefit in the treatment or relief of lack of pep, energy or strength, loss of vitality, or loss of a sense of well-being except in a small minority of persons in whom such symptoms are due to a deficiency of Vitamin B-1, Vitamin B-2, Vitamin-C, or Niacinamide. All the remaining ingredients in this preparation are of no benefit in the treatment or relief of said symptoms.

Furthermore, the statements and representations in said advertisements have the capacity and tendency to suggest, and do suggest, to persons of both sexes and all ages who experience lack of pep, energy or strength, loss of vitality, or loss of a sense of well-being, that there is a reasonable probability that they have symptoms which will respond to treatment by the use of V-tabs. In the light of such statements and representations, the advertisements are misleading in a material respect and therefore constitute "false

advertisements," as that term is defined in the Federal Trade Commission Act, because they fail to reveal the material facts that in the great majority of persons or of any age, sex or other group class thereof, who experience the symptoms of lack of pep, energy or strength, loss of vitality, or loss of a sense of well-being, such symptoms are not caused by deficiency of one or more of the nutrients provided by V-tabs, and that in such persons the said preparation will be of no benefit.

5. The use of V-tabs will not enable a person to appear or feel younger.

Therefore, the advertisements referred to in Paragraph Five were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 8. The dissemination by respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce, in violation of Sections 5 and 12 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 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 Jay Norris Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business

located at 273 Merrick Road, in the city of Lynbrook, State of New York.

Respondents Joel N. Jacobs, Mortimer Williams and Bernard Jacobs are officers of said corporation. The address of respondent Joel N. Jacobs is 453 Links Drive, E., Oceanside, New York. The address of respondent Mortimer Williams is 72 E. Henrietta Street, Oceanside, New York. The address of respondent Bernard Jacobs is 1 East Broadway Street, Long Beach, New York.

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 Jay Norris Company, a corporation, trading as Norris Nutritions, or under any other name or names, and its officers, and Joel N. Jacobs, Mortimer Williams, and Bernard Jacobs, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation designated "V-tabs," or any other preparation of substantially similar composition or possessing substantially similar properties, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing the dissemination of, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication:

(a) That such preparation immediately supplies new energy to the human body, or continues to provide new energy for 24 hours; or which misrepresents in any manner the time in which said preparation may produce such an effect or the duration of such an effect.

(b) That such preparation is a new medical or scientific discovery or achievement.

(c) That such preparation, or any ingredient supplied thereby, will be of benefit in the treatment or relief of lack of pep, energy or strength, loss of vitality, or loss of a sense of well-being, unless such advertisement expressly limits the effectiveness of the preparation to those persons whose symptoms are due to a deficiency of Vitamin B-1, Vitamin B-2, Vitamin C, or Niacinamide, if in fact these nutrients are provided by such prepartion, and, further, unless the advertisement clearly and conspic-

uously reveals the facts that in the great majority of persons, or any age or sex or other class or group thereof, who experience lack of pep, energy or strength, loss of vitality, or loss of a sense of well-being, such symptoms are due to conditions other than those which may respond to treatment by use of the preparation and that in such persons the preparation will not be of benefit.

(d) That such preparation will enable a person to appear or feel younger.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of any such preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in, or which fails to comply with any of the affirmative requirements of, Paragraph 1 hereof.

It is further ordered, That respondents Jay Norris Company, a corporation, trading as Norris Nutritions, or under any other name or names, and its officers, and Joel N. Jacobs, Mortimer Williams and Bernard Jacobs, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any vitamin or vitamin-mineral preparation, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing the dissemination of, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents directly or by implication:

(a) That vitamin or vitamin-mineral preparations which release their contents over a prolonged period of time when being digested in the human body are in any way superior, because of this feature, to other preparations of similar content which do not have this feature.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in, or which fails to comply with any of the affirmative requirements of, Paragraph 1 hereof.

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

DEAN MILK COMPANY ET AL.

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

Docket 8032. Complaint, June 30, 1960—Decision, Oct. 22, 1965

Order requiring a large dairy company with executive offices in Franklin Park, Ill., and its wholly owned subsidiary in Louisville, Ky., engaged in the processing and sale of fluid milk and other dairy products in a number of States, to cease violating Sec. 2(a) of the Clayton Act by discriminating in price between competing purchasers of its dairy products through a quantity discount system which permitted large retailers to purchase its products for lower prices than smaller retailers in the same market area, and by engaging in unlawful territorial price discriminations.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondents Dean Milk Company and Dean Milk Co., Inc., hereinafter more particularly described, have violated and are now violating the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C. Title 15, Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Dean Milk Company, sometimes hereinafter referred to as Dean Illinois, is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 3600 North River Road, Franklin Park, Illinois.

PAR. 2. Respondent Dean Milk Co., Inc., sometimes hereinafter referred to as Dean Kentucky, is a corporation organized and existing under the laws of the State of Kentucky, with its principal office and place of business located at 602 West Hill Street, Louisville, Kentucky. Respondent Dean Milk Co., Inc., is wholly-owned and controlled by Respondent Dean Milk Company.

PAR. 3. Respondents Dean Illinois and Dean Kentucky are extensively engaged in the business of purchasing, processing, manufacturing, and selling fluid milk and other dairy products throughout the States of Illinois, Indiana, Kentucky and Wisconsin. Their total combined annual net sales are in excess of $20 million.

PAR. 4. In the course and conduct of their business, respondents Dean Illinois and Dean Kentucky are now, and for many years past have been, purchasing and transporting fluid milk and other dairy products, or causing the same to be transported, from dairy farms and other points of origin to respondents' receiving stations, processing and manufacturing plants, and distribution depots located in States other than the State of origin.

Respondents Dean Illinois and Dean Kentucky are now, and for many years past have been, transporting fluid milk and other dairy products, or causing the same to be transported, from the State or States where such products are processed, manufactured or stored in anticipation of sale or shipment, to purchasers located in other States of the United States.

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

PAR. 5. Respondent Dean Illinois and respondent Dean Kentucky sell their fluid milk and other dairy products to retailer-purchasers, distributors and consumers. The retailer-purchasers of respondent Dean Illinois are in competition with other retailer-purchasers of respondent Dean Illinois. The retailer-purchasers of respondent Dean Kentucky are in competition with other retailer-purchasers of respondent Dean Kentucky.

Respondents' distributors resell to retailer-purchasers and consumers to the extent that such purchasers do not buy directly from respondents. In many instances respondents' distributors act as their agents in making sales and deliveries to retailer-purchasers to the extent that such distributors pay or allow discounts and rebates on sales to such customers on behalf of respondents for which said distributors are reimbursed by respondents. Many of the customers of these distributors are in competition with many of respondents' customers.

Respondent Dean Illinois and respondent Dean Kentucky, in the sale of their fluid milk and other dairy products to retailer-purchasers, distributors and consumers, are in substantial competition with other manufacturers, distributors and sellers of said products.

PAR. 6. In the course and conduct of their business in commerce, respondent Dean Illinois and respondent Dean Kentucky have

discriminated and are now discriminating in price in the sale of fluid milk and other dairy products by selling such products of like grade and quality at different prices to different purchasers at the same level of trade.

Included in, but not limited to, the discriminations in price, as above alleged, respondent Dean Illinois has discriminated in price in the sale of said products to retailer-purchasers in the Blufton, Goshen, Elkart, Rochester and Terre Haute, Indiana; and Clinton, Martinsville, Marshall and Champaign, Illinois market areas by charging said retailer-purchasers substantially higher prices than charged by said respondent Dean Illinois for the sale of said products of like grade and quality to other retailer-purchasers, many of whom are competing purchasers.

Included in, but not limited to, the discriminations in price, as above alleged, respondent Dean Kentucky has discriminated in price in the sale of said products to retailer-purchasers in the Louisville, Henderson and Owensboro, Kentucky; and Evansville, Tell City, Rockport, Jasper and Boonville, Indiana market areas by charging said retailer-purchasers substantially higher prices than charged by said respondent Dean Kentucky for the sale of said products of like grade and quality to other retailer-purchasers, many of whom are competing purchasers.

Included in, but not limited to, the methods and plans used by respondent Dean Illinois and respondent Dean Kentucky to effect and carry out such discriminations in price are the quantity discount and rebate plans hereinafter described, applicable to the retailer-purchasers located in the aforementioned cities and towns.

Respondents' quantity discount and rebate plans are applied to the daily purchasers by its retailer-purchasers of respondents' dairy products computed in points, said products including, but not limited to, fluid milk, buttermilk, half and half, whipping cream, coffee cream, sour cream and cottage cheese. Each of the said products is assigned a given number of points, with a corresponding percentage of discount applicable to a given total of points. Respondents are now and for many years past have been using the following quantity discount and rebate plans:

Quantity Discount and Rebate Plans

Average daily points per store	*Percent of discount off list*
0 - 24	0
25 - 49	2
50 - 74	3
75 - 99	4
100 and over	5

Quantity Discount and Rebate Plans—Con't

Average daily points per store	*Percent of discount off list*
0 - 24	0
25 - 49	2
50 - 99	3
100 - 174	4
175 - 274	5
275 - 399	6
400 and over	7
0 - 24	0
25 - 49	2
50 - 74	3
75 - 99	4
100 - 124	5
125 - 149	6
150 and over	7

In the application of these quantity discount and rebate plans to many of respondents' customers, including, but not limited to, large chain stores and other stores having a common ownership or control, including voluntary associations or groups of stores having a central buying officer, such customers are treated as a unit, regardless of the number of individual stores involved, in that respondents, in computing the volume of daily purchases of such customers, pay quantity discounts or rebates according to the rate applicable to the aggregate purchases of all stores in the chain, association or central buying group, without regard to the daily volume of purchases of such individual stores. In all or most instances, respondents' large chain store, association and central buying group customers are paid the maximum quantity discounts or rebates by respondents on purchases made by all their stores.

Many of respondents' smaller, usually independent retailer-purchasers, who compete with the large chain, association and central buying group customers, receive no discounts or rebates under respondents' quantity and rebate plan, or receive a percentage discount that is substantially below that which is paid to respondents' large chain stores and group buying customers.

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

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

2. Between retailer-purchasers paying higher prices and competing retailer-purchasers paying lower prices for said products of respondent Dean Illinois and respondent Dean Kentucky.

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

Mr. Herbert I. Rothbart, Mr. F. P. Favarella and *Mr. Bernard Turiel* for the Commission.

Mr. Francis J. McConnell, for the respondents; *McConnell, Curtis & McConnell,* Chicago, Ill. of counsel.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

OCTOBER 22, 1963

The Complaint in this matter alleges that the respondents have violated Section 2(a) of the amended Clayton Act by discriminating in price in the sale of fluid milk and other dairy products and that the effect of such discrimination has been, or may be, substantially to lessen, injure, destroy, or prevent competition.

Hearings were held in several cities during 1961, 1962, and 1963. The record consists of more than 1,000 exhibits, some of which contain hundreds of pages of statistical and financial data, filling more than twenty-one bound volumes and almost 4,000 pages of oral testimony.

Proposed findings and briefs have been filed by the parties. To the extent such findings are inconsistent with the facts found below they are deemed rejected.

FINDINGS OF FACT

I. *Identity and General Operations of the Respondents*

1. Respondent Dean Milk Company, sometimes hereinafter referred to as Dean Illinois, is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 3600 North River Road, Franklin Park, Illinois (Answer, Par. 1).

2. Respondent Dean Milk Co., Inc., sometimes hereinafter referred to as Dean Kentucky, is a corporation organized and existing under the laws of the State of Kentucky, with its principal office and place of business located at 4420 Bishop Lane, Louisville, Kentucky (Answer, Par. 2, and CX 741).

3. Respondent Dean Kentucky, Pure Seal Dairy and Wilson Milk Company, Inc., are wholly owned and controlled subsidiary

corporations of respondent Dean Illinois. The testimony of the officials of the parent corporation, Dean Illinois, makes it clear that the purchasing, selling, advertising, and accounting acts and practices of the subsidiary corporation, Dean Kentucky, are supervised and controlled completely by the officers, directors and employees of Dean Illinois. The two corporations have common officers. All of the officers of Dean Kentucky, with one exception, are officers of Dean Illinois, and reside in the State of Illinois (Tr. 1654; CX 744). They perform their duties as officers of Dean Kentucky primarily from the main offices of the parent corporation and receive their salaries and compensation from the parent company, not from Dean Kentucky (Tr. 1656-1657). Tom T. Thompson, regional marketing manager for Dean Illinois, supervises the operations of Dean in Kentucky (Tr. 2072). Bertram Hoddinott, vice president and director of Dean Illinois, has responsibility for sales of fresh milk for both the parent company and the subsidiary companies, and was responsible for organizing the sales program of Dean in Louisville (Tr. 2039). Thus Mr. Hoddinott issues instructions regarding sales policies to Mr. Thompson for Louisville (Tr. 1674). References to "Dean" hereinafter are, accordingly, meant to refer to both respondents unless otherwise indicated.

4. In recent years Dean Illinois has seen significant growth due to the extension of its operations and through the various acquisitions made during recent periods. The principal acquisitions have been the following:

Fenley Model Dairy
Louisville, Ky.—1952

Wilson Milk Co., Inc.
Indianapolis, Indiana—1955

Pure Seal Dairy
Flint, Michigan—1958

Sunshine Dairy Co.
Lafayette, Indiana—1960

Forest Hill Dairies, Inc.
Memphis, Tennessee—December 31, 1960.
(CX 743, pp. 5 and 6; Tr. 1648.)

5. Directly and through wholly owned and controlled subsidiaries, Dean pasteurizes and otherwise processes milk and milk products, such as cottage cheese, ice cream and evaporated and powdered milk. These products are distributed in the central and northern half of Illinois, including the entire Chicago metropolitan

area; the south half of Wisconsin, not including Milwaukee; substantially the entire State of Indiana; east central Michigan; north central Kentucky; western Tennessee; and most of the State of Arkansas. Fresh milk is distributed principally under the Dean name. Wilson Milk Company, Inc., a subsidiary, markets evaporated milk under its own label. Fresh milk, which includes cream, buttermilk and cottage cheese for classification purposes, constitutes more than 75 per cent of Dean's consolidated sales (CX 743, pp. 5 and 6).

6. Milk is processed in Dean's bottling plants located at Huntley and Chemung, Illinois, Rochester, Indiana, Flint, Michigan, Louisville, Kentucky, Memphis, Tennessee, and Conway, Arkansas. Ice cream is manufactured in a plant at Belvidere, Illinois, from which deliveries are made principally to the Illinois, Wisconsin, Indiana and Kentucky markets. Evaporated milk is produced at Pecatonica, Illinois, and powdered milk of various types at Rockford, Illinois (CX 743, pp. 5 and 6; Tr. 1635-37).

7. Respondents Dean Illinois and Dean Kentucky are extensively engaged in the business of purchasing, processing, manufacturing and selling fluid milk and other dairy products throughout the States of Illinois, Indiana, Kentucky and Wisconsin. For 1960, total annual net sales for Dean Illinois amounted to approximately $45,000,000 (CX 755). For the same year, net sales for Dean Kentucky amounted to approximately $6,000,000 (CX 755). In 1960, the consolidated net sales for Dean Illinois and all of its wholly owned and controlled subsidiary companies were in excess of $56,000,000 and in 1962 they were in excess of $63,000,000 (CX 755, p. 304; Tr. 2049).

8. In the course and conduct of their business, respondents Dean Illinois and Dean Kentucky are now, and for many years past have been purchasing and transporting fluid milk or have purchased fluid milk that has been transported, from dairy farms and other places of origin to respondents' receiving stations, processing and manufacturing plants, and distribution depots located in States other than in the State of origin (Answer; CX 531-38, 545-48; Tr. 218-21, 1635, 2246-48, 3335-37).

9. Respondents Dean Illinois and Dean Kentucky are now, and for many years past have been, transporting fluid milk and other dairy products, or causing the same to be transported, from the State or States where such products are processed, manufactured or stored in anticipation of sale or shipment, to purchasers located in other States of the United States (Answer; Tr. 2265-69, 2276-77; CX 8A-8Z-34, 66-154, 764-98).

10. All of the matters and things, including the acts, practices, sales and distribution by respondent Dean Illinois and respondent Dean Kentucky of their said fluid milk and other dairy products, were and are performed and done in constant current of commerce as "commerce" is defined in the Clayton Act, as amended.

11. Respondent Dean Illinois and respondent Dean Kentucky sell their fluid milk and other dairy products to retailer-purchasers, distributors and consumers (Answer; CX 616).

12. Retailer-purchasers of respondent Dean Illinois are in competition with other retailer-purchasers of respondent Dean Illinois (Answer CX 764-879; Tr. 1680-1817).

13. Retailer-purchasers of respondent Dean Kentucky are in competition with other retailer-purchasers of respondent Dean Kentucky (Answer; Tr. 1507-08; Tr. 1509-10).

14. In many instances respondents' distributors act as agents of the respondents in the delivery of fluid milk and other dairy products to retailer-purchasers of respondents (Testimony of Tom T. Thomson, Tr. 2113-24, 2265-69, 2273-78; testimony of John Guckien, Tr. 1829-30, 1878-86; testimony of Robert A. Brundage, Tr. 3461-62; CX 917-18; CX 8A-8Z-34; CX 59, 61, 67 and 68).

15. The Falls Cities market, often referred to as the Louisville market, is comprised of the city of Louisville and other Kentucky towns surrounding it and the cities of New Albany, Jeffersonville and Clarksville in Indiana (Tr. 2209-10).

16. Dean entered the Falls Cities market on September 1, 1952, when it acquired Fenley's Model Dairy, a local dairy company located in Louisville, Kentucky (Tr. 2075). Dean's operation in Louisville was given a separate corporate identity, the Dean Milk Co., Inc., under the laws of the State of Kentucky.

17. Dean commenced distribution in Evansville, Indiana, Henderson, Kentucky, Jeffersonville, Indiana, and New Albany, Indiana, through Cardinal Distributing Company. Cardinal was a partnership of two individuals named Brundage and Clyatt who had been employed by Dean Illinois as route men in the Chicago area (Tr. 3437-38, 3458). Letters written on the Dean Kentucky letterhead and signed "Dean Milk Co., Inc." were mailed to the grocers in the Henderson and Evansville markets in November 1952, stating in part:

In brief, we will be in your city with Dean's Homogenized, Pasteurized, Grade A, Vitamin D Enriched Milk in a very few days. And most important—the only place people will be able to buy this fine milk will be in stores like

your own. There will be no home deliveries of Dean's to compete with your business.

Yes, exclusive store distribution is a strict Dean policy; * * * (CX 630).

Cardinal purchased milk at Dean's dock in Louisville and hauled the milk by trailer to Evansville and Henderson, where the load was broken down and distributed by trucks. The partnership owned its own trucks and employed its own drivers (Tr. 3470). It was the practice for one of the supervisors at Dean Kentucky to notify the partnership of any change in milk prices. The partnership would then change its prices so that the prices charged by the partnership and by Dean Kentucky were identical. Similarly, any change in the discount schedule would be transmitted so that the discounts were identical (Tr. 3442-44, 3451).

Some purchasers like A & P and Kroger were billed for their purchases by Dean Kentucky, who remitted the difference between that price and the price charged the Cardinal Distributing Company to that partnership (Tr. 3476). These accounts were called "house" accounts and with reference to them, Cardinal's business was described by an official of Dean Kentucky as that of a "hauler" on behalf of Dean (Tr. 2113-14, 2268). In the Henderson market such house accounts represented about 50 per cent of all of Dean's products sales. In the Evansville market, sales to house accounts represented 90 percent of the Evansville sales, among which were A & P and Kroger.

The Cardinal Distributing Company had no home delivery business. Mr. Brundage explained that it was against the Dean Milk Company policy to deliver to the home (Tr. 3460).

18. In view of the history of the distribution described above, the method of determining prices employed by such distributors, the sales policies employed by the parties and the responsibilities assumed by each, it is found that the respondents controlled the sales price and policies of their distributors and that retailer-purchasers buying from respondents' distributors are actually purchasers of the respondents within the meaning of Section 2(a) of the Clayton Act, as amended.

Respondents argue that the distributors should be considered independent of Dean and their relationship to Dean merely that of a buyer. The record evidence points more strongly to a principal-agent relationship between the two than to a seller-buyer relationship. Assuming, nevertheless, that the respondents are correct as to the existence of a seller-buyer relationship, the conclusions made above remain unchanged. The record makes it obvious that Cardi-

nal and Dean not only consulted about prices, but agreed to an identical price to be charged by both, as well as to the quantity discount schedules to be used (Tr. 3442-44, 3451, 157-62). Such control by the respondents over the terms and conditions of purchase in effect for the customers of Cardinal, as well as Dean's direct dealing with many retailer-customers renders such customers the customers of Dean and indirect purchasers from Dean within the meaning of Section 2(a) of the Act. *American News Co.* v. *F.T.C.* 300 F. 2d 104 (2d Cir. 1962), citing *K. S. Corp.* v. *Chemstrand Corp.,* 198 F. S. 310 (D.C.S.D.N.Y. 1961), *Kraft Phenix Cheese Corp.,* 25 F.T.C. 537 (1937), *Champion Spark Plug Co.,* 50 F.T.C. 30 (1953), and *Dentists Supply Co. of New York* 37 F.T.C. 345 (1940); *National Lead Co.* v. *F.T.C.* 227 F. 2d 825 (7th Cir. 1955).

Even under general principle of law where two parties enter into an illegal conspiracy (such as price fixing), any act done by either in furtherance of the common design and in accordance with the general plan (such as the establishment of discriminatory prices among competing purchasers) becomes the act of all. See the discussion of the law and cases cited at 15 Corpus Juris Secundum, p. 1028.

19. Respondents Dean Illinois and Dean Kentucky, in the sale of their fluid milk and other dairy products to retailer-purchasers, distributors and consumers, are in substantial competition with other manufacturers, distributors and sellers of said products (Answer, par. 5).

II. *The Louisville Market*

A. *The Price Discrimination*

20. When Dean entered the Louisville market on September 1, 1952, the chain stores in the area had been receiving a ½ cent discount on unit purchases of milk and milk products from local dairies (Tr. 2231; RX 107 A-G). Dean continued this practice, granting a ½ cent discount to A & P and Kroger (RX 8). This was Dean's first difference in price to its retailer-purchasers.

21. In addition, Dean lowered its list price of homogenized milk by 1 cent a quart on September 18, 1952, with a further reduction of ¼ cent per quart in October 1952 and 1 cent per quart in March 1953 (CX 927).

22. On June 1, 1953, Dean introduced an earned service discount of 2 percent for chain store customers having a certain volume of business and using central billing, and an earned

handling discount of 2 or 3 percent for such volume accounts taking drop delivery (CX 928-29).

23. Dean Kentucky showed a net profit of more than $2,000 in September 1952; for October 1952, the profits fell to $150; in November 1952, Dean Kentucky suffered a loss of over $22,000, and in December 1952, the loss exceeded $48,000 (CX 619 G-N). In January 1953, Dean Kentucky sustained a loss of over $7,000, and in February the loss was over $4,000. In March, the loss exceeded $5,000, and in April 1953, the loss was over $4,000. The loss continued in May, exceeding $6,000, and in June 1963, exceeding $3,000 (CX 619 O-Z-2). Exclusive of executive salaries and expenses, Dean Kentucky incurred a loss of over $49,000 during its first year in the Louisville market (CX 619 A).

24. On November 15, 1954, with the list price of homogenized milk reduced 1 cent a quart below the price levels of June 1953, Dean Kentucky introduced a schedule of quantity discounts as follows (CX 927 A):

Average Daily Points	*Discount*
0-24	0%
25-99	2%
100-199	3%
200-299	4%
300 and over	5%

However, regardless of the point system indicated above the chain stores always qualified for the top quantity discount (CX 930).

In arriving at the average daily points, each product sold by Dean was not treated separately for purposes of the quantity discounts. On the contrary, each unit of the products shown on Dean's line of fresh milk products (homogenized milk, skim, chocolate flavored milk, buttermilk, egg nog, half and half, whipping cream, sour cream, cottage cheese and Reddi-Whip) was treated as one point for the computation of the number of points purchased by a customer, except for half gallon units which were treated as 2 points and 2 pound tubs of cottage cheese which were also treated as 2 points. In order to arrive at the average daily points per store, the total monthly purchases in points would be taken and divided by the number of stores which a particular account operated and then divided by the number of delivery days in a particular month (CX 57). As indicated above, the chain stores always qualified for the highest discount regardless of this mathematical computation (Tr. 308).

25. Throughout most of the period between 1954 and 1960, Dean used some schedule of quantity discounts. In June 1955, the maximum reached 8 percent. Again in June 1957, the 8 percent maximum was reached. In February 1959 and continuing until April 1959, a maximum of 7 percent was allowed. Between April 1959 and October 1960, a uniform 7% discount was allowed all purchasers but in October 1960 a quantity discount schedule was reinstituted with a maximum of 10% allowed (CX 927, 930, 896, 972). At all other times between 1954 and 1960, the maximum discount was 5 percent.

26. The quantity discounts described above were supplmented from time to time by additional discounts known as service or handling discounts which have been previously described. These special discounts were not offered or made available to any independent grocers in that area.

27. These pricing practices gave chain stores, particularly A & P, Albers Colonial and Kroger, significant advantages in prices. The net prices charged such chains were always at least one cent per quart below the prices charged smaller independent stores, which difference in price was often the difference between the chain stores' cost and their selling price to the consumer; in other words, the discount given chain stores by the respondents permitted sales by such chain stores to consumers at prices often approximating the cost of the same milk to small grocery stores (See Chart 1, attached).

28. Between 1954 and 1960 the chain stores purchasing from the respondent usually set their prices to consumers in line with the prices charged them by the respondent. Thus when Dean lowered the price on half gallons of homogenized milk in December 1958, Kroger at the same time lowered its price to the consumer by the same amount and advertised such lowered price in the local papers (See Chart 1, attached, and RX 162). Similarly, in March 1959, when Dean lowered its price by one cent per half gallon on two different occasions in rapid succession, A & P made similar retail reductions simultaneously (CX 745).

29. At several times between 1954 and 1960, Dean's delivered cost for half gallons of homogenized milk exceeded the price it charged chain store accounts. Thus, in August 1959, Dean's cost was 34.02 cents and in September of that year, the cost was 34.10 cents. These costs did not include executive salaries or corporate income taxes of the respondent. Nevertheless Dean's price to the chain stores did not exceed 33.3 cents between August 24 and

September 21, during part of which time A & P advertised such milk at 35 cents (CX 745, CX 927, CX 616 Z39-56; RX 162).

B. *Competitive Injury to Respondents' Competitors*

30. The relative market shares of the Louisville dairies based upon Class 1 milk sales during the period 1953-1960 are shown below (RX 132, 136, 135). These figures include both in and out of market sales by the various companies under Federal Order No. 46 (CX 640, 641). The amount of sales made outside of the market area varies with the individual companies (Tr. 3616). For all but Sealtest, Sure Pure and Grand Avenue, the calculations were made from Handler Reports filed with the Milk Market Administrator. For these three dairies, the market shares shown are more or less arbitrarily calculated from other data not necessarily consistent with the Handler Reports used for the other dairies. The results, nevertheless, are the best obtainable for the Falls Cities market.

	1953	1954	1955	1956	1957	1958	1959	1960
Bowman Dairy							5.19	7.03
Carrithers Creamery					1.00	1.19	1.17	.95
Cherokee Sanitary					2.28	2.05	2.03	1.73
Creamtop Creamery			3.17	3.09	2.88	2.60	2.41	2.14
Dean Milk Co.	6.34	9.33	11.09	12.04	14.53	15.22	16.65	13.44
Ehrler's Dairy						3.30	3.56	3.35
Grand Avenue Dairy						1.24	1.21	.95
J. W. Haywood & Sons			1.77	1.52	1.70	1.86	1.96	2.38
Kannapel's Dairy	2.23	2.10	2.05	1.84	1.74	1.60	1.55	1.29
Model Farms Dairy**					6.97		9.34	8.20
Oscar Ewing, Inc.	7.64	7.23	7.76	7.33	7.37	6.25	6.75	5.60
Plainview Farms	6.52	6.84	6.42	5.88	6.02	5.39	4.69	3.39
Sealtest Foods		37.98	37.34	38.98	34.27	32.03	28.50	21.43
Sure Pure Milk Co.					2.75	2.96	3.66	3.22
Walnut Grove Dairy					2.62	2.39	2.01	1.35
Purity Maid Products*					4.49	3.66		

* (Bowman Dairy Purchased Purity Maid in October 1958.)
** (Beatrice Purchased Model Farms in January 1959.)

31. The experiences of the dairies in the Falls Cities market with respect to sales and profits were as follows:

(In Approximate Thousands)

Dairy	1952 Sales	1952 Profits or (Loss)	1953 Sales	1953 Profits or (Loss)	1954 Sales	1954 Profits or (Loss)	1955 Sales	1955 Profits or (Loss)	1956 Sales	1956 Profits or (Loss)	1957 Sales	1957 Profits or (Loss)	1958 Sales	1958 Profits or (Loss)	1959 Sales	1959 Profits or (Loss)	1960 Sales	1960 Profits or (Loss)	1961 Sales	1961 Profits or (Loss)
Mellwood (Tr. 1109-58; CX 656-57)	1,044	11	957	5	894	.3	941	(7.9)	962	1.9	911	(1.8)	857	(17)	60	(17)				
Purity Maid (Tr. 1293-1333; CX 721)	2,104	43	2,164	28	1,597	8	2,004	8	1,890	(5.8)	1,859	(62)	390	(1.2)						
Cream Top (Tr. 859-996; 1462-92; CX 631-43)	810	7.9	780	14	811	0	930	(.1)	955	(5)	959	(10)	907	2.9	638	(1)	962	(2.8)		
Cherokee (Tr. 1159-93; CX 658-91)	1,025	31	960	21	910	26	926	26	927	12	902	1.5	864	(13)	844	(21)	859	(11)	1,014	1.8
Walnut Grove (Tr. 1079-1107; CX 654-55)	614	15	742	24	846	22	964	20	1,054	17	988	23	1,005	11	901	3	774	(1.2)		
Carrithers (Tr. 1194-1225; CX 692-698)	333	2.9	319	9	277	1	268	(6)	262	(10)	286	(11)	333	(9)	399	(8)	470	(4)		
Shannon's (Tr. 1227-52; CX 699)	......	16	......	9	......	10	......	12	......	13	......	5	......	.06	......	2	......	(1.3)		
Oscar Ewing (Tr. 998-1078; CX 644-53)	2,973	46	3,098	69	2,735	68	2,764	64	2,890	(1.4)	2,957	(14)	3,059	(19)	3,314	(11)	3,473	(111)		
Plainview (Tr. 1254-92; 1334-56); 1417; CX 700-20)	1,721	62	1,816	70	1,898	61	1,914	36	1,966	(26)	2,078	(59)	2,044	(36)	1,974	(116)	1,898	(86)		
Kannapel's (Tr. 1389-1450; CX 733-35)	605	53	573	49	524	34	548	18	551	(1.6)	531	(.8)	515	.08	519	(9)	550	(4)	609	10
Oehrle's (Tr. 1532-42; CX 739-40)	109	....	108	....	98	7	103	5	108	10	105	7	99	9	88	1.5	88	2.9		
Von Allmen (Tr. 1419-29; CX 736)			......	(7)	574	1.4	620	(5)	690	(5)										
Sealtest (RX 105)					6,056		6,478		7,128		6,797		6,328		5,871		5,885		5,294	
Dean Kentucky (CX 746-55)			1,612	(3.9)	2,273	53	2,919	50	3,544	41	4,400	67	4,742	113	5,326	94	5,989	141		

32. With respect to Mellwood Dairy, Inc., it appears that the $17,000 loss of 1959 is attributable, in substantial part at least, to inventory write-offs in connection with the sale of Mellwood to Model Farms. A similar loss for 1958, however, appears to be due largely, if not solely, to a $54,000 reduction in sales from the previous year (CX 656-57). There was uncontradicted testimony to the effect that many of Mellwood's store accounts were lost to Dean (Tr. 1126), and that many retail customers were lost to the chain stores because of the latters' lower prices which were blamed upon Dean (Tr. 1127).

33. In 1955 Bowman offered $550,000 for Purity Maid's business. This offer was turned down. In 1958 Purity Maid was sold to Bowman for $220,000. Profits declined steadily from 1952 through 1957. For fiscal 1955/56, the loss was over $5,000; for fiscal 1956/57, the loss was over $62,000 although sales had only dropped some $32,000. It was testified that the retail business was not affected by the discounts, from which it may be assumed that the loss in sales was attributable to wholesale business. Ten percent of Purity's store accounts in Louisville were also served by Dean. Fifty percent of Purity's store accounts in New Albany and Jeffersonville were also served by Dean's distributor. The testimony indicates that at least a substantial part of the $62,000 loss can be attributed to a loss of wholesale business, which loss forced the sale of the business to Bowman (Tr. 1293-94, 1297). There was uncontradicted testimony that Purity Maid lost some of its store business because its customers stood to earn large discounts by buying all of their dairy products from a single dairy (Tr. 1300) instead of splitting their business among two or more dairies.

34. With respect to Cream Top Creamery, Inc., the profit and loss figures shown between 1952 and 1958 are after payment of managerial salaries. These salaries never exceeded $8,000 per employee. Using 1953 as a more or less normal year, it appears that the profits of the company declined thereafter despite lowered managerial salaries. In 1957, the managerial draw was about 4 percent higher than it had been in 1953 and sales were 20 percent higher than in 1953. Nevertheless the company lost more than $10,000 (CX 635). In 1958, its wholesale business was $179,000 and its retail sales about $555,000. This dropped to $153,000 wholesale and $485,000 retail in 1959 (CX 632 B). Significantly, with the cessation of discounts in December 1960, Cream Top showed a $7,000 net profit for the fiscal year ending September 30, 1961, and more than $13,000 profit for the following fiscal year (CX 900-1). The record indicates that Cream Top lost many retail cus-

tomers to the chain stores (Tr. 977), and suffered its losses in its efforts to match the discounts being given by Dean (Tr. 943).

35. In the case of Cherokee Sanitary Milk Co., Inc., the record indicates that after 1952, both the sales volume and the profits declined until the latter reached substantial loss amounts. In 1957, the company's sales were approximately the same as they were in 1954. The profits, however, were about $25,000 less than 1957. Inasmuch as the discounts paid by Cherokee amounted to only $2,800 in 1957, the reduction in profits appears to be attributable to increased expenses (CX 690). The same analysis appears to apply to the year 1956. In 1958, 1959, and 1960, however, the Cherokee sales declined significantly from previous years, and the losses sustained for those three years were attributed by company officials to the loss of business (Tr. 1185).

36. Walnut Grove Dairy, Inc., sold primarily to home delivery customers. Although sales remained at a high level between 1953 and 1959, the profits showed a gradual but consistent decline until 1960 when there was an actual loss of over $1,000. The record shows that it lost many home delivery customers in 1959, in which year its sales dropped about 10 percent below the proceeding year's level (CX 655). An even greater loss in sales was sustained in 1960. The record indicates that much of this decline in sales was due to the loss of home delivery customers to the chain stores (CX 655). Walnut Grove went out of business on May 1, 1961.

37. In the case of Carrithers Creamery, Inc., sales declined from a high of $333,000 in 1952 to $262,000 in 1956. Thereafter sales increased again reaching a peak of $470,000 in 1960. The company experienced net profits for the first three years, but thereafter sustained losses of varying amounts. Thus, with sales in 1957 about 3 percent higher than in 1954, the loss was over $11,000 compared to a profit of over $1,000 in 1954. The difference in profits for these years is largely attributable to increased costs, but part, at least $2,000, is due to discounts Carrithers paid to meet competition (CX 692, 694-95, 697). As in the case of Purity Maid, some of the wholesale customers were lost when these customers concentrated more of their purchases with a single dairy in order to earn the higher discount rates. In at least four instances, Dean was the beneficiary and Carrithers the victim of such diversion of business (CX 698).

38. Shannon's Dairy had increased profits from 1953 to 1956. Thereafter, profits diminished until there was an actual loss in 1960. It went out of business in 1961 (Tr. 1227).

39. The sales of Oscar Ewing, Inc., remained at a fairly consistent high level from 1952 through 1960. In fact, 1959 and 1960 sales were relatively good, being substantially higher than any other year in that decade. Profits, however, took a sharp drop in 1956 when a small loss was sustained and this loss increased to a maximum of $111,000 in 1960. Much of the loss by Ewing can be attributed to increased costs of operation. Nevertheless, discounts paid by Ewing to meet competition were also a contributing factor to the loss picture. In 1956, about $28,000 in discounts were paid. The discounts paid for 1958, 1959, and 1960 were $31,000, $37,000 and $57,000 respectively. Moreover, much of the increased sales figures for Ewing for 1958, 1959, and 1960 were only diversions of raw milk to other handlers, making a comparison of sales alone misleading (CX 640-41).

40. Plainview Farms, Inc., experienced consistently high sales during the period involved and sustained profits from 1951 through 1955. From 1956 on, the company experienced varying losses, reaching a high of $116,000 in 1959. Plainview has discontinued processing fluid milk products (Tr. 3581). The declining profit picture of this company appears to be due to higher expenses. The record, however, does not contain the financial data in sufficient detail to be sure, particularly since the accounting classifications employed in the records submitted are not necessarily consistent from year to year (RX 155). It is clear, nevertheless, that Plainview lost many of its home delivery customers in late 1958 and early 1959 as a result of the lower prices being charged by the chain store (CX 719-20).

41. Von Allmen Brothers, Inc., after sustaining losses of $5,000 in each of 1955 and 1956, went out of business in 1957.

42. The record contains no information with respect to the profits or losses sustained by Sealtest.

43. RX 160 purports to show the following market share for Dean in Louisville alone:

Year	*Class 1 Per Cent of Market*
1953	3.04
1954	3.76
1955	4.55
1956	5.24
1957	5.80
1958	6.42
1959	7.19
1960	5.84

These percentages were computed by dividing the respondents'

sales in the city of Louisville into the total Class 1 sales of all dairies regulated by Federal Order No. 46. Most of the dairies reporting under that order had sales outside the city of Louisville as well as outside the market area covered by the order. The resulting figures for Dean's market share in Louisville alone cannot be accepted inasmuch as they represent an inappropriate comparison between part of Dean's sales and all sales of the other dairies (Tr. 3703, 3120-24, 3238, CX 885).

44. Some of the loss of home delivery business by the Louisville dairies was due to the introduction of gallon jugs which were sold both in grocery stores and jug or dairy stores. Computations offered by the respondents purport to show that the percentage of gallon jug use to total homogenized milk use increased from 6.2 percent in 1958 to 19.67 percent in 1960 (RX 12, 23). There is also some testimony to the effect that the gallon jug was a very competitive price item and was responsible for the lowering of milk prices (Tr. 3049). The record is silent, however, regarding the prices or pricing practices of the dairy store operators. Moreover, the computed increase in gallon jug use from 6.2 percent to 19.67 percent is not necessarily correct. The statistics used to arrive at this increase include not only *gallon jug* utilization but institutional sales and military contracts involving *bulk* milk (Tr. 3830). Moreover, the statistics comprehend three different market areas: In 1958 the market area under consideration for Federal Order No. 46 was the so-called Louisville market. In March 1960, Federal Order No. 46 took in Lexington as well. It was then that the percentage use of gallons and bulk milk rose abruptly from 14.95 to 19.97 percent. In 1962 the area was enlarged to include Evansville as well (CX 904, Tr. 3833). In addition, the alleged "significance" of gallon jug usage does not survive a close scrutiny. Respondents stress the importance of dairy stores, citing Ehrler's Dairy and Haywood as the ones "most mentioned." Ehrler's utilization of bulk and gallons in October 1959 was only 1.02 percent of the total homogenized milk usage in the area. For the same month, Haywood's utilization of bulk and gallons was only .0008 percent of the total homogenized milk usage (CX 905). The same exhibit shows that Grand Avenue's usage in October 1959 was .84 percent. Some dairy stores such as Cream Top did not even carry gallon jugs (Tr. 2923).

It is concluded and found, therefore, that the gallon jug business of the dairies in the Louisville market has not been shown to have had any real and meaningful effect upon the home delivery business of Louisville dairies.

45. A major contention of the respondents is that the dairies in the Louisville area have engaged in a conspiracy to fix prices and that as a result there was no competition which the respondents could have injured by discriminatory pricing. The record discloses that since at least 1946 and until 1952 there had been a 1 cent per quart differential in retail price between creamline and homogenized milk. During the same time there was a consistent 2½ cent differential between the wholesale and retail price (RX 142). In 1948, all of the principal dairies in the Louisville market were indicted for alleged fixing of milk prices in violation of the Sherman Act (RX 10). Certain of the defendants were fined following their pleas of nolo contendere (RX 11). Although there is an admission of price fixing prior to 1948 in the record (Tr. 2444), this is denied for the period following (Tr. 2448).

When Dean entered the Louisville market in 1952, respondents argue the conspiracy among competing dairies continued. They cite the fact that the dairies admitted to discussing their costs under Federal Order No. 46 (Tr. 2449); that the dairies tried to find out the price at which their competitors were selling (Tr. 2892); that the dairies filed various lawsuits against Dean and even Sealtest, seeking to have both dairies raise their milk prices (Tr. 2686, 2763, 2678, 2680, 2804, RX 71, Tr. 2889); that, according to some of the respondents' officials, the competing dairies conspired with the union's business agent to force the respondents to pay higher wages, and, failing this, to institute a strike in the respondents' plant; and that Sealtest had harassed the respondents with excessive charges for processing.

The record, however, contains no evidence of any post 1948 agreement among the competing dairies for the fixing of sales prices, nor does it contain any evidence from which such inference may be drawn. The mere uniformity of milk prices among competing dairies is insufficient, nor is the exchange of price information necessarily evil. *Pevely Dairy Co.* v. *United States,* 178 F. 2d 363, 369 (8th Cir. 1949) states:

> Neither of them had any power or authority to fix prices and the information given was not with reference to any purpose to fix prices in the future but with reference to prices which had already been fixed * * *. The evidence is undisputed that they did not make any agreement with reference to the fixing of prices and it is equally undisputed that they did not communicate the knowledge of the changes determined upon by reason of any agreement between the dairy companies.

A comparison of prices charged by Sealtest (RX 104), Ewing (CX 650), and Plainview (CX 717) reveals a number of instances where

there were significant differences among the competing dairies. Moreover, prior to 1954, many of the companies sold at uniform prices to all their customers and no discounts were employed. Sealtest, however, did grant a discount to chain stores (RX 107). After 1954 there were a variety of discounts given by the dairies. Kannapel had a 2 to 5 percent quantity discount (CX 735) between April 1959 and October 1960, at which time Ewing and Cream Top were giving 7 percent (CX 634, 648). Cherokee used one set of discounts during the whole period between 1954 and 1960 (CX 689). Sealtest did not commence quantity discounts until 1957 (RX 104).

The probability of a price-fixing conspiracy is further diminished by the fact that the same companies were sustaining very modest returns on sales. Walnut Grove's return on sales for 1950 was 2.81%; Mellwood's was 1.06% in 1952; Purity Maid had 2.08% in 1952 and Cream Top 0.64% in 1951 (CX 654, 656, 721, 635). It strains one's credulity to believe that these dairies conspired to perpetuate a price structure which would result in such small returns.

It is therefore found that sufficient evidence has not been adduced from which may be concluded that a price fixing conspiracy existed among the Louisville dairies between 1952 and 1960.

46. Assuming, arguendo, that a price-fixing conspiracy nevertheless did exist when the respondents entered the Louisville market in 1952 and continued thereafter, the effect of which conspiracy was to eliminate competition among the conspirators, it does not appear that this constitutes a legal excuse for the respondents' discriminatory pricing.

The legal relevancy of this conspiracy first arose in connection with a motion to quash a subpoena directed to National Dairy Products Corporation, in which documentary evidence of the alleged conspiracy was sought. In a ruling dated February 27, 1963, the motion to quash was denied. In that ruling it was pointed out that a Section 2(a) violation stands on two legs—one of price discrimination and another of competitive injury. If the respondents could disprove either of these elements, it would not be guilty of a 2(a) violation. Evidence of the alleged conspiracy was allowed to go into this record for a clearer understanding of the nature of the competition which respondents argue their price discrimination had not injured. In *Moore* v. *Mead Service Co.* 348 U.S. 115 (1954), the trial court charged the jury that the respondent would not be liable if the price cutting was for the purpose of regaining its own

market or for re-establishing competition and not to destroy competition or eliminate a competitor. The Supreme Court took note of the charge and affirmed the lower court's action.

The evidence of the alleged conspiracy is, therefore, pertinent to show whether the respondents in this case were acting to regain their own market or re-establish competition rather than destroy it. Since respondents were new entrants to the market under consideration, there is no issue of regaining their own market. With respect to re-establshing or injuring competition, however, the record is abundantly clear, as shown above, that the respondents' competitors in many instances lost wholesale business when they failed to meet the discount schedule of the respondents, and/or retail business when home delivery customers turned to the chain stores because of the latters' lowered prices, which in turn were the result of discriminatory discounts given them. Even more marked was the sudden loss of profits, even when sales were apparently not impaired. Even though it is undoubtedly true, as respondents argue, that home delivery business diminished with the growth of chain stores and the use of paper cartons in the chain stores and that the dairies suffered because of increased costs as well as by the growth of the jug stores, this cannot constitute a license to the respondents to enter upon a campaign of discriminatory pricing with further anti-competitive effects. It is sufficient if respondents' discriminatory practices injured competition or eliminated a competitor even though there were other factors contributing to such injury or elimination. Any other result would, in effect, open the door to predatory sellers in any area troubled with high costs, diverted business, lost sales, or any of the other problems of marketing which can beset a group of sellers. It cannot be the Congressional intent in Section 2(a) to add to the burdens and woes of such sellers the added and perhaps ultimate burden of competition by discriminatory pricing.

47. It is therefore concluded and found that even if a price fixing conspiracy had existed among the respondents' competitors in the Louisville market, the effect of which was to eliminate effective competition among them, Dean's entry into this market in 1952, although creating competition between it and the alleged conspirators, nevertheless injured that competition, eliminated some of the competitors and otherwise resulted in the evils prescribed by Section 2(a) of the Act.

C. *Competitive Injury to Respondents' Customers*

48. Under Dean's system of discounts described above, chain

accounts such as Winn-Dixie, Kroger, and A & P, and in many instances cooperative buying groups such as Little Giant, Gateway Markets, and Key Markets, qualified for the top quantity discounts, even though individual stores were purchasing quantities substantially below the quantities needed to qualify for the top discounts (Tr. 307, CX 155, 230). On occasion, member stores of cooperative buying groups received the top quantity discounts even though the required average daily points were not met by each of the member stores.

49. In 1958 and 1959, Dean's products were sold in the A & P stores, the Kroger stores, Winn-Dixie and Albers Colonial in the Falls Cities area. These stores and other chain stores pursued a consistent policy of extensive advertising of Dean's dairy products (CX 8, 82, 94, 4, 745; Tr. 1453).

50. There is a Gateway Market located diagonally across the street from a Winn-Dixie store on the Dixie Highway. There is also a Stop & Shop store located directly across the street from Gateway. The Gateway store is also in competition with A & P. During the latter part of February 1959 and until April 8 of that year, Gateway was receiving an 8½ percent discount from Dean. At the same time A & P and Stop & Shop (operated by Albers Colonial) were receiving a 10 percent discount from Dean. Similarly between April 8 and April 30, 1959, Gateway received only 7 percent, while the others got 10 percent discounts. At the same time Winn-Dixie was getting an 8½ percent discount (CX 3, 4, 5, 625). Winn-Dixie received a higher discount even though in many instances the individual Gateway store's purchases were greater than the purchases from the individual Winn-Dixie stores (CX 5 Z-3/6, CX 5 Z-57/71).

51. Another Gateway owner testified that being in competition with Kroger, Winn-Dixie and other chains made it necessary to meet the competitive price advertised and that since his net margin was approximately 1 percent, a difference of 1 percent in his cost was of substantial importance (Tr. 1510-14).

52. Beechmont Super Market is one block away from a Kroger store (CX 34, 116). During part of February 1959, Kroger's discount from Dean was 3 percent higher than Beechmont's. Thereafter until April 7, 1959, Kroger's was 2 percent higher than Beechmont's. For the balance of April 1959, Kroger's was 1½ percent higher than Beechmont's. Parkatt Super Market is located four blocks from the Kroger store and five blocks from Beechmont Super Market. Between February and April 1959, Parkatt's discounts from Dean were 5½ to 6½ percent less than Kroger's and between 2 and 4 percent below Beechmont's (CX 3V-Z1). The record con-

tains other instances of discriminatory pricing by Dean among retailers located within four to ten blocks of each other (CX 615 A-160, 4 S, 116, 8 Z-8, 4 P, 3 O-Q, 615 Z-166, 4 J, 3 C).

53. It is, therefore, found that the discount schedule employed by the respondents in the Louisville market area resulted in cost differences among its store customers, which cost differences ran substantially higher than 1 percent, in many instances 6 or 8 percent, and that such differences in cost were substantial. It is further found that the customers of the respondents paying such higher prices suffered competitive injury as a result.

It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence. *Federal Trade Commission* v. *Morton Salt Co.,* 334 U. S. 37 (1948).

III. *The Terre Haute, Indiana, Market Area*

54. Dean Illinois entered the Terre Haute market in 1954. The market was supplied from Dean's processing plant in Rochester, Indiana. Much of its raw milk came from Indiana producers (Tr. 1852). Subsantial amounts, however, came from outside the State of Indiana (CX 531-38, 545-48; Tr. 218-22).

55. The shipments of the processed dairy products by Dean to its customers in Terre Haute, Indiana, were concededly intrastate shipments. Price quotations, however, were submitted by Dean from its main office in Franklin Park, Illinois, to the Kroger offices in Indianapolis, Indiana (CX 801). Billings by Dean were submitted from its Franklin Park office to Kroger in Indianapolis (CX 802-53; Tr. 1586, 1594, 1866). It is, therefore, found that Dean's sales to Kroger in Terre Haute were in interstate commerce. *Shreveport Macaroni Manufacturing Company* v. *Federal Trade Commission* 321 F. 2d 404 (5th Cir. 1963); *Foremost Dairies, Inc.,* FTC Docket No. 7475, May 23, 1963 [62 F.T.C. 1344]; *Pevely Dairy Co.* v. *United States, supra.*

56. Dean's sales manager testified that when Dean entered the Terre Haute market it sold at the prevailing list prices and gave quantity discounts only later when it learned other dairies were

doing that. His testimony, however, was unsure in point of time or amount (Tr. 1887). In contradiction to these self-serving statements, several of Dean's customers testified that it was Dean who initiated discounts in the Terre Haute market (Tr. 1702, 1726, 1792). It is found, therefore, that Dean did not adopt the discount schedules of its competitors in the Terre Haute market, but initiated them. Assuming, arguendo, that Dean did adopt its competitors' discounts, the defense of meeting competition is nevertheless unavailable to Dean if it adopted the discriminatory system of pricing employed by a competitor. *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

57. Between January 1958 and September 1960, Dean employed a discount schedule for its customers which ranged from 2 to 10 percent; between 2 and 7 percent was allowed independents in 1958 (CX 764-75); 5 to 10 percent was paid them in 1959 and until September 1960. During the entire period, however, Kroger stores received a 10 percent discount (CX 776-94, 801).

58. One of Dean's customers, Elmerick Brothers, located four blocks away from the Kroger store and in competition with that store, received discounts of 4 or 5 percent compared to Kroger's 10 percent. His annual net margin of profit ranged from 2 to 3 percent (Tr. 1683-86, 1714).

59. Beatty's Grocery, another of Dean's customers located four blocks from a Kroger store, received 5 percent discount compared to Kroger's 10 percent (Tr. 1737-39). There was similar testimony from other individuals of the Terre Haute area (Tr. 1784, 1801, 1776). As in the case of the Louisville grocers, *supra,* the difference in price paid for Dean's milk raises the reasonable probability of competitive injury. Although the amount of money involved in the failure of these grocers to receive the maximum discounts which was allowed Kroger averages less than $3 per week, which the respondent urges should be deemed in the *de minimis* category, a small proportion of a grocer's customers can influence the price policy of the entire operation.

> There are certain subtle but very important aspects of the concept of price elasticity as it applies to food retailing especially. Certain customers of a retail food establishment are apt to be very price conscious and thus would respond promptly to price changes made by one vendor, and others not so price conscious would either be slow to respond or would not respond at all.

It follows, therefore, that the patronage of most food stores is composed of a certain percentage of customers who are easily enticed by low-price specials. Since the profit of the operation is derived in part at least from this volatile group it is important to retain their patronage. Thus, a small proportion of one's customers might influence the price policy of the entire operation. Cassady, *Competition and Price Making in Food Retailing* (1962).

As the Court stated in the *Morton Salt* case, *supra:*

There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect the merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commence, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store. [At page 49.]

IV. *The Evansville, Indiana, Market Area*

60. Dean entered the Evansville, Indiana, market in 1952, using Cardinal Distributing Company as distributor (Tr. 2114). Immediately upon its entry, Dean established a price for its homogenized milk at the same level that the Evansville dairies were selling their creamline milk and 1 cent lower than the established Evansville price for homogenized milk (Tr. 519). Dean's prices in Evansville were 2 cents per half gallon lower than Dean's prices in Louisville (CX 609 Z-3, 4, 5, 6, 8, 10, 11, 12, 14, 15, 21, 23; 590; 923; Tr. 676).

61. Prior to Dean's entry in the Evansville market, the Blue Ribbon Dairy had been supplying Kroger and A & P. Dean replaced Blue Ribbon in the Kroger stores (Tr. 487), and took away much of Blue Ribbon's A & P business as well (Tr. 488). Blue Ribbon's production fell from 1200 gallons of milk per day in 1952 to 750 gallons of milk per day in 1953. Blue Ribbon went out of business in September 1953.

62. Dairy Service, Inc., was another Evansville dairy. Between April 1953 and April 1954, its sales declined approximately $40,000 and its profits fell from over $7,000 to less than $2,000 (CX 587).

63. Dairy Service reduced its price to remain competitive with Dean, but went out of business on May 1, 1954 (Tr. 375).

64. In July 1954, Dean introduced quantity discounts in the Evansville market. These discounts allowed quantity purchasers

lower net prices than other customers and, in addition, certain customers were given service and handling discounts (CX 44, 45).

65. Among Dean's customers receiving the highest discounts in the Evansville market were the A & P stores, who, between June and November 1960, were charged approximately 32 cents per half gallon. Dean's delivered cost during that time was more than 37 cents per half gallon (CX 45, 616 Z-44/55, 607 Z-102/214).

66. American Dairy is another local dairy in the Evansville area. Its sales and profits for the fiscal years 1957, 1958, 1959, and 1960 are as follows (CX 587):

	Sales	*Profits*
1957	$2,663,144	$33,452
1958	2,501,531	22,453
1959	2,490,735	27,440
1960	2,509,347	21,072

Much is made of the fact that the American Dairy increased its wholesale routes from 10 to 17 (Tr. 644). Actually, however, it acquired four routes from each of two companies with which it merged during that period (Tr. 647).

67. Dean's sales and profits or losses for 1958/1960 in the Evansville area are as follows:

	Sales	*Profits or (Losses)*
1958	$255,842	($7,371)
1959	288,356	3,917
1960	324,247	(1,871)

For the same years Dean granted discounts of $10,943, $20,448, and $27,793 respectively.

68. Respondents compute Dean's share of the Evansville market at less than 2 percent. The computation for Dean's share comprehends only Dean's sales in the Evansville area. The computations made for the other dairies in the Evansville area include sales both within and without that area. This discrepancy renders the conclusion of 2 percent for Dean suspect and unacceptable. Although it is conceded and found as a fact that American Dairy and Ideal have larger shares of the Evansville market than does Dean, the fact that Dean has a relatively small share of the market does not give it an exemption from the antitrust law. *H. J. Heinz Co.* v. *Beech-nut Life Savers, Inc.*, 181 F. Supp. 452 (S.D.N.Y. 1960). The fact re-

mains that the respondents are a large dairy, having operations in a number of states. Although their operations in Evansville were relatively small, their overall financial resources were not. Their sale of dairy products in Evansville at prices lower than they charged in Louisville despite increased costs, with the resulting price for homogenized milk below the preestablished competitive level in Evansville for such milk, constituted territorial price discrimination and forced two dairies out of business even before the introduction of quantity discounts. With the introduction of quantity discounts, even large competitors found their business affected and profits reduced.

V. *The Henderson, Kentucky, Market Area*

69. Dean Kentucky entered the Henderson, Kentucky, market in 1952, using Cardinal Distributing Company as the distributor. In 1957, the respondents took over Cardinal's routes in Henderson.

70. The price of homogenized milk in the Henderson market prior to Dean's entry was 23½ cents per quart. Dean began by charging 20½ cents per quart or 40 cents per half gallon. At the same time, in November 1952, Dean was charging 2 cents more per half gallon for the same milk in Louisville despite the added cost of bringing the milk from Louisville to Henderson.

71. The Henderson Creamery Company, Inc., is a local dairy in Henderson, Kentucky, which supplied the Kroger stores with dairy products until 1952. When Dean came into the market it took away virtually all of the Kroger business from Henderson Creamery (Tr. 693).

72. In May 1953, as a result of court action instituted by Henderson Creamery, Dean was restrained from selling at prices lower than it charged in Louisville except as necessary to meet competition.

73. In July 1955, Henderson Creamery discovered that Dean had been granting quantity discounts to customers for some time. Henderson Creamery took steps to meet these discounts (Tr. 723; CX 605).

74. In 1958, Henderson Creamery made a profit of over $15,000. This was reduced to $6,000 in 1959, and in 1960 it incurred a loss of over $7,000 (CX 598).

75. In addition to Dean's territorial price discrimination by its charging less to Henderson customers than to its Louisville customers, Dean resorted to sales below cost on different occasions. Dean's delivered cost per half gallon of homogenized milk in Henderson between June and November 1960 ranged from a low of 36.32 cents to a high of 39.61 cents (CX 616 Z-45/55). During the same time, Dean's price to A & P in Henderson was 31.5 cents (CX 42, 607 Z-102/214).

76. It is found, therefore, that Dean's practice of price discrimination in the Henderson market area has been, or may be, substantially to lessen or destroy competition between the respondents and their competitors.

VI. *The Lexington, Kentucky, Market Area*

77. Dean entered the Lexington, Kentucky, market area December 1, 1958. Its initial price schedule to A & P in Lexington called for 36 cents per half gallon. Its charge to A & P in the Falls Cities market at the same time was 37.4 cents per half gallon (CX 1 M, 81, 39, 42 A & B, 606 Z, 200, 212). Dean's delivered cost in Lexington for a half gallon of homogenized milk in December 1958 was more than 44 cents, and, in fact, all of the products sold in Lexington by Dean at that time were being sold below cost.

78. Dean reduced its Lexington price to A & P on December 15 to 34.9 cents, thus increasing the spread between it and the Falls Cities price. In addition, at various times during 1958 and 1959, Dean gave certain free gifts such as 8 ounces of cottage cheese or a quart of buttermilk with a half gallon of homogenized milk.

79. Prior to Dean's entry into the Lexington market, the established price for half gallons of homogenized milk was 38 cents (CX 730; Tr. 1370). Dean, however, engaged in territorial price discrimination, not merely meeting the 38 cent price level but reducing the price to 36 cents and then to 34.9 cents. The 38 cent price was not reached by Dean until April 1959. Respondents defend the program of low prices and give-aways as merely temporary promotional campaigns. Four months, however, appear to be unduly long for mere promotion, nor are give-aways staged at weekly intervals, or nearly such, over a period of four months merely promotional.

80. In addition to the price cuts on homogenized milk and the give-away programs, Dean engaged in price reductions on other commodities such as cottage cheese and Vim, offering them for sale at substantially below cost (CX 1 N, 606 Z-232).

81. From December 1958 through December 1959, Dean sustained a net operating loss in the Lexington market for each of the months involved. In 1960, it also had a loss in that market. Sales, however, increased from only $9,000 in December 1958 to over $19,000 in December 1960 (CX 616 Z-252/331).

82. Ashland Dairies, Inc., a local dairy operating in the Lexington market, served both A & P and Winn-Dixie. When Dean entered the Lexington market with prices below the preestablished prices in the area, both Winn-Dixie and A & P stopped doing business with Ashland (Tr. 1369, 1375). Winn-Dixie's annual purchases exceeded $26,000 (CX 722).

83. As a result of its lowered costs, A & P reduced its price to customers from 42 cents to 39 cents. Ashland met Dean's price reduction (Tr. 1376) as well as the give-away program instituted by Dean. Ashland sustained a loss of over $5,000 for the month of December 1958 compared to a profit of almost $3,000 for the month of December 1957 (Tr. 1380).

84. Ashland went out of business in April 1961.

CONCLUSIONS

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

2. Respondents have engaged in commerce within the meaning of Section 2 (a) of the Clayton Act, as amended.

3. In the course of such commerce respondents have discriminated in price between different purchasers of commodities of like grade and quality.

4. The effect of such discrimination has been, and may be, substantially to lessen competition or tend to create a monopoly 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.

5. Proof is lacking that the respondents' lower prices to some of their customers were made in good faith to meet an equally low price of a competitor.

6. The acts and practices of the respondents, as charged in the complaint, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

ORDER

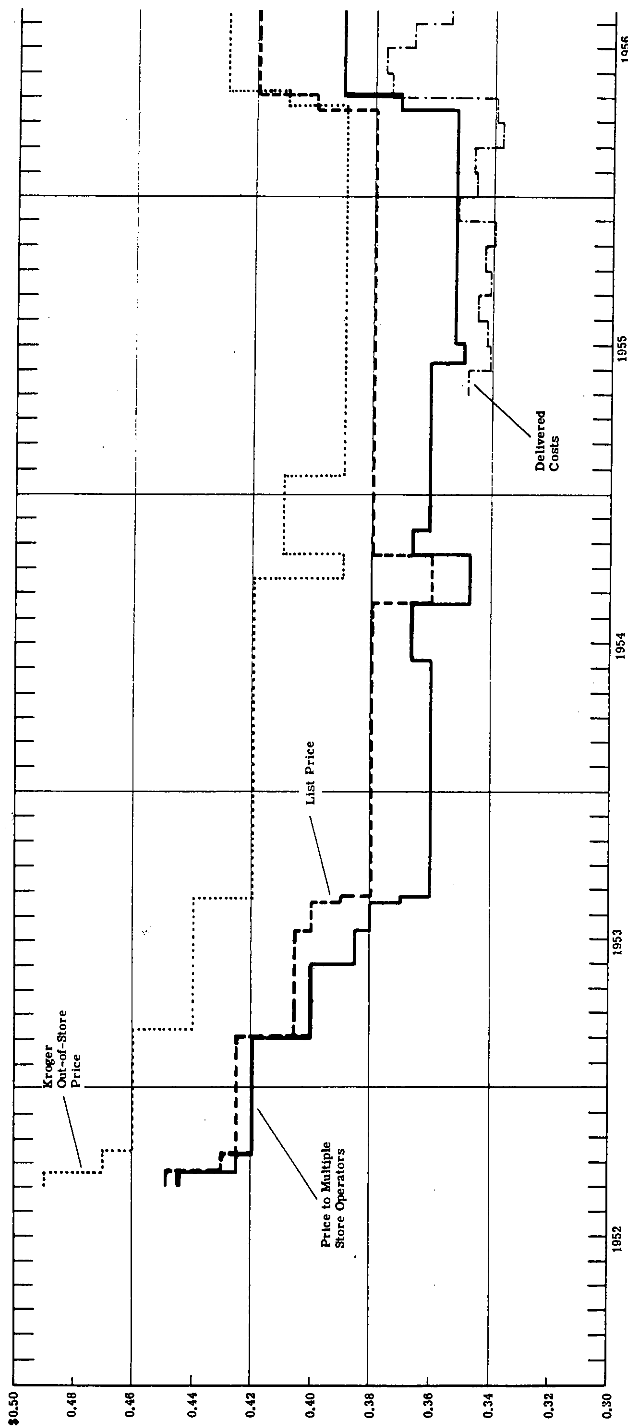
It is ordered, That respondents, Dean Milk Company, a corporation, and Dean Milk Co., Inc., a corporation, and their officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of fluid milk or other dairy products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from, directly or indirectly, discriminating in price by selling fluid milk or other dairy products of like grade and quality to any purchaser at a net price higher than the price granted to other purchasers:

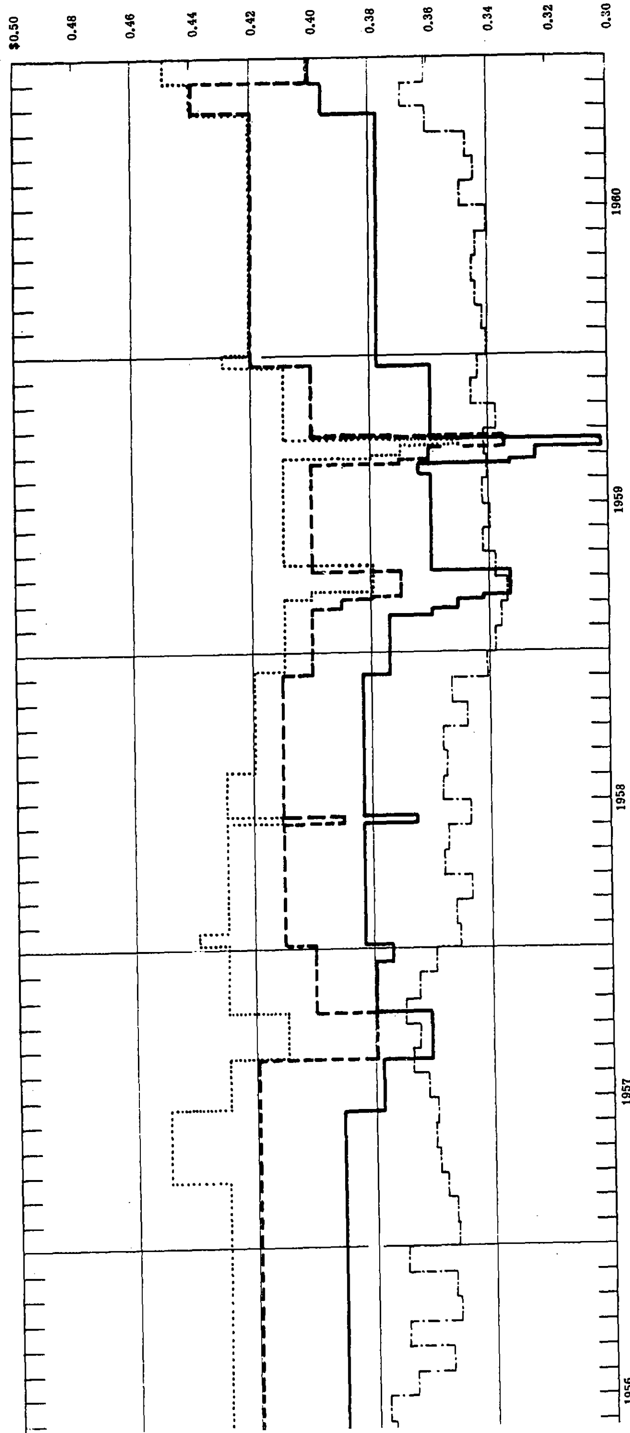
1. Where respondents, in the sale of said products, are in competition with any other seller.

2. Where any purchaser who pays the higher price does in fact compete in the resale of said products with the purchaser who receives the benefit of the lower price.

CHART I—Appendix

COMPARISON OF DEAN'S LIST PRICE; DEAN'S PRICE TO MULTIPLE STORE OPERATORS QUALIFYING FOR TOP DISCOUNTS; DEAN'S DELIVERY COST; AND KROGER'S OUT-OF-STORE PRICE—HALF GALLONS HOMOGENIZED MILK—LOUISVILLE AREA (Source: Tables III and IV—Appendix, Proposed Findings of Counsel Supporting the Complaint).




$0.50
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1960
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1956

OPINION OF THE COMMISSION

OCTOBER 22, 1965

BY DIXON, *Commissioner:*

The complaint in this case charged respondents with violations of Section 2(a) of the Clayton Act, as amended,[1] through discriminations in price which may substantially lessen competition or injure, destroy, or prevent competition as proscribed by the statute on both the seller or primary level and the customer or secondary level. The examiner found that the allegations of the complaint had been sustained and the case is presently before the Commission on appeal by respondents from the examiner's initial decision.

Respondent Dean Milk Company, hereinafter referred to as Dean Illinois, maintains its executive offices in Franklin Park, Illinois, and is engaged in the processing and sale of fluid milk and other dairy products in a number of states. Some of its operations are carried on through subsidiaries. Respondent Dean Milk Co., Inc., located in Louisville, Kentucky, and hereinafter referred to as Dean Kentucky, is one of these subsidiaries. Dean Kentucky was organized in 1952 and operates a processing plant in Louisville which supplies surrounding Kentucky and Indiana areas with Dean products. The examiner disregarded the separate corporate entities of these respondents and held that for the purposes of this case, Dean Kentucky could be considered to be a branch of Dean Illinois. The evidence demonstrates that Dean Kentucky is wholly owned by Dean Illinois and that the acquisition of a Louisville dairy, the genesis of the subsidiary, was financed from the earnings of the parent. During 1952 and 1953, funds from the earnings of Dean Illinois were made available to Dean Kentucky.[2] A substantial portion of the capital necessary for the construction of a new processing and bottling plant in Louisville was loaned to Dean Kentucky by Dean Illinois. Part of this loan was discharged through issuance of stock by Dean Illinois.[3] Four of the Kentucky corporation's five directors serve concurrently as directors of the parent. Three of the four primary officers of Dean Kentucky are officers of Dean Illinois and reside in Illinois rather than in Kentucky.[4] These officers of the subsidiary receive no salary or other compensation from the subsidiary, but are wholly paid by the parent company.[5] The sole official of the subsidiary who is not in some

[1] 49 Stat. 1526 (1936), 15 U.S.C. 13(a).
[2] Tr. 1650-1653.
[3] Tr. 1659-1662.
[4] Tr. 1652-1654; CX 744(A), (C).
[5] Tr. 1657.

way directly affiliated with the parent is Mr. Tom T. Thompson, a director and vice-president of Dean Kentucky. During 1952-1960, the span of time covered by the evidence, Mr. Thompson resided in Louisville, where he functioned as general manager of the Kentucky operation, and received his salary from the subsidiary. However, at the time of the hearing, he was regional manager for the parent's entire southern operation, including the Kentucky company, and resided in Tennessee.[6] Thompson apparently had little independence in his management of the Kentucky operation. The vice-president in charge of sales of Dean Illinois, although not an officer or director of the subsidiary, was charged with the "* * * responsibility to see that each division manager, such as Mr. Thompson in Memphis and Louisville operates his division at profit." In this position, he issued instructions on policy matters to Thompson. Operational decisions, such as decisions to change prices, grant additional discounts, or initiate advertising programs, were subject to the final approval of the parent's officers.[7] In addition, the cost accounting, advertising, and labor relations problems of the Kentucky corporation were handled by the parent from its Illinois office, and the persons performing these functions received compensation from the parent rather than from the subsidiary.[8]

Considered in the aggregate, all of these factors indicate a substantial degree of identity between Dean Illinois and Dean Kentucky and justify a conclusion that Dean Kentucky, rather than being an independent entity, is operated as a completely controlled division or branch of Dean Illinois. Where a parent corporation dominates a subsidiary to such an extent that the subsidiary is merely an agent or an instrumentality of the parent, and where there is sufficient public interest involved, the corporate entity may be disregarded. *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510 (1941); *Gulf Oil Corp.* v. *Lewellyn,* 248 U.S. 71 (1918); *Southern Pacific Co.* v. *Lowe,* 247 U.S. 330 (1918); *Chicago, M. & St. P. Ry.* v. *Minn. Civic Assn.*, 247 U.S. 490 (1918); *United States* v. *Lehigh Valley R.R. Co.*, 220 U.S. 257 (1911); *G.E.J. Corp.* v. *Uranium Aire, Inc.*, 311 F. 2d 749 (9th Cir. 1962); *Fitz-Patrick* v. *Commonwealth Oil Co.*, 285 F. 2d 726 (5th Cir. 1960); *American News Co.*, 58 F.T.C. 10, 23 (1961), *aff'd, American News Co.* v. *Federal Trade Commission,* 300 F. 2d 104 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962). Here, we think the degree of dominance by

[6] Tr. 285, 1656, 1658, 1666.
[7] Tr. 1673-1677.
[8] Tr. 1669-1672.

the parent over the subsidiary justifies a conclusion that Dean Illinois was the perpetrator of the alleged offenses and requires that it be held accountable for the acts of its subsidiary. Accordingly, the acts and transactions of Dean Kentucky will, for the purposes of this case, be deemed to be those of Dean Illinois.

The price differences with which this case is concerned occurred in several geographical locations and are of two types. In Louisville, Kentucky, and in Terre Haute, Indiana, the price differences emanated from a quantity discount system which permitted large buyers to purchase products for lower prices than smaller buyers in the same market. In Louisville, an area served by the Louisville processing plant of Dean Kentucky, complaint counsel offered evidence to show that the system had the proscribed statutory effects upon competition at both the primary and secondary levels. In Terre Haute, an area served by the Rochester, Indiana, processing plant of Dean Illinois, the alleged statutory injury was confined to the secondary level. The second type of price difference was territorial or geographical. The evidence showed that respondents' prices in Evansville, Indiana, Henderson, Kentucky, and Lexington, Kentucky, all of which are served by the Louisville processing plant, were lower than the prices in Louisville. Complaint counsel presented evidence in support of their theory that the price differences caused the requisite statutory injury on the seller or primary level in each of these three smaller cities in which respondents' market position was not as well established as in Louisville. Respondents do not contest the existence of price differences on this appeal, but instead argue vigorously that the evidence fails to show the requisite statutory injury. Since the greater part of the evidence deals with such injury at the primary level, the Commission will first address itself to that question.

I

A conclusion that there is a "reasonable possibility"[9] of adverse competitive effects upon competition on the primary or seller level does not require findings of either actual injury to competition or actual injury to particular competitors, nor does it re-

[9] In deciding whether the effect of a discrimination "may be" substantially to lessen competition or to injure, destroy, or prevent competition at either the primary or secondary levels, the courts have indicated that the test to be applied is whether there is a "reasonable possibility" that such substantial effects will emanate from the price discrimination. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726 (1945); *Monroe Auto Equipment Co.* v. *Federal Trade Commission*, 347 F. 2d 401 (7th Cir., June 16, 1965); *Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F. 2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (March 1, 1965); *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958).

quire a finding of an intent on the part of a discriminator to injure or destroy a competitor. Congress clearly intended to prevent in their incipiency practices which might harm the competitive process and thus explicitly provided that a showing of actual injury was not necessary. Although many of the cases which have discussed primary line injury involve factual situations in which predation was present, neither the legislative history of the statute nor these cases stand for the proposition that predation is a requisite element in primary line cases. An examination of the legislative history of Section 2 of the Clayton Act indicates that predation, although one of several factors to be properly used in the determination that there is a reasonable possibility that a price discrimination may substantially affect competition, was not made a necessary element in such a determination. It is true that one of the motivating factors behind the passage of the Clayton Act in 1914 was a desire on the part of Congress to curb predatory local price cutting. As originally proposed and as passed by the House, Section 2 of the Clayton Act was a criminal statute requiring proof of a predatory intent. There was no good faith meeting of competition proviso or defense. As explained by Representative Webb of North Carolina, the proposed Section 2—

> * * * forbids any person to discriminate in price between different purchasers of commodities in the same or different sections, if such commodities are sold for use within the United States * * * and if such discriminating sale is made with the purpose or intent to destroy or wrongfully injure the business of a competitor of either such purchaser or seller.[10]

The "intent" clause was amplified by the following colloquy:

> Mr. WEBB. I think the seller who gives a discount to one person and not to another ought to be included within the provisions of this section, and is, in my opinion.
>
> Mr. GARNER. He ought to be.
>
> Mr. BARKLEY. But the purpose and object must be evil?
>
> Mr. WEBB. Yes; the object must be evil, and to destroy the competitor or wrongfully injure him.[11]

In this form, the bill was first presented to the Senate.[12] Before passage, however, Section 2 was substantially altered.[13] The criminal sanction for violation became civil and the good faith meeting competition proviso was inserted. Significantly, the element of predation was stricken, thus easing the almost insurmountable bur-

[10] 51 Cong. Rec. 9069 (1914).
[11] *Id.*, at 9070.
[12] *Id.*, at 13659.
[13] *Id.*, at 15589, 15638.

den of establishing such an intent in every case.[14] It is not surprising, therefore, that the House Committee report, which referred to the "destructive intent" of the discriminator, is sometimes cited in support of the proposition that a showing of predation is necessary in a primary level competitive case.

In most of the early cases decided under Section 2, some reference was made to the motives of the perpetrator of the discrimination. In some of these cases, findings of an absence of good faith were made. However, a close reading of the cases indicates that the purpose of the findings was to negate an effort to establish a defense under the good faith meeting of competition proviso. *E.g., Fleischmann Co.,* 1 F.T.C. 119 (1918); *Pittsburgh Coal Co.,* 8 F.T.C. 480 (1925). In others, affirmative findings of predation are present, but in many instances such findings were made in connection with charges brought under Section 5 of the Federal Trade Commission Act. *E.g., Wayne Oil Tank & Pump Co.,* 1 F.T.C. 259 (1918); *Galena Signal Oil Co.,* 2 F.T.C. 446 (1920); *Pittsburgh Coal Co., supra.* The most celebrated case brought under Section 2 prior to passage of the Robinson-Patman Act is *Porto Rican American Tobacco Co.* v. *American Tobacco Co.,* 30 F. 2d 234 (2d Cir. 1929), *cert. denied,* 279 U.S. 858 (1929). There, American, a large company with substantial assets, cut its prices in Porto Rico, thereby threatening the continued existence of Porto Rican, a smaller company.[15] In the eyes of the court, facts indicating the possible elimination of Porto Rican constituted a sufficient showing of possible substantial competitive injury. Although the evidence clearly revealed predation,[16] this factor is discussed in the opinion *after* the court had already concluded that the discrimination would substantially lessen competition and appears to have been directed primarily toward negation of the meeting competition

[14] Senator Works of California made the following statement during debate before the element of predatory intent had been deleted:

* * * Any legitimate effort to prevent unfair and oppressive monopolies meets my hearty approval. Therefore the provision of the bill making it a criminal offense to discriminate in prices is to be commended; *but the provision is weakened and its practical effect almost completely destroyed by making the specific "intent thereby to destroy or wrongfully injure the business of a competitor" necessary to constitute the offense.* It would seem from this that the purpose of the bill is not to protect the public but competitors in business * * *. What we need to do is to protect the people of the country from unjust or exorbitant charges. Under this bill, in order to establish the specific intent, to injure a competitor and not the public is made the test. And besides the fact that the theory upon which the bill proceeds is wrong, *the intent would generally be impossible to prove.* 51 Cong. Rec. at 12277 (emphasis added).

[15] It is interesting to note that when the discrimination began, Porto Rican, the injured competitor, had the largest volume of sales in the local market. 30 F. 2d at 236.

[16] The court first noted that discrimination was not made in good faith. Then it went on to state that the evidence proves that American "intended to punish, and, if possible, eliminate, (Porto Rican) as a competitor" and that it shows "* * * a design and plan to put the appellee out of business * * *." 30 F. 2d at 237.

proviso. Although predation was clearly one of the factors considered by the court in its determination of possible competitive injury, there is no indication that the court regarded it as a necessary element.

When Section 2 of the Clayton Act was amended by the Robinson-Patman Act in 1936, predatory area price discrimination was included within those practices prohibited by Section 3 of that Act, a criminal provision which requires proof of an anticompetitive intent. Thus, it is apparent that Congress regarded predatory area price discrimination as a particularly anticompetitive practice and placed special emphasis upon it. However, there is no indication that Congress intended to limit the application of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, to the type of area price discrimination actionable under Section 3 of the Robinson-Patman Act or in any other way to curtail the application of Section 2 to price discriminations affecting the seller level. As the Supreme Court, speaking through Chief Justice Warren, noted in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960):

> It is, of course, quite true—and too well known to require extensive exposition— that the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congressional concern over the impact upon secondary-line competition of the burgeoning of mammouth purchasers, notably chain stores. However, the legislative history of these amendments leaves no doubt that Congress was intent upon strengthening the Clayton Act provisions, not weakening them, *and that it was no part of Congress' purpose to curtail the pre-existing applicability of § 2(a) to price discriminations affecting primary-line competition.* (363 U.S. at 543-544; emphasis added.)

It appears that the Robinson-Patman Act, through its amendment to the competitive injury test of Section 2, actually strengthened the applicability of the price discrimination statute to nonpredatory price discrimination affecting competition among sellers. That amendment prohibited price discrimination, the effect of which may be to injure, destroy, or prevent competition *with the grantor* of the discrimination. As Congressman Utterback stated, the statute would apply—

> * * * where a nonresident concern opens a new branch beside a local concern, and with the use of discriminatory prices destroys and replaces the local concern as the competitor in the local field. Competition in the local field generally has not been lessened, since one competitor has been replaced by another; but competition with the grantor of the discrimination has been destroyed.[17]

[17] 80 Cong. Rec. at 9417 (1936).

The major primary line injury cases decided subsequent to passage of the Robinson-Patman Act have, for the most part, involved factual situations in which predation on the part of the discriminator existed. In a few cases, the intent to drive a competitor out of business has been particularly flagrant. *E.g., E. B. Muller & Co.*, v. *Federal Trade Commission*, 142 F. 2d 511 (6th Cir. 1944); *Forster Mfg. Co.* v. *Federal Trade Commission*, 335 F. 2d 47 (1st Cir. 1964), *cert denied*, 380 U.S. 906 (March 1, 1965). Where the intent is boldly expressed and proved by a preponderance of the evidence, this factor usually permeates the entire opinion and may even eclipse the discussion of other factors. In other cases, however, predatory intent, although present, appears to be less important. In *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954), the Supreme Court, there speaking through Mr. Justice Douglas, found the necessary indicia of competitive injury under Section 2(a) through the destruction of a competitor. The Court's discussion of the discriminator's "purpose to eliminate a competitor" occurred solely in conjunction with its conclusion that Section 3 of the Robinson-Patman Act had been violated.[18] In *Maryland Baking Co.* v. *Federal Trade Commission,* 243 F. 2d 716 (4th Cir. 1957), the court of appeals, noting that there was evidence of a purpose to drive a competitor out of business, affirmed with little discussion the Commission's finding of possible injury to competition. However, the primary factors considered by the Commission in its determination were loss of sales and a decline in the injured competitor's share of the market. Significantly, the injured competitor there dominated 91.3% of the local market prior to the respondent's discriminatory activities and still controlled 58.2% at the time of trial.[19] In *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960), the court of appeals summed up the evidence of actual injury relied upon by the jury as follows:

> There was testimony that the appellant's 20¢ delivered price to the principal contractors deprived the appellee of its "bread-and-butter" business and prevented it from enlarging its plant facilities to take care of the demand, or to pursue a vigorous sales policy. There was evidence that in a healthy market the appellee could have enlarged its plant within a short time to enable it to compete for the business of the principal contractors in this particular area. (269 F. 2d at 956.)

The jury was instructed that it might consider the appellant's size

[18] 348 U.S. at 118. Section 3 of the Robinson-Patman Act requires a finding that the discriminations is "for the purpose of destroying competition, or eliminating a competitor * * *." 15 U.S.C. 13(a).

[19] 52 F.T.C. 1679, 1689 (1956).

and economic power in "determining the tendency of the price discrimination to substantially lessen competition and create a monopoly." Although the court of appeals observed that the appellant had "utilized its dominant market power for predatory ends," there is no indication that the jury was instructed that a finding of predatory use of market power was in any way necessary. In *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956), the court specifically dispelled the notion that a finding of predatory intent is required. In discussing this question, the court stated:

Plaintiffs complain that the District Judge required them to prove that defendants had an illegal intent to destroy competition, but this is not true. Of course, intent is not an essential factor to a § 2(a) violation, although, if the intent to destroy were found to exist, it might tend to render the injury probable. The court did find that no defendant did any act with intent or design to prevent or destroy competition in the ice cream products business or with intent to restrain or lessen trade or commerce between the several states. But this was made in negation of an allegation in plaintiffs' complaints charging such an intent and a conspiracy to carry it out. (231 F. 2d at 369.)

That case was dismissed because the court could find no likelihood of injury attributable to the defendant's acts and because it was convinced that the different prices resulted from good faith efforts to meet competition.

Where the actual effects of a territorial price discrimination have been limited to temporary diversion of business and minor losses of sales and profits, and there is no indication of predation, the courts have manifested a reluctance to find possible competitive injury and a violation of Section 2(a). *E.g., Minneapolis-Honeywell Regulator Co.* v. *Federal Trade Commission,* 191 F. 2nd 786 (7th Cir. 1951), *cert. dismissed,* 344 U.S. 206 (1952); *Anheuser-Busch, Inc.* v. *Federal Trade Commission,* 289 F. 2d 835 (7th Cir. 1961). In *Minneapolis-Honeywell,* the respondent's share of the market decreased from 73 percent to 60 percent, while that of its competitors increased. Moreover, it appears that the prices charged by its competitors were generally lower than those of that respondent and there was no evidence that it undercut competitors' prices. In *Anheuser-Busch,* the only visible effects of the discrimination were temporary shifts in market shares. The absence of evidence of permanent changes in the market structure appears to have been crucial in the court's conclusion that no actual injury to competition had occurred. In holding that there was no showing that the price reductions may produce adverse effects upon competition, the court noted the absence of any predatory intent and com-

mented upon the fact that the respondent seemed to be using its market strength fairly.

It is the Commission's opinion that a finding of possible substantial competitive injury on the seller level is warranted in the absence of predation where the evidence shows significant diversion of business from the discriminator's competitors to the discriminator or diminishing profits to competitors resulting either from the diversion of business or from the necessity of meeting the discriminator's lower prices, provided that these immediate actual effects portend either a financial crippling of those competitors, a possibility of an anticompetitive concentration of business in larger sellers, or a significant reduction in the number of sellers in the market. In such a situation, the finding of possible competitive injury is not bottomed solely upon the fact that there has been or may continue to be diversion of business or loss of profits. Instead, the emphasis is placed upon the reasonably foreseeable results of the diversion or loss of profits. If the diversion of business and loss of profits herald a trend toward further losses of business and profits and the increased concentration of business in fewer sellers, or there is a reasonable possibility that some sellers will be driven out of business, there is then sufficient cause to conclude that the effect of the price discrimination may be substantially to lessen competition or tend toward creation of a monopoly, as proscribed by the original Section 2 of the Clayton Act or that competition with the discriminator may be lessened or injured, as proscribed by the Robinson-Patman amendment to Section 2. Although the demise or potential elimination of only one competitor will not automatically result in a finding of seller line competitive injury, the actual or possible elimination of a single seller in a market in which there are only a few sellers or where there is a reasonable possibility that a continuation of the price discrimination will cause the elimination of others will be sufficient to support the required finding. Moreover, if there is a reasonable possibility that the diversion of business or loss of profits attributable to the price discrimination has already rendered or will render competing sellers less able to compete with the discriminator by preventing the expansion of facilities or the use of aggressive sales or advertising campaigns, or otherwise, statutory injury as proscribed by the Robinson-Patman amendment to Section 2 of the Clayton Act has occurred. Thus, if a large national firm enters a new market with the intent of merely securing a foothold in the market or of wresting a share of the market from another competitor, either smaller or larger, but, in carrying out this legitimate

purpose, utilizes a price discrimination which actually lessens or which may lessen the ability of local firms to compete with it, the requisite statutory injury has occurred. In determining whether or not there is a reasonable possibility that the ability of local firms to compete with the new entrant will be lessened, factors such as the relative sizes of the new entrant and the local firms, the length of time the discrimination is practiced, the severity of the price cut, and the relationship between demand and price in the market should be considered. With these tests in mind, we turn to a consideration of the facts of this case.

II

The Falls Cities market, also referred to in the transcript as the Louisville market, encompassed the city of Louisville, its Kentucky environs in Jefferson County, Kentucky, and the neighboring Indiana cities of New Albany, Jeffersonville, and Clarksville. Dean Illinois obtained a foothold in Louisville through the formation of the Kentucky subsidiary and the acquisition of Fenley's Model Dairy in September of 1952. At that time, Fenley supplied twenty-two Kroger stores and twenty-one A & P stores in Louisville, all of which carried the products of at least one, and sometimes two, other dairies. Respondents immediately extended their activities to New Albany, Jeffersonville, and Clarksville, Indiana, through sales to these two chain accounts and other smaller accounts.[20] Respondents made no home delivery or other retail sales directly to consumers, but instead functioned in the Falls Cities market, and in other markets with which this case deals, as wholesalers and, as a result, sold their products only to grocery stores. There was evidence that they solicited and sold not only to large chain stores, but also to grocery accounts of all sizes.

Dean products were distributed to purchasers throughout Louisville and the Kentucky suburbs by employees of Dean Kentucky. In the Indiana portion of the market, however, Dean products were delivered to purchasers by the Cardinal Distributing Company, a partnership composed of two individuals who had been previously employed in Chicago by Dean Illinois. Cardinal, which owned the trucks used in delivery, obtained Dean products at the Louisville processing plant and delivered them to purchasers in Indiana. Chain stores receiving delivery from Cardinal made their payments directly to the Dean office in Louisville, but Cardinal collected payment from other purchasers.[21] All purchasers not

[20] Tr. 3438-42.
[21] Tr. 2113-14.

obligated to pay cash on delivery were termed "house accounts" and were billed by and submitted their remittances directly to respondents.[22] Cardinal "settled" with respondents at the end of each week by paying a special "dock" price for each unit delivered to purchasers other than "house accounts."[23] Since the "dock" price paid by Cardinal was lower than the wholesale price charged purchasers in Indiana, Cardinal's compensation for delivery was the difference between the two prices. For delivering to "house accounts," Cardinal received a commission equivalent to its "profit" derived from other transactions.[24] Cardinal sometimes allowed cash purchasers to defer their payment a day or two, but apparently always collected before it was required to account to respondents for the "dock" price.[25]

Respondents concede that certain of the "house accounts," such as A & P, Kroger, and Winn-Dixie, purchase from them rather than from Cardinal,[26] but contend that all other retailers purchasing their products in the Falls Cities market are purchasers from Cardinal. We think it clear that all "house accounts"—purchasers which were billed by and which made their payments directly to respondents—are purchasers from respondents and that Cardinal is merely a commission agent distributing the products to these purchasers. Moreover, we think that the purchasers which paid Cardinal upon delivery should also be considered to be purchasers from respondents for purposes of Section 2(a) of the amended Clayton Act. Respondents solicited all prospective purchasers in new markets through letters sent out under the Dean letterhead.[27] The letter states that Dean products will be sold in the area in the near future and suggests that interested retailers contact respondents. Nothing is said about contacting a distributor. The letter indicates that Dean products will be backed by continuous advertising and promotions, aided by the Dean merchandising staff. Respondents created consumer demand for Dean products in new markets by newspaper advertising which they financed, and supplied Cardinal with all additional sales material which was needed.[28] Further, respondents determined absolutely the wholesale prices paid by these accounts. Although there was some testimony that Cardinal determined the prices charged these purchasers,[29] it ap-

[22] Tr. 2267, 2268, 3461.
[23] Tr. 2111-12.
[24] Tr. 2114.
[25] Tr. 3476.
[26] Respondents' Appeal Brief, p. 70.
[27] Tr. 856, 2118; CX 630.
[28] Tr. 2118-19.
[29] Tr. 3463-64.

pears that the wholesale prices for Dean products throughout the entire Falls Cities market were determined by respondents and that Cardinal used Dean price lists in selling to these purchasers.[30] Cardinal's prices to grocers in Indiana changed when respondents' prices in Louisville changed, and Cardinal made the various discounts available to Indiana purchasers without even knowing how they were computed or why they were being given.[31] These two factors—direct solicitation and absolute control over wholesale prices—make it clear that the small retailers purchasing Dean products in the Indiana portion of the Falls Cities market, *i.e.*, retailers, other than "house accounts," should be considered to be purchasers from respondents for purposes of Section 2(a) of the Clayton Act, as amended. *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310 (S.D.-N.Y. 1961); *Dentists' Supply Co. of New York*, 37 F.T.C. 345 (1943); *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937).

When respondents began their operation in Louisville, the prevailing wholesale price of creamline milk was 1¢ per quart lower than the price of homogenized milk and the chain stores were receiving a ½¢ per unit discount on their purchases from local dairies. Upon entering the market, respondents also followed the practice of allowing this discount and, within less than a month, had ceased bottling creamline milk and were selling their homogenized product for the same price as their competitors' creamline product. In June of 1953, respondents introduced earned service and earned handling discounts. The earned service discount, which amounted to 2% of total purchases, was available to any multiple store customer whose average daily volume of business exceeded 100 units per store, provided that all sales, billings, and other business were transacted through a central headquarters rather than through the individual stores.[32] The earned handling discount was applicable where the purchaser took delivery at his loading dock floor or walk-in cooler. This discount amounted to 2% on all purchases where the average daily volume exceeded 100 units per store and 3% where the daily volume was in excess of 200 units.[33] Obviously, the earned service discount favored chain organizations, while the earned handling discount favored all large purchasers.

[30] Tr. 3441-46, 3451, 3464, 3468.
[31] Tr. 3443-45.
[32] CX 928.
[33] CX 929.

In November of 1954, respondents introduced into the Falls Cities market a system of quantity discounts. With the exception of Sealtest, all of respondents' competitors at the time the discount system was introduced were small local dairies, many of which reported total annual sales of less than one million dollars. On the other hand, respondents' consolidated sales in all areas in which they operated were more than 27 million dollars in 1954. It appears that respondents were the innovators in this regard and that prior to 1954, quantity discounts on dairy products were unknown in this market.[34] At that time, respondents' maximum discount was 5% where the average daily purchase was 300 units or more. Subsequently, the percentages and the number of units necessary to qualify for the different percentages varied. At times, the service and handling discounts were available in addition to the quantity discounts. During July of 1957 and much of 1959, the combination of quantity and other discounts permitted chain purchasers a maximum discount of 10%. Between April 8, 1959, and October 27, 1960, all purchasers regardless of size received a uniform 7% discount off list price. However, large purchasers continued to receive handling and service discounts which totaled 3% until August 3 and 2% from that date until August 24, 1959. Between August 24, 1959, and October 27, 1960, multiple store operators received a group volume discount of 3% in addition to the 7% quantity discount. After the latter date, a system of quantity discounts which favored chains and other large purchasers was reinstated.[35] Pursuant to a Kentucky antimonopoly statute which became effective in 1960, the discounts were discontinued. During the system's existence, large chain organizations were able to pool the purchases of their individual stores in determining the applicable discount, and, as a result, usually qualified for the maximum. Smaller purchasers such as local chains and independent grocers qualified for progressively smaller discounts. Since respondents sold their products to retailers of all sizes and made their discounts available in varying proportions to all, the discount system was not limited in its application to only a few retailers.[36] Moreover, it is apparent that the discounts were not trivial in amount, nor was their existence temporary or of short duration.

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[34] Tr. 951, 952, 1233.

[35] CX 972.

[36] The transcript shows that respondents sold their products to the major chain accounts, such as A & P, Kroger, Winn-Dixie, and Albers' Colonial; to smaller cooperative buying associations, such as Gateway stores, Key Markets, and Little Giant stores; and to a substantial number of independent grocery stores.

The Falls Cities market, which corresponds to the market area defined as the Louisville market prior to 1960 by Federal Milk Order No. 46, was, in terms of the quantity of milk disposed of or sold by the local dairies, a growing market.[37] In 1959, the amount of Class I milk, *i.e.,* fluid milk and cream, flavored milk, and buttermilk, sold or utilized in this market was approximately 53 million pounds more than in 1953—an increase of about 27 percent. The amount of Class I milk sold both within and without the market by dairies located within the market in 1959 was about 78 million pounds more than in 1953, while the average daily utilization or sales by the Falls Cities dairies were 213,000 pounds more in 1959 than in 1953—gains exceeding 37 percent.[38] Although the market expanded substantially, an analysis of the evidence shows that only a few of respondents' competitors increased their sales of Class I milk in pounds or increased their total sales in terms of dollars, and that those which did so realized relatively slight gains. In general, the evidence shows that both the wholesale and retail sales of respondents' competitors increased until the mid-1950's and then declined steadily thereafter. In sharp contrast, however, respondents' sales of Class I milk in pounds and their overall sales in dollars were showing phenomenal gains throughout the entire period.

Dairies competing with respondents sold their products to grocery accounts (wholesale sales) and also made retail sales directly to consumers through home delivery service and through dairy owned stores. The annual net sales in dollars and profit and loss

[37] Prior to March 1, 1960, Federal Milk Order No. 46 defined the Louisville, Kentucky, market area as the territory within Jefferson County, Kentucky, including but not being limited to the city of Louisville and the Fort Knox Military Reservation; the territory within Floyd County, Indiana, including but not being limited to all municipal corporations in said county; and the territory within the townships of Jeffersonville, Utica, Silver Creek, Union, and Charleston, in Clark County, Indiana. On March 1, 1960, the market area was expanded to include a larger portion of Kentucky and Indiana. See tr. 3222, 3225-26; CX 640; 19 F.R. 4707 (July 31, 1954); 25 F.R. 1747 (March 1, 1960); 7 C.F.R. 946.6.

[38] The following figures, found in CX 640, are derived from Handler's reports submitted in compliance with Federal Milk Order No. 46. Column A contains the total sales in pounds of Class I milk both within and outside the Louisville market by dairies or handlers located within the market. Column B contains the average daily utilization in pounds of Class I milk both within and without the market by these dairies. Column C contains the sales of Class I milk in pounds solely within the Louisville market.

	A	B	C
1953	203,724,595	559,306	193,045,569
1954	216,989,906	595,306	202,797,804
1955	237,111,128	649,748	220,089,668
1956	249,678,226	682,349	230,998,279
1957	260,318,079	713,423	236,105,513
1958	263,809,156	723,074	235,470,762
1959	281,873,799	772,433	245,923,958

statements of many of these dairies during the period with which this case is concerned are shown in Appendix I,[39] while Appendix II shows total utilization or sales of Class I milk in pounds by these dairies during the relevant period.[40] Since each of these dairies sold a small percentage of their products outside the Falls Cities market, these charts cannot show either absolute market shares or the precise sales made by these dairies solely within the Falls Cities market. However, these charts are invaluable as indicators of trends between 1952 and 1960 and will be used by the Commission for this purpose. The Commission also makes the following findings with respect to respondents' competitors in this market.

1. *Creamtop Creamery, Inc.* Creamtop, which sells to grocery accounts and direct to consumers through home delivery routes and a dairy owned store, confines its sales to the Kentucky portion of the Falls Cities market The majority of its wholesale sales were made to small grocery accounts, but there is some indication that it made some sales to Key Markets, a group of independently owned stores which cooperated in advertising and purchasing.[41] Between 25 and 30 percent of its total net sales in dollars between 1952 and 1960 occurred at the wholesale level.[42] These figures indicate that total net sales increased by approximately $150,000 over the eight-year period[43] and that the gain was attributable to increased retail and institutional sales. It should be noted that wholesale sales declined after 1956 and, even though they began increasing again in 1960, such sales were less in that latter year than in 1951. An official of the dairy blamed the decrease in the dollar amount of wholesale sales partially on the fact that many of the small stores which constituted the dairy's clientele went out of business during the period,[44] and partially on the fact that the

[39] Appendix I [p. 788 herein] is a chart prepared by the examiner. See Initial Decision, Findings of Fact, par. 31.

[40] Appendix II [p. 789 herein] is derived from Federal Milk Market Administrator reports submitted in evidence by respondents. See tr. 3214-3225, 3237-38, 3241-44; RX 128-136.

[41] Tr. 979-80, 1454.

[42] Creamtop's annual net sales in dollars, divided into wholesale, retail, sales to institutions, and sales by a company owned store, found in CX 632(a) (b), are as follows:

	Wholesale	Retail	Institutions	Store
1952	$268,479	$330,657	$ 30,511	$63,043
1953	228,439	352,818	14,923	67,176
1954	268,730	348,034	21,677	59,044
1955	286,303	416,708	48,679	50,149
1956	298,542	492,439	25,809	45,008
1957	255,903	518,227	64,910	24,141
1958	179,833	555,738	74,897	29,182
1959	153,679	485,003	128,005	42,946
1960	223,936	410,461	178,256	88,790

[43] See Appendix I.

[44] Tr. 988.

dairy was forced to match respondents' discounts.[45] Retail sales began a steady decline after 1958. Creamtop's sales of Class I milk in pounds were less in 1960, a year in which its sales in dollars exceeded all previous years, than were the sales in pounds in 1955.[46]

2. *Oscar Ewing, Inc.* Ewing has both wholesale and retail routes and sells its products in the Kentucky and Indiana segments of the Falls Cities market. Ewing's grocery accounts included a few of the Key Markets, Little Giant stores, and Gateway stores, all of which are members of cooperative buying and advertising groups.[47] Ewing's wholesale sales constituted in excess of 30 percent of its total net sales.[48] The figures indicate that wholesale sales began declining in 1957, while retail sales began a similar decline in 1958. Although total sales and wholesale sales were greater in 1959-60 than in 1951-52, retail sales had dropped beneath the 1951-52 figure. Beginning in 1955, Ewing sustained substantial operating losses. These losses were partially attributable to increased operating expenses, but it is important to note that discounts granted by Ewing played a significant part in this result.[49] Prior to 1954, the discounts, which apparently were composed of the various handling and service discounts made available to many of the stores, were relatively small. When respondents instituted quantity discounts in November of 1954, Ewing began granting similar discounts to meet those of respondents, [50] and the figures

[45] Tr. 940.

[46] See Appendixes I, II [pp. 788-789].

[47] Tr. 1040.

[48] Ewing's net wholesale and retail sales in dollars, as stated in CX 645(a)(b), are as follows:

	Wholesale	Retail
1951-52	$389,657	$ 971,162
1952-53	425,838	1,049,635
1953-54	418,224	1,012,776
1954-55	448,351	1,033,132
1955-56	598,365	1,063,932
1956-57	658,096	1,102,357
1957-58	568,666	1,102,000
1958-59	619,150	1,034,990
1959-60	686,654	966,243

[49] Ewing's operating profits and losses, and the amounts of discounts paid in the respective years, as found in CX 647(a)(b), are as follows:

	Operating Profit or loss	Dollar Amount of Discounts Paid
1951-52	$ 70,905	$ 5,849
1952-53	131,541	7,642
1953-54	129,315	9,444
1954-55	97,114	18,068
1955-56	2,786 (loss)	28,958
1956-57	11,639 (loss)	28,822
1957-58	28,276 (loss)	31,718
1958-59	2,191	37,905
1959-60	79,956 (loss)	57,453

[50] Tr. 1026.

reflect the sharp increase in the amounts granted in fiscal 1954-55. In several of the years, the discounts granted exceeded the operating losses.

3. *Walnut Grove Dairy, Inc.* Walnut Grove operates both wholesale and retail routes and sells in the Kentucky portion of the Falls Cities market. During the relevant period, its business was derived principally from the home delivery of milk. Its wholesale sales in terms of dollars were generally less than 15 percent of its total sales, while its income from its own retail dairy stores constituted less than 20 percent of such sales. [51] Both wholesale and retail sales in dollars increased steadily through 1955. In 1956, wholesale sales began dropping so that by 1960 the figure was only slightly in excess of the 1952 figure. Retail sales began declining in 1957 and in 1960 were significantly below the 1954 figure. Sales of Class I milk in pounds began declining in 1958 and in 1960 were more than two million pounds less than in 1957.[52] The dairy suffered an operating loss in 1960[53] and in 1961 went out of the dairy business. It is now engaged solely in the operation of two retail stores.[54]

4. *Mellwood Dairy, Inc., Model Farms, and Beatrice Foods.* Mellwood operated in the Kentucky portion of the Falls Cities market and sold its products at both wholesale and retail levels. In January of 1959, Mellwood merged with Model Farms Dairy.[55] Model Farms was subsequently acquired by Beatrice Foods Co., a multi-state organization.[56] In 1952, Mellwood's wholesale sales constituted 80 percent of its total sales,[57] but when it merged with Model Farms, this figure had dropped to 65 percent.[58] Its principal wholesale customers were independent grocers.[59] Mellwood's total

[51] Walnut Grove's net dollar sales divided into wholesale, retail, and sales from its own stores, as found in CX 654, are as follows:

	Wholesale	Retail	Store
1952	$ 50,863	$365,078	$ 80,821
1953	75,487	468,872	80,157
1954	118,101	517,550	102,449
1955	152,177	591,105	127,515
1956	145,539	678,020	135,719
1957	97,233	667,075	132,812
1958	114,249	661,921	134,337
1959	87,959	559,755	151,432
1960	51,610	482,584	145,542

[52] See Appendix II.

[53] See Appendix I.

[54] Tr. 1080.

[55] Tr. 1110, 1112, 1129.

[56] Tr. 1138.

[57] Tr. 1117.

[58] Tr. 1150.

[59] Tr. 1117.

sales in dollars declined steadily from 1952 through 1958, and it sustained net operating losses in 1955, 1957, 1958 and 1959.[60] The former president testified that respondents continuously solicited its wholesale accounts,[61] and that respondents' discounts, together with give-aways and lower wholesale prices, enabled them to take some of Mellwood's wholesale accounts and reduced its wholesale sales.[62] Mellwood was unable to match respondents' maximum discounts.[63] The former president also testified that the dairy lost home delivery sales because the discounts to chain stores permitted lower retail prices and increased the difference in price between home delivery sales and the out-of-store prices.[64]

5. *Cherokee Sanitary Milk Co.* Cherokee operates both wholesale and retail routes and sells in Louisville and the surrounding Kentucky area. Cherokee's dollar wholesale sales of Class I milk were generally less than 30 percent of its total dollar sales of Class I milk prior to the mid-1950's, but wholesale sales constituted more than 43 percent of this total by 1960.[65] Its wholesale sales decreased shortly after respondents' entry into the market in 1952, but increased substantially during 1959-60. The 1960 wholesale figure slightly exceeded the 1952 figure. On the other hand, retail sales of Class I milk declined steadily after 1952. Overall sales declined throughout the period and the dairy sustained operating losses in 1958, 1959, and 1960.[66] Since operating costs declined during these years, the losses appear to be primarily attributable to the decline in overall sales.[67] An official testified that the dairy lost volume in its wholesale accounts after respondents introduced quantity discounts, because of failure to match the discounts immediately,[68] and stated that the decline in retail sales was caused

[60] See Appendix I.

[61] Tr. 1125.

[62] Tr. 1126, 1140-46.

[63] Tr. 1124.

[64] Tr. 1127-28.

[65] Cherokee's annual net wholesale and retail sales in dollars of Class I milk from 1951-1960, as reported in CX 659-676, are as follows:

	Wholesale	Retail
1951	$267,641	$493,387
1952	281,878	518,922
1953	236,324	504,722
1954	212,119	494,154
1955	220,226	502,123
1956	214,002	499,487
1957	222,746	461,010
1958	214,682	423,960
1959	252,388	370,415
1960	282,017	364,860

[66] See Appendix I.

[67] See CX 691.

[68] Tr. 1185-1186.

by the lower chain store retail prices made possible by the discounts.[69]

6. *Carrithers Creamery.* Carrithers sells to grocery accounts and at retail and operates in both the Kentucky and Indiana portions of the Falls Cities market. The record does not reveal the percentage of total sales which occurred at the wholesale level. However, overall dollar sales declined steadily from 1952 through 1956, but increased thereafter.[70] The significant increases in 1959 and 1960 are not attributable to increased sales on routes, but instead occurred because of increased sales to other dairies and through its company owned stores.[71] In spite of increased overall sales, however, the dairy sustained operating losses in each of the years after 1954. There was testimony that specific retail customers were lost to chain stores because of lower retail prices and that the loss of such customers was usually permanent.[72] The dairy met respondents' wholesale discounts to retain its grocery accounts and there was testimony that this "was the difference between operating at a profit and a loss."[73]

7. *Plainview Farms, Inc.* Plainview has both wholesale and retail sales in the Kentucky portion of the Falls Cities market. Its wholesale sales constitute approximately 40 percent of its total sales.[74] One of its wholesale customers is A & P.[75] Plainview's overall dollar sales, its wholesale sales, and its retail sales all increased through 1957, but declined thereafter. Sales of Class I milk in pounds declined substantially after 1957. The dairy's 1959 sales in pounds were less than in 1953 and the 1960 figure was significantly less than any previous year. The dairy suffered large oper-

[69] Tr. 1186.

[70] See Appendix I.

[71] See CX 693 (a)-(i).

[72] Tr. 1210, 1212, 1213.

[73] Tr. 1210.

[74] Plainview's annual net sales in dollars, divided into wholesale and retail sales, as reported in CX 704-707, are as follows:

	Wholesale	Retail
1951	$648,259	$ 972,388
1952	688,634	1,032,952
1953	726,454	1,089,681
1954	759,228	1,138,842
1955	765,711	1,148,567
1956	786,560	1,179,841
1957	831,452	1,247,178
1958	817,905	1,226,857
1959	789,790	1,184,685
1960	759,471	1,139,207

[75] Tr. 261, 282.

ating losses in each year after 1955. Although these losses were partially caused by increased operating expenses,[76] the effect of declining volume and the necessity of matching respondents' discounts cannot be ignored.

8. *Purity Maid Products Co., Von Allmen Bros., Inc., and Bowman Dairy Co.* Purity Maid, located in the Indiana section of the market, sold its products throughout the Falls Cities market and made 60 percent of its sales to stores.[77] In the Indiana portion of the market, the dairy sold to A & P, Winn-Dixie, Kroger, and Gateway.[78] Most of these stores were "split" among several dairies. In the Kentucky portion of the market, none of its customers were chain stores.[79] In January of 1958, the dairy was acquired by Bowman Dairy Co. of Chicago.[80] Prior to its acquisition by Bowman, the dairy was suffering declining sales and operating losses.[81] After 1955, its total sales began dropping and it sustained operating losses in 1956 and 1957. The dairy lost some of its chain store business,[82] and, as a result, realized declining wholesale business. Respondents' increasing sales also caused it to lose additional volume among customers which it retained.[83] During 1958, the first year after its acquisition by Bowman, the dairy's sales of Class I milk in pounds were less than in 1957.[84] In 1959, Bowman also acquired Von Allmen, a Louisville dairy which made 85-90 percent of its sales to independent stores.[85] Prior to its acquisition by Bowman, this dairy was not operating profitably.[86] Bowman's sales increased in 1960, but declined in 1961 and 1962.[87]

9. *Kannapel's, Inc.* Kannapel's is located in the Indiana portion of the Falls Cities market and concentrates its sales in that area. Approximately 50 percent of this dairy's dollar sales were wholesale

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[76] See RX 155.

[77] Tr. 1297.

[78] Tr. 1314, 1322.

[79] Tr. 1313.

[80] Tr. 1297, 1304.

[81] CX 721.

[82] Tr. 1319-20.

[83] Tr. 1301.

[84] See Appendix II.

[85] Tr. 1420.

[86] See Appendix I.

[87] Bowman's annual net wholesale and retail sales, as reported in RX 55, are as follows:

	Retail	Wholesale	Total
1959	$474,610	$1,402,274	$1,876,885
1960	479,120	2,217,367	2,696,857
1961	427.553	1,994,704	2,422,089
1962	394,416	1,833,299	2,227,715

during the relevant period,[88] and the dairy competed with respondents, Bowman, Sealtest, and Beatrice for such sales.[89] Total dollar sales and wholesale sales declined from 1953 through 1959. Although both increased in 1960, the total sales and the wholesale sales in that year were less than in 1953. Retail sales increased until 1956, but declined steadily thereafter. The 1960 retail sales were less than such sales in 1952. Kannapel's suffered operating losses in 1956, 1957, 1959 and 1960.[90] An official testified that the decline in profits was attributable to loss of volume and the lower prices which occurred in attempts to meet respondents' discounts.[91] Several accounts were lost directly to respondents.[92] Home delivery business was lost to chain stores because of the lower prices.[93] The amounts of discounts granted by Kannapel's exceeded the operating losses in two years and constituted a significant portion of these losses in other years.[94] Kannapel's sales of Class I milk in pounds increased until 1955, but decreased thereafter.[95] Although there were slight increases in 1959 and again in 1960, the 1960 figure was not as great as the 1954 figure.

10. *Shannon's Dairy.* Shannon's limited its operations to the Indiana portion of the Falls Cities market. Sixty percent of its total sales were wholesale.[96] Shannon suffered steadily declining profits

[88] Kannapel's annual net sales in dollars, divided between wholesale and retail sales, for the years 1952 through 1960, as reported in CX 734, are as follows:

	Wholesale	Retail
1952	$359,622	$245,560
1953	313,266	260,273
1954	259,902	265,008
1955	272,294	275,979
1956	270,918	279,889
1957	264,762	265,685
1958	252,836	260,696
1959	269,516	248,574
1960	309,872	240,362

[89] Tr. 2789.

[90] See Appendix I.

[91] Tr. 1399-1402.

[92] Tr. 1404-06.

[93] Tr. 1400-01.

[94] Kannapel's operating profits and losses in dollars and the dollar amount of discounts granted from 1952-1960, as found in CX 734 and 735, are as follows:

	Operating Profit of Loss	Discounts Granted
1952	$53,755	None
1953	49,000	None
1954	34,404	None
1955	18,434	$1,327
1956	1,661 (loss)	1,456
1957	805 (loss)	1,684
1958	84	1,916
1959	9,265 (loss)	4,916
1960	4,583 (loss)	8,625

[95] See Appendix II.

[96] Tr. 1244.

after 1956 and sustained an operating loss in 1960.[97] The meeting of respondents' discounts to retain wholesale customers contributed to the decline of wholesale profits.[98] The loss of retail customers to chain stores where retail prices were lower than home delivery prices injured its retail business.[99] The dairy was "split" in a few stores with respondents and were replaced in several accounts by respondents.[100] In 1962, Shannon's ceased operation and sold its routes to Kannapel's.[101]

11. *Sealtest*. National Dairy's Louisville operation had both wholesale and retail sales. Sealtest's wholesale customers included several chain and group buying organizations which also purchased respondents' products — Winn-Dixie, Kroger, A & P, Key Markets, Little Giant stores, Gateway Markets, and Stop & Shop stores.[102] Prior to 1958, wholesale sales were less than 50 percent of total sales in dollars, but beginning in 1958, Sealtest's wholesale sales constituted more than 50 percent of its total sales.[103] Although the record does not reveal what percentage of Sealtest's total sales occurred outside of the Falls Cities market, the figures show that Sealtest's total dollar sales in and around the Falls Cities market increased through 1956 and steadily declined through 1962. Its retail sales reached an apex in 1956 and declined thereafter, while its wholesale sales began declining after 1957. The record does not contain Federal Milk Market Administrator reports which would accurately reflect Sealtest's utilization or sales of Class I milk in pounds. However, respondents submitted calculations which purported to convert wholesale and retail sales into pounds of milk sold and then estimated the percentage of total sales which constituted Class I milk.[104] These figures, since predicated on dollar sales, show that sales in pounds reached a peak in 1956 and declined thereafter.

[97] CX 699.
[98] Tr. 1232, 1233, 1235.
[99] Tr. 1234.
[100] Tr. 1242-43.
[101] Tr. 1243, 1411.
[102] See Tr. 3010-16.
[103] Sealtest's annual net wholesale and retail sales in dollars from 1954-1962, as reported in RX 105, are as follows:

	Wholesale	Retail
1954	$2,224,494	$3,831,600
1955	2,615,417	3,862,931
1956	3,156,783	3,972,040
1957	3,182,842	3,614,365
1958	3,172,464	3,156,211
1959	3,148,019	2,723,361
1960	3,289,781	2,595,434
1961	2,929,829	2,364,190
1962	2,883,390	2,383,469

[104] See RX 134-136.

In analyzing the gains realized by the various dairies in the Falls Cities market, the increase in the volume of fluid milk sold must be taken into consideration. In 1959, all of the dairies in the Falls Cities market utilized or sold approximately 43.1 million pounds more of Class I milk than in 1954.[105] Moreover, the complexion of the market changed. Although the volume of milk sold in the market appreciated substantially between 1954 and 1959, the dollar amount of retail sales made by the major dairies declined over this period.[106] Thus, the increase in volume occurred in the sales of milk by the various dairies to stores. The evidence shows quite clearly that respondents' sales of Class I milk were mutiplying far more rapidly than the sales of their competitors and that the percentage increase realized by respondents was considerably greater than the percentage of growth by the market as a whole. The market increase of 43.1 million pounds between 1954 and 1959 constituted an increase of 21 percent over the 1954 figure. Respondents' volume in the Kentucky portion of the Falls Cities market expanded over this period by approximately 14 million pounds or 175 percent, while the volume of Class I milk sold both by respondents and their vendors increased by 20.5 million pounds or 114 percent over the same period. Respondents' hefty gains were unmatched by competitors. Oscar Ewing's 1959 gain of approximately 3 million pounds over its 1954 sales of Class I milk constituted an increase of only 22 percent. The sales of other dairies were less in 1959 than in 1954. Sealtest's 1959 sales were 3.1 million pounds less than in 1954, while Plainview's sales were down by 1.8 million pounds and Kannapel's had decreased by 240,000 pounds.

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[105] See note 38, *supra*.

[106] The retail and wholesale sales of various Falls Cities dairies in 1954 and 1959 in dollars, as previously found by the Commission, are as follows:

	1954		1959	
	Retail Sales	Wholesale Sales	Retail Sales	Wholesale Sales
Creamtop	$ 348,034	$ 268,730	$ 485,003	$ 153,679
Ewing	1,012,776	418,224	1,034,990	619,150
Walnut Grove	517,550	118,101	559,755	87,959
Cherokee	494,154	212,119	370,415	252,388
Plainview	1,138,842	759,228	1,184,685	789,790
Kannapel's	265,008	259,902	248,574	269,516
Sealtest	3,831,600	2,224,494	2,723,361	3,148,019
Dean Ky. (total)		2,273,329		5,326,267
Purity Maid and Von Allmen (Approximate)	706,200	1,446,100		5,326,267
Bowman (acquired Purity Maid and Von Allmen)			474,610	1,402,274
Total	$8,314,164	$7,980,227	$7,081,393	$12,049,042

Moreover, an examination of the figures establishes that respondents were acquiring the greatest percentage of the increment of expansion in the market. All of the dairies in the Falls Cities market sold 10.4 million pounds more Class I milk in that market in 1959 than in 1958. Respondents' 1959 sales in the Kentucky portion of the Falls Cities market exceeded 1958 sales by 4.1 million pounds, while the combined sales of respondents and their vendors were 6.3 million pounds more in 1959 than in 1958.[107] This latter gain is greater than the gain of any other single dairy. The 4.7 million pound increase realized by Purity Maid is primarily attributable to its merger with Mellwood and the subsequent acquisition of the consolidated dairy by Bowman. Sure Pure's gain of 2.4 million pounds, Ewing's increase of 2.3 million, and Ehler's growth of 1.2 million pounds are all substantially smaller than respondents'. The combined gains of Cherokee, Carrithers, Grand Avenue, and Kannapel's total less than a million pounds and thus are relatively insignificant. Sealtest's utilization of Class I milk was approximately 5 million pounds less in 1959 than in 1958, while Walnut Grove lost approximately 827,000 pounds. The Class I sales of Haywood and Creamtop were also lower in 1959 than in 1958.

A comparison of sales of Class I milk in 1958 with such sales in 1957 demonstrates even more graphically respondents' unprecedented growth. Total sales of Class I milk in the Falls Cities market declined between 1957 and 1958 by 634,000 pounds. In spite of the overall market decline between these two years, sales by respondents and their vendors in 1958 exceeded such sales in 1957 by about 3.6 million pounds and respondents' 1958 sales solely within the Kentucky portion of the Falls Cities market exceeded 1957 sales by almost 2.3 million pounds. Only two of respondents' competitors realized gains. Haywood's increase was slightly less than 500,000 pounds, while that of Sure Pure exceeded this figure by a small amount. In sharp contrast, Sealtest lost 5.1 million pounds and Ewing lost 2.7 million pounds. Purity Maid's sales were down by 2 million pounds, while Plainview lost 1.4

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[107] The "vendors" category in Appendix II from 1953-1956 contains all sales by Cardinal Distributing Co., including sales in the Indiana portion of the Falls Cities market and in Evansville, Indiana, a separate market. From 1956 through 1960, the Evansville totals are listed separately. See RX 133. For these latter years, therefore, the sum of respondents' Louisville sales and the sales by "vendors" constitutes a reasonably accurate indication of the quantity of milk sold by respondents and Cardinal in the Falls Cities market. Any "vendor" sales made outside the Falls Cities market during the latter years are more than compensated for by the fact that the above sums do not include respondents' Fort Knox sales, which technically are a part of the "Louisville" market as defined by Federal Milk Order No. 46. See note 37, *supra*.

million pounds. Sales by Creamtop and by Cherokee declined by more than 500,000 pounds.

It is evident, therefore, that respondents' volume was expanding considerably more rapidly than the volume of their competitors and that respondents were taking the lion's share of the increment of expansion in the market. We think that respondents' program of quantity and other discounts was the prime factor in their unusual growth. In the first place, the discounts lowered wholesale prices. Several dairy owners testified that they lost specific wholesale accounts to respondents and that their volume of wholesale sales in other accounts was reduced as a result of the discounts.[108] Secondly, we think that the discounts were instrumental in preventing competing dairies from increasing their sales to stores. The Commission has noted in the past and we now hold that quantity discounts have an inherent "tying" effect in that they encourage a purchaser to confine his purchases to a single seller or a small number of sellers so that he will obtain the maximum discount, and that this is one of the principal purposes of such discounts. See *Bausch & Lomb Optical Co.*, 28 F.T.C. 186 (1939); *American Optical Co.*, 28 F.T.C. 169 (1939). Patently, a chain organization which opens a new store is less likely to "split" the account among several dairies or to offer dairies not selling in its other stores the opportunity of selling in the new store during the existence of quantity discounts than would otherwise be the case. As a result, we think that the most damaging effect of the instant quantity discounts was their tendency to prevent competing dairies from breaking into the wholesale market or from increasing their sales in this market. Loss of specific wholesale accounts and the inability to acquire new wholesale accounts was particularly detrimental in this case, since, as previously noted, home delivery of dairy products declined in the Falls Cities market during the 1950's, while sales of milk products to the consuming public through grocery stores increased significantly.

Moreover, we think that the quantity discounts were a contributing factor in initiating and sustaining the trend away from home delivery of milk and milk products in the Falls Cities market. Virtually all dairy officials who testified stated that some of their home delivery customers were attracted to the chain stores because the price of milk there was considerably less than the price of home delivered milk. Prior to respondents' entry into the Louisville market, the price of a quart of milk delivered to a customer's

[108] Tr. 1030-31, 1124-26, 1185-89, 1202, 1212-13, 1221, 1232, 1248-49, 1301, 1319-20, 1404-06, 1426.

home was only 1¢ more than the price at a chain store, but the discounts widened the spread.[109] It is clear that respondents, whose products were sold in almost all chain stores in the Falls Cities market, were the first to grant quantity discounts to store accounts and that they took the lead in increasing the discounts, thus permitting the chains to sell the products to consumers at lower prices. The evidence shows that the chain store retail prices closely paralled the rise and fall of respondents' wholesale prices, as affected by the discounts.[110] Thus, we think the discounts played an important role in the decline of home delivery sales and the corresponding loss of business — both actual and potential — by dairies engaged in the retail distribution of milk and milk products.

The loss of particular wholesale accounts, the inability to share in the expanding market to the extent otherwise possible between 1954 and 1960 and the decline in home delivery sales had both permanent and profound effects upon the local dairies. All were forced to adopt discount schedules similar to respondents' to hold their remaining wholesale customers. In some cases, the difference between profitable and unprofitable operation appears to have been equal to the amounts of discounts granted by the small dairies. Caught between the squeeze of being forced to grant substantial discounts during a period of rising operating costs, and having been prevented to a large extent from increasing their volume, many of the local dairies sustained continued operating losses. Prior to the introduction of discounts in 1954, all of respondents' competitors were able to realize reasonable operating profits. However, the evidence shows a stark contrast in the period immediately following. In 1955, four of respondents' thirteen competitors whose statements of profit and loss appear in the record operated at a loss. In 1956, seven of the thirteen sustained operating losses. In 1957, seven of the twelve reporting dairies operated at a loss. In 1958, six were unable to realize a profit. In 1959, seven of the eleven reporting dairies operated at a loss. In 1960, eight of the ten dairies whose statements appear operated at a loss. Of these last eight, one had operated at a loss for six of the years during which the discounts were in effect, three had operated at a loss for five of these years, one had operated at a loss for four years, and one for three years.

The ability of these local dairies to continue competing with respondents in any meaningful fashion has clearly been curtailed.

[109] Tr. 938-939, 1030, 1065, 1096, 1100, 1127-28, 1187, 1210-11, 1232-33, 1400-01, 1538, 2310.

[110] See Initial Decision, Appendix, Chart I.

Their severely weakened financial condition will obviously prevent expansion of facilities and the utilization of an aggressive marketing effort.[111] Moreover, there is every indication that their operating losses are the forerunner of increased concentration in the Louisville market. Before 1960, one local dairy was acquired by an outside dairy with operations in several states. Two other dairies merged and were promptly acquired by still another multistate dairy. Two dairies went out of business after 1960. If more of these local dairies go out of business, competition in the Louisville area will have been decidedly lessened. In light of the substantial operating losses sustained by many of these dairies, this result is a district possibility. Thus, the evidence establishes actual alteration in the market structure and a reasonable possibility of an even more drastic concentration of business in the larger dairies. We think that these factors support the conclusion that, as required by the statute, the effect of the quantity discount system coupled with other discounts granted by respondents during the period of time with which this case is concerned, "* * * may be substantially to lessen competition" in the line of commerce in which respondents compete and "* * * to injure, destroy, or prevent competition" with respondents, and we so hold.

In arguing that the discounts do not have the proscribed effects upon competition, respondents present a defense of an affirmative nature. It is their contention that a price-fixing conspiracy existed among the local dairies in the Louisville market at the time of respondents' entry into that market, and that this conspiracy continued throughout the time with which this case is concerned. They urge that the existence of this conspiracy indicates that there was no competition in the Louisville market at the time of Dean's entry or thereafter. As a result, it is respondents' theory that even though they discriminated in price by introducing into the market a quantity discount system, there could be no possible injury to competition on the primary level, because no competition existed which could be injured.

Even if respondents' competitors did conspire to fix prices during the period of time with which this case is concerned, a question upon which we do not express an opinion, such a conspiracy does not constitute a defense to a charge of price discrimination. Section 2(a) of the Clayton Act prohibits price discrimination where the effect may be "* * * to injure, destroy, or prevent competition *with any person who either grants* or knowingly receives the bene-

[111] See Tr. 982-983.

fits of such discrimination." Applying this test to the present case, the competition which may be injured is not only the competition among the dairies allegedly involved in the conspiracy to fix prices, but is also the competition between respondent and each of these dairies, considered either separately or in the aggregate. Thus, even if it is assumed that there was no competition among the various Louisville dairies at the time of respondents' entry into that market, respondents' discriminatory prices after entry could well diminish the ability of each of these dairies, considered separately, to compete with them. Moreover, if one or several dairies are driven out of business or there is a possibility that this will result, competition with respondents on the part of the local dairies considered in the aggregate has been or may be lessened or injured within the purview of the statute. Thus, the adoption of respondents' theory that proof of a price conspiracy among their competitors prevents any finding of injury to competition on the seller level ignores the plain wording of the statute. Further, it is predicated upon the underlying assumption that their competitors have forfeited their right to protection under the antitrust laws as the result of the alleged conspiracy, thus in essence granting to respondents a license to discriminate in prices so long as their competitors continue to attempt to fix prices. We do not believe this to be the law. See *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F. 2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961); *Moore* v. *Mead Service Co.*, 190 F. 2d 540 (10th Cir. 1951), *cert. denied*, 342 U.S. 902 (1952). Accordingly, the Commission concludes that there was primary line competition in the Louisville market susceptible to injury during the period of time encompassed by this case, and that such competition is entitled to protection from price discrimination on the part of respondents. On this basis, we reject the theory that evidence of a price conspiracy in the Louisville market on the part of respondents' competitors prevents any finding of possible or probable injury to such competition.

III

The territorial price discrimination with which this case is concerned began in Evansville, Indiana, and Henderson, Kentucky, cities which are located approximately 130 miles from Louisville and which are separated from each other by the Ohio River.[112]

[112] Tr. 3465.

The Commission will treat these two cities as a single market because of their geographical proximity and the fact that local dairies sold in both cities. Respondents' advent into this market occurred shortly after their entry into the Louisville market in 1952. Customers in Evansville-Henderson were supplied by the Louisville processing plant through the facilities of the Cardinal Distributing Co. The principal purchasers of Dean products in this market were "house accounts"—chain stores such as A & P and Kroger, which were billed by respondents and made their payments directly to respondents.[113] Prior to respondents' entry into either the Evansville-Henderson market or the Louisville market, the prevailing price for a quart of homogenized milk in Evansville was 1¢ less than the price in Louisville, while the price in Henderson was 1¢ more than in Louisville. As previously noted, respondents dropped the price of a quart of homogenized milk upon their entry in Louisville to the price of the creamline product—a cut of 1¢. When respondents entered the Evansville-Henderson market, they dropped their price for homogenized milk to the level of their competitors' creamline product in Evansville, a price which was 1¢ less than the prevailing Evansville price for homogenized milk and 3¢ beneath the prevailing price in Henderson. Thus, respondents' list price for a quart of homogenized milk in Evansville-Henderson was 1¢ lower than their list price for a quart of such milk in Louisville.[114] In 1954, respondents introduced a quantity discount system similar to their Louisville system into the Evansville-Henderson market, thereby further reducing the price of Dean products to larger purchasers. After that date, it appears that the net prices to respondents' favored customers in Evansville and Henderson, which were computed by subtracting the applicable discount from the list prices, were always lower than the net prices paid by favored customers in Louisville. For most of 1958 and a large portion of 1960, respondents sold to their

[113] Approximately 95% of the purchases of respondents' products in Evansville were made by "house accounts," while in Henderson, approximately 50% of the purchases were made by such purchasers (tr. 2276-78). As previously noted, these chain stores are clearly purchasers from respondents. Moreover, the Commission held that purchasers which paid Cardinal rather than submitting payment directly to respondents should also be considered to be purchasers from respondents for purposes of Section 2(a). That conclusion is applicable to the Evansville-Henderson market.

[114] The following chart, presented at page 59 of respondents' Brief on Appeal, shows the quart prices of homogenized milk prevailing immediately before and immediately after respondents' entry into the various markets.

Market	Price Prior to Dean's Entry	Price Following Dean's Entry
Louisville	22.5	21.5
Henderson	23.5	20.5
Evansville	21.5	20.5

favored customers in this market at a price which was below their delivered cost,[115] and in these years incurred operating losses.[116] At all times between 1952 and 1960, respondents' prices to their favored customers in Evansville-Henderson were lower than their prices for goods of like grade and quality in Louisville, even though the products sold in Evansville-Henderson were processed in Louisville and thereafter physically transported from the Louisville plant to purchasers in Evansville-Henderson.

At the time of respondents' entry into the Evansville-Henderson market, their competitors were small dairies, none of which had total annual sales of more than two million dollars. It appears that these dairies confined their sales to the area in and around Evansville and Henderson and that none operated in the Louisville market. All of respondents' sales in Evansville-Henderson market were wholesale and were generally confined to stores within these two cities. Competing dairies in this market sold their products at both the wholesale and retail levels and served customers not only in these two cities, but also in adjoining rural areas. Because the local dairies did not have corresponding geographical markets, there can be no accurate determination from this record of the precise market shares of respondents and their competitors within the Evansville-Henderson market. However, the transcript reveals the following facts about competing dairies in the Evansville-Henderson market area.

1. *Ideal Pure Milk Co.* Ideal, a dairy which competes with respondents in Evansville, Indiana, and Henderson and Owensboro, Kentucky,[117] makes approximately 65 percent of its sales to stores,[118] and is one of the larger local dairies. Its annual sales averaged slightly less than $2,500,000 between 1957 and 1960.[119] Ideal acquired Purity Dairy a few years before the trial of this case.[120]

2. *American Dairy Co.* American, which sells in Evansville and in Henderson, makes approximately 60 percent of its sales at wholesale and was the second largest local dairy at the time of trial.[121] An official of the dairy testified that respondents solicited

[115] Respondents sold their products below their delivered cost from January through November of 1958 and from May through October of 1960 (Tr. 62-63; CX 1B-1K, 45, 606Z, 607Z, 616Z).

[116] Respondents' operation in Evansville, Henderson, and Owensboro sustained losses of $7,371 in 1958 and $1,871 in 1960. Initial Decision, Findings of Fact, par. 67.

[117] Tr. 3132.

[118] RX 120.

[119] *Ibid.*

[120] Tr. 444.

[121] Tr. 433, 447, 449; CX 588.

its grocery accounts[122] and that it was compelled to meet respondents' lower prices and their discounts to retain its wholesale business.[123] Respondents' lower net prices had the effect of widening the difference between home delivery prices and the prices of milk in stores and eventually caused a loss of retail customers.[124] There was testimony that respondents' discounts resulted in the reduction of retail prices through stores.[125] After respondents' entry into the market, American Dairy acquired three local competitors—Dairy Service and Gold Medal Dairy in Evansville and Keach Dairy of Henderson.[126]

3. *Dairy Service, Inc.* Dairy Service, which was acquired by American Dairy on May 1, 1954, made approximately 60 to 70 percent of its sales at the retail level.[127] The dairy was forced to meet respondents' initial price cuts to retain its customers.[128] An official testified that a price cut of 1¢ on dairy products can be the difference between profit and loss.[129] As found by the examiner, Dairy Service's sales and profits declined steadily after respondents' entry into the market.[130] Dairy Service merged with American Dairy because of the declining profits and because of a fear on the part of its stockholders that small dairies could no longer compete effectively.[131]

4. *Henderson Creamery.* This dairy confines its activities to Henderson County, Kentucky, and has both wholesale and retail customers.[132] The record does not reveal what percentage of this dairy's sales were wholesale, but its total annual sales were never more than $450,000 between 1952 and 1960.[133] One of the dairy's wholesale customers was Kroger. Other wholesale customers are smaller chains, such as "Red Front" stores, Sure Way, and other smaller accounts.[134] This witness also testified that a 1¢ difference in the price of milk can make the difference between profitable and nonprofitable operation.[135] Although this dairy was not forced out of any Kroger stores by respondents,[136] it lost volume to re-

[122] Tr. 612.
[123] Tr. 611, 612, 615.
[124] Tr. 617-619.
[125] Tr. 617-618.
[126] Tr. 374, 404, 440, 615; CX 587.
[127] Tr. 374.
[128] Tr. 375, 378-379.
[129] Tr. 411, 412.
[130] Initial Decision, Findings of Fact, par. 62.
[131] Tr. 414-15.
[132] Tr. 675.
[133] CX 598.
[134] Tr. 733-749.
[135] Tr. 698.
[136] Tr. 693.

spondents within Henderson. Although its overall wholesale sales increased somewhat between 1952 and 1960, the increase seems primarily attributable to increased sales in rural areas.[137] When Henderson became aware that respondents were granting discounts to chain stores, it met the discounts.[138] As found by the examiner, the dairy suffered declining profits in 1959 and suffered an operating loss in excess of $7,000 in 1960.[139]

5. *Blue Ribbon Dairy.* Blue Ribbon sold in Evansville and surrounding rural areas, but apparently had no sales in Henderson.[140] Its grocery accounts included Kroger, A & P, and Economy Markets, a local chain, and it was the first in the area to begin selling its milk products in paper containers.[141] Blue Ribbon lost its Kroger accounts to respondents and lost volume in its A & P accounts after respondents' entry.[142] Respondents solicited all of their wholesale accounts and took "quite a bit" of business.[143] Blue Ribbon went out of business in September of 1953.[144]

Respondents' pricing activities in the Evansville-Henderson market closely resemble the classic example of a large, multi-state seller entering a market in competition with smaller, local sellers and using its overall superior size, financial reserves, and higher prices in other markets as a crutch to enable it to undercut the prices of local competitors. In this case, the local dairies immediately met respondents' lower prices, thus indicating that respondents were strong enough to dictate prices, even though their total sales in the market were small when compared with the sales of the local dairies. When respondents introduced discounts into the market, the local dairies immediately countered by instituting similar discounts. The testimony of the local dairy owners to the effect that a 1¢ reduction in price was of extreme significance indicates that these dairies were operating on narrow profit margins. After the lower prices were introduced, five local dairies

[137] Tr. 739.

[138] Tr. 723.

[139] See CX 598.

[140] Tr. 484-85.

[141] Tr. 485-86, 510-11.

[142] Tr. 490.

[143] Tr. 495.

[144] Other dairies which made some sales in Evansville or Henderson between 1952 and 1960 were Prairie Farms, Herrmann's, Holland Custard, Mount Vernon Creamery, and Beatrice Foods. Herrmann's and Prairie Farms were located in Evansville, but the record reveals little else about their operations. The remaining dairies were located outside of Evansville and Henderson and realized their largest volume of sales elsewhere. The record does not reveal what percentage of their total sales occurred in Evansville-Henderson. There is no indication that Beatrice Foods, which also operates in Louisville, was selling in Evansville-Henderson prior to 1960.

ceased operation. The tenacity of the remaining dairies prevented respondents from capturing a large segment of the market, but these dairies suffered declining profits and operating losses. In 1958 and in 1960, respondents further reduced their prices and, as a result, were selling half gallons of milk below cost to their favored customers during substantial parts of these years.[145] Even during the period when the prices were above cost, respondents' profit margin was extremely narrow. Patently, respondents' operating losses during 1958 and 1960 were recouped either from cash reserves or from some other market, such as Louisville, where their operations were showing profits.

The above findings, together with the findings of the examiner, indicate that between 1952 and 1960, the Evansville-Henderson market was a market in which profit margins were small and in which the number of competitors was limited.[146] In such a market, the crippling or elimination of even one competitor takes on an added significance. See *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); *H. J. Heinz Co.* v. *Beech-Nut Life Savers, Inc.*, 181 F. Supp, 452 (S.D.N.Y. 1960). The undercutting of prevailing prices by a large, multi-market competitor may well result in the elimination of several competitors, where, as here, the evidence indicates that the smaller competitors were constantly struggling to stay in business. The evidence showed that the larger dairies sustained losses of business and profits and some smaller dairies ceased operation after respondents lowered the prevailing prices. We think that the evidence justifies the conclusion that respondents' pricing activities have already contributed to the loss of business and decline in profits sustained by several of the dairies, and the demise of others. Moreover, we think it clear that the conditions extant in the market—the low profit margins and the high mortality rates of the smaller dairies—support a conclusion that there is a reasonable possibility that continued sales by respondents at below cost prices or at prices at which even they cannot realize a reasonable profit will cause the demise of other small dairies, with a consequential concentration of business in the hands of even fewer sellers. Moreover, there is a reasonable possibility that such pricing will permanently impair the ability of the remaining dairies to continue competing with respondents through expansion of facilities or intensive advertising or promotional programs. As a result, the Commission concludes that the

[145] See note 115, *supra*.
[146] See CX 575, 587, 598.

price discrimination has the proscribed statutory effects upon competition and constitutes a violation of Section 2(a) of the amended Clayton Act.[147]

Respondents entered the Lexington, Kentucky, market in December of 1958 and supplied it from their Louisville processing plant. The prevailing prices in that market were also lower than those in Louisville. From the date of their entry into this market until the first week of April of 1959, respondents' Lexington prices were below the prevailing prices there, and below their Louisville prices. Significantly, respondents' prices during this period were at all times below cost. The record shows that respondents' Lexington operation sustained a loss for each of the months from December 1958 through November of 1959. One dairy in Lexington lost a substantial part of its wholesale business to respondents and later went out of business.[148] However, the record fails to reveal the status of other dairies or the condition of the market as a whole. Although injury to or the elimination of one competitor in a market in which there are only a few competitors may, and in many instances does, constitute a showing of statutory injury, the absence of more evidence on the number and condition of other dairies in the Lexington market prevents the Commission from determining whether this is such a case or from making any sort of informed projection of the possible competitive effects of respondents' pricing activities in this market. As a result, the Commission does not adopt the examiner's finding that respondents' territorial price discrimination between Lexington and Louisville purchasers resulted in the statutory injury to competition in the Lexington market.

IV

Possible injury to secondary level competition emanating from respondents' use of the quantity discount system and other discounts was also an important aspect of this case. The record specifically shows that competing merchants in Terre Haute, Indiana,

[147] Respondents contend that their prices were below unit cost only because their volume of sales was low. Although a new entrant into a market may not be able to avoid prices which are below unit cost when it first begins selling, that situation is decidedly different from the present situation where respondents' below cost sales first occurred some five years after their entry into the market. In any event, we do not think that the Robinson-Patman Act permits a large, multi-market seller to undercut prevailing local prices by pricing its products below unit cost or at prices yielding only negligible profits for an extended period of time or after it has been in the local market for a number of years, if it maintains higher prices in other markets and recoups its losses or the absence of normal profits either from such markets or from superior cash reserves built up through activities in other markets, provided there is a reasonable possibility of statutory competitive injury.

[148] The owner testified that he suffered a heart attack and elected to retire.

and in the Falls Cities market, paid different prices for respondents' products. In Terre Haute, the evidence shows that the discount schedules employed from January of 1958 to September of 1960 permitted Kroger stores to acquire respondents' products at 10% off the list prices. Smaller competitors located within a few blocks of Kroger stores received discounts ranging between 4 and 5%. The examiner concluded that this difference was substantial, and, relying on *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948), found the requisite "reasonable possibility" of competitive injury.[149] Respondents do not contest the examiner's findings on these points and appeal solely on the question of whether any of the purchases occurred " in commerce." In Louisville, the evidence showed that the discount schedules permitted the A & P and Stop & Shop stores in that city to acquire respondents' products at 10% off the wholesale list price during parts of 1959. A Gateway Market in competition with an A & P Supermarket and a Stop & Shop store received discounts of only 8½% and 7% during the same period. There were numerous examples of other stores in the Falls Cities market purchasing at differences of 2 to 3%. In some instances, there were differences of 6 to 8%. The examiner found these differences substantial and concluded that the effect of the discrimination may be substantially to lessen competition on the secondary or buyer level.[150] Respondents' chief objection to these findings is a contention that none of the purchases by customers located in Kentucky occurred "in commerce." The commerce question will be discussed in Section V of this opinion, *infra*. The Commission is of the opinion that the evidence sufficiently establishes the requisite injury to competition on the secondary level in Terre Haute and in both the Kentucky and Indiana segments of the Falls Cities market and, as a result, adopts the examiner's findings in this regard.

V

Respondents argue that the commerce provisions of Section 2(a) of the Clayton Act do not provide the Commission with jurisdiction over many of the differences in price which form the basis for the findings that respondents have illegally discriminated in price. The statute states that the discriminator must be engaged "in commerce," that the discrimination occur "in the course of such commerce" and that "either or any of the purchases involved in such discrimination" be "in commerce." Respondents stress the

[149] Initial Decision, Findings of Fact, pars. 54-59.

[150] *Id.*, pars. 48-53.

fact that the processing plant which services accounts located in the Kentucky portion of the Falls Cities market and in other Kentucky cities is located in Louisville, and that the plant which services Terre Haute, Indiana, is situated in Rochester, Indiana. In essence, respondents take the position that a purchase is not "in commerce" for purposes of Section 2(a) of the Clayton Act, as amended, unless the products cross state lines when being delivered by the seller to the purchaser. Before turning to the relevant facts of this case, an examination of the legislative history behind the requirement that "either or any of the purchases" involved in the discrimination be "in commerce" is appropriate. This condition was not present in Section 2 of the Clayton Act as originally passed in 1914, but was added by the Robinson-Patman Act in 1936. A study of the legislative materials[151] indicates that Congress intended to broaden the scope of the statute. There appears to have been some doubt that Section 2(a) would cover the situation where, for example, a seller charged a low price to a purchaser within the state where the seller was located and a higher price to a purchaser in another state. The Report of the Senate Committee on the Judiciary indicates that the clause is designed to extend the scope of the price discrimination prohibition to discriminations between interstate and intrastate purchasers as well as to discriminations between two interstate purchasers.[152] Senator Logan stated that the clause "* * * is necessary in that it will extend the provisions of the law to discriminations between interstate and intrastate customers, as well as between those purely interstate."[153] Representative Utterback, a manager of the House bill, noted that the seller may not use discriminations in interstate commerce to injure his local customers nor may he favor his local customers to the injury of his interstate account.[154] In declining to adopt an additional proposal in the House bill which would have extended the prohibitions of Section 2(a) to discriminations by any person, "whether in commerce or not," where the discriminations may substantially lessen competition in any line of commerce and in any section of the country, the conference committee stated that the current language "covers all discriminations, both interstate and intrastate, that lie within the limits of Federal authority."[155] Although none of the legislative materials

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

[152] S. Rep. No. 1502, 74th Cong., 2d Sess. (1936).

[153] 80 Cong. Rec. 3113.

[154] 80 Cong. Rec. 9416-17.

[155] H.R. Rep. No. 2951, 74th Cong., 2d Sess., p. 6.

delineate what Congress considered to be the limits of federal authority, the House Committee report notes that the requirement that "either or any of the purchases" be "in commerce"

> * * * is of first importance in extending the protection of this bill against the full evil of price discrimination, whether immediately in interstate or intrastate commerce, *wherever it is of such a character as tends directly to burden or affect interstate commerce.* (Emphasis supplied.)[156]

Moreover, Representative Utterback stated that "[t]he Federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the State, and to protect interstate commerce itself from injury by influence within the State.[157]

Although Congress apparently desired to use the full federal commerce power in its amendment to the original Section 2 of the Clayton Act, the plain wording of the statute requires that at least one of the purchases which forms the basis for the price discrimination be "in commerce." However, the legislative history sheds little light on what constitutes a purchase in commerce. Representative Utterback stated that an intrastate sale of goods to a mass buyer for further shipment across state lines was "* * * by long settled law, interstate commerce."[158] Mr. Teegarden, the draftsman of the statute, testified that where goods are purchased in one state and delivery taken there for the purpose of shipping them into another, or where merchandise is shipped from one state into another and sold there in the original packages, both the purchase transactions at one end and the sales transactions at the other are, when considered separately, strictly intrastate. Nevertheless, he stated, they are part of the interstate commerce by which goods pass from one state into another.[159] Thus, it appears that the requirement that the purchase be in commerce can be met without evidence that title passes from a seller in one state to a buyer in another and without a showing that there was interstate product movement at the time the purchase is consummated. In light of the facts that Congress expressly desired to use its full commerce power in the enactment of the amended Section 2(a) and that it has not voiced its intent regarding the factors which determine whether or not a purchase is "in commerce," the Commission would not be doing violence either to the intent of Congress or the plain wording

[156] H. R. Rep. No. 2287, 74th Cong., 2d Sess., p. 8.

[157] 80 Cong. Rec. 9417.

[158] *Id.* at 9416.

[159] Hearings before the Committee on the Judiciary, House of Representatives, 74th Congress, 1st Session, on H.R. 4995, H.R. 5062 (1935), p. 16.

of the statute by applying broad federal commerce principles in deciding that a particular purchase is in commerce. *Cf.*, *Minnesota Mining and Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311 (May 24, 1965).

Interstate movement of the products sold, both prior to and subsequent to the purchase, affects the interstate character of the purchase. As previously noted, Congress contemplated that a purchase by a mass buyer in one state from a seller in the same state for shipment to a second state would constitute a purchase in commerce for purposes of Section 2(a). Moreover, Congress desired to cover the situation where the product moved from one state to a second state and, before coming to rest in the second state, was sold in that state. In the latter situation, the question of what "breaks" the flow of commerce or what caused the product to "come to rest" in the second state is important.[160] Mr. Teegarden indicated that where goods are shipped from one state into another and sold in the second state in the original package, the goods had not come to rest in the second state and their sale was an interstate sale.[161] The courts have indicated that temporary storage of the product is not sufficient to interrupt the flow. *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951). A temporary halt for processing which does not materially alter the basic product also fails to break the flow. *Hardrives Co.* v. *East Coast Asphalt Corp.*, 329 F. 2d 868 (5th Cir. 1964) (bitumen temporarily stored and blended to meet viscosity standards); *Deep South Oil Co. of Texas* v. *Federal Power Commission*, 247 F. 2d 882 (5th Cir. 1957) (passage of natural gas through a processing plant to remove water and impurities); *Pevely Dairy Co.* v. *United States*, 178 F. 2d 363 (8th Cir. 1949), *cert. denied*, 339 U.S. 942 (1950) (passage of milk through a processing plant for bottling and pasteurization). In the latter case, the court of appeals, in ruling that the indictment alleged a conspiracy to restrain interstate commerce on the part of several dairy companies or handlers by fixing the wholesale and retail prices of milk noted that fluid milk, a perishable, nonstorable commodity, remains in the stream of commerce until it reaches the ultimate consumer. There, the processing plant where the milk was inspected, cooled, pasteurized, bottled, and capped was in St. Louis. Milk was delivered to the processing plant by producers or by independent truckers employed by the producers. Some of this milk originated in Illinois. The court's statement of

[160] See *Swift & Co.* v. *United States*, 196 U.S. 375 (1905). In resolving this issue, cases other than those arising under the Robinson-Patman Act may be pertinent.

[161] See "Hearings," note 159, *supra*.

the facts indicates that title to the milk did not pass from the Illinois producers to the Missouri dairy companies until it was accepted by these companies at their processing plants in St. Louis. After processing and bottling, the milk was sold to customers in St. Louis and these sales were the subject of the price-fixing charge. The court, in holding that the indictment alleged restraint of interstate commerce, concluded that the milk had entered commerce and remained therein, even though there had been a temporary halt at the St. Louis processing plant. Quoting from *Binderup* v. *Pathe Exchange, Inc.*, 263 U.S. 291, 309 (1923), the court of appeals stated:

> The general rule is that where transportation has acquired an interstate character "it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

Where, however, the processing substantially alters the product, or where that product is only one of several ingredients in the finished product, it appears that it comes to rest in the state where the processing occurs and at that point leaves the flow of commerce. *E.g., Central Ice Cream Co.* v. *Golden Rod Ice Cream Co.*, 184 F. Supp. 312 (N.D. Ill. 1960), *aff'd*, 287 F. 2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961).

In *Foremost Dairies, Inc.* v. *Federal Trade Commission*, 348 F. 2d 674 (5th Cir. 1965), the court of appeals agreed with the Commission's determination that purchases by customers located in Albuquerque, New Mexico, of milk processed by Foremost in Santa Fe, New Mexico, were purchases "in commerce" for purposes of Section 2(a) of the Clayton Act, where there was evidence that a substantial portion of the milk processed in Santa Fe had been produced outside New Mexico. The Commission noted that it was not deprived of jurisdiction even though title to the milk may not have passed from the producers to Foremost until after the milk entered New Mexico[162] and even though out-of-state milk was commingled with milk produced within the state prior to the discriminatory sales.[163] In requesting that the Commission reconsider its holding in the *Foremost* case, respondents, on the authority of a series of cases, including *Nebbia* v. *New York*, 291 U.S. 502 (1934), and *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608 (1937), argue that a sale of milk by a processor to a wholesaler or retailer is not turned into a purchase or sale in commerce solely because some

[162] See *Pevely Dairy Co.* v. *United States, supra.*

[163] *Currin* v. *Wallace*, 306 U.S. 1, 11 (1939); *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 399 (1st Cir. 1940).

of the milk may have been produced in another state. The cases cited by respondents were decisions upholding a state's power to set minimum and maximum resale prices of milk sold within that state. There was evidence in some of these cases that part of the milk subject to regulation had been produced in other states. However, the Court's decision in these cases that various states should be permitted to regulate the maximum and minimum resale prices of milk in the absence of conflicting federal legislation is not necessarily a holding by the Court that these sales are intrastate sales for federal antitrust purposes. As the Supreme Court stated in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944):

> But past decisions of this Court emphasize that legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause. * * * It is settled that, for Constitutional purposes, certain activities of a business may be intrastate and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation. And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated * * *. 322 U.S. at 545, 548.

Moreover, we think that a purchase may be in commerce even where there is no product movement across state lines either before or after the purchase is consummated. A purchase is made up of various component parts or elements, such as the offer, the acceptance, the delivery, and payment. Some of these elements may take place solely within the bounds of a single state, while others may transcend state lines. Before a purchase may be finally categorized as "intrastate" or "interstate," its multiple elements must be carefully studied and analyzed. If the product is delivered across state lines, the purchase would clearly be "in commerce" even though offer, acceptance, and payment occurred within one state. The converse would appear also to be true. If a buyer in one state negotiates across state lines with a seller in a second state for the purchase of products to be delivered by the seller to one of the buyer's branches in the second state, and billing and payment are subsequently made across state lines, the purchase should be considered to be "in commerce" for purposes of Section 2(a) even though the product movement was confined to the second

state. Further, if the seller has a central office located in one state, and operates branches in other states, a buyer located in a second state receiving delivery of merchandise from a branch of the seller located in the second state may be purchasing in commerce if the negotiations for the purchase, as well as invoicing and payment, took place between the buyer in the second state and the seller's office in the first state.

Such a factual situation occurred in *Shreveport Macaroni Mfg. Co.* v. *Federal Trade Commission*, 321 F. 2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964), a proceeding arising under Section 2(d) of the Clayton Act. There, the respondent-seller was located in Shreveport, Louisiana. The headquarters of Weingarten, the customer receiving the discriminatory advertising allowances, was in Houston, Texas, but that company purchased the respondent's products for sale in its Louisiana stores only. Thus, the product moved from the respondent-seller's warehouse in Shreveport to various Weingarten stores in Louisiana. Negotiations for the purchases, invoicing, and solicitation and payment of the advertising allowances, the subject of the charge, occurred between the supplier's Louisiana plant and Weingarten's Houston headquarters. The Court of Appeals noted that Weingarten's purchases were in interstate commerce even though the deliveries were intrastate, and held that the discrminatory payments for advertising were solicited and paid in interstate commerce. Although the court in this case was concerned with whether advertising allowances were made in interstate commerce for purposes of Section 2(d) of the Clayton Act, as amended, the same factors which resulted in that finding should be, and we think they are applicable in determining whether a purchase is in commerce for the purposes of Section 2(a) of that Act.[164]

[164] Citing *Atlantic C.L.R.R.* v. *Standard Oil Co.*, 275 U.S. 257 (1927); *B. & O. S.W.R.R. Co.* v. *Settle*, 260 U.S. 166 (1922); *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa*, 233 U.S. 334 (1914); and *Nachman* v. *Shell Oil Co.*, 1944-45 Trade Cases, par. 57,361, respondents argue that bookkeeping procedures, such as billing, are without substantial significance in the determination of whether a transaction is in interstate commerce. In *Nachman*, the only proceeding cited by respondents originating under Section 2(a) of the Clayton Act, the district judge in his charge to the jury stated that if all incidents of the purchase—contract to sell, orders, and delivery of the product—occur in one state, billing from outside the state would not transform the purchase into an interstate purchase. However, the judge went on to charge the jury that if the products had been ordered over the telephone from another state, the purchase might be in interstate commerce even though the product movement from seller to purchaser was confined to one state. The remaining cases cited by respondents were concerned with whether the flow of commerce which originated out of state was broken by a temporary halt within the final state before being sent to a second point in the final state, so that state authorities could tax or otherwise regulate the shipment between the latter points. In these cases, the underlying intent of the parties as to the point of final destination was determinative. Where the intent was obvious from other factors, the presence or absence of a through bill of lading was not controlling. However, where the intent was not obvious, the bill of lading was one of several

In considering the facts of this case, we turn first to the Falls Cities market. The purchasing offices for A & P, Kroger, and Winn-Dixie were located in Louisville, as was respondents' processing plant. The purchasing office for Albers Colonial (Stop and Shop stores) was situated in Cincinnati, Ohio. The Commission holds that the purchases of respondents' products by these chains for delivery to their Kentucky stores and purchases by other Kentucky customers are purchases in commerce for purposes of Section 2(a) of the Clayton Act pursuant to the principles applied in *Foremost Dairies, Inc.* v. *Federal Trade Commission, supra.* The president of Dean Illinois testified that "* * * quite a bit of milk is bought in Indiana for both the Illinois and the Louisville corporation."[165] Thompson, the regional manager for Dean Kentucky, stated that the subsidiary obtained 85 to 90% of its milk through the Falls City Cooperative in 1952, and that at the time of the hearing it acquired all of its milk from that cooperative, then known as the Kyana Milk Producers Association. The milk purchased through the cooperative was produced within a seventy-mile radius of the city of Louisville, including a portion of Indiana. Approximately 25% of the milk obtained through the cooperative comes from Indiana. Thompson stated that the milk "* * * is picked up at the farm by a hauler and in most cases it goes right to the plant that buys the milk. If there is not a sale for this merchandise, then it goes to the Kyana plant, where it is held."[166] The record does not reveal whether the "haulers" are agents of the producers or of Dean, and it is not clear where title to the milk passes. However, in *Pevely Dairy Co.* v. *United States, supra,* title to the out-of-state milk passed to the handlers in the same state where it was resold after processing. In *Foremost Dairies, Inc.* v. *Federal Trade Commission, supra,* the Commission, in its opinion, noted that title may not have passed to Foremost until the milk arrived at the New Mexico processing plant. Thus, even if respondents in the instant case did not receive title to the milk until it was delivered to their Louisville processing plant by Kyana agents, we think that neither this factor nor the fact that the milk was pasteurized, homogenized, and bottled at the processing plant prior to sale to Kentucky customers breaks the interstate flow of the product from producer to ultimate consumer. Thus, the purchases by Kentucky customers were purchases in commerce.

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factors to be considered in its determination. In the present example, the question is whether a "purchase" is in commerce—not whether the flow of commerce is terminated at a particular point.

[165] Tr. 1635.

[166] Tr. 2245-48.

Moreover, Section 2(a) requires only that "either or any of the purchases" involved in the discrimination be in commerce—not that all must be in commerce. In the present case, the Albers Colonial stores in Louisville were favored customers. Dean's price quotations for Albers' individual stores in Louisville were submitted directly to Albers' regional headquarters in Cincinnati, Ohio.[167] That office authorized the purchase of Dean products for various Kentucky stores.[168] Further, Dean invoiced the Cincinnati office for goods delivered to Albers' individual Louisville stores.[169] Thus, the offer to sell at a particular price, the acceptance of that offer, and invoicing pursuant to the agreement occurred in commerce. This is true whether Dean Kentucky is considered to be a separate corporate entity or merely an operational arm of Dean Illinois. Accordingly, applying the theory of commerce enunciated in *Shreveport Macaroni Mfg. Co.* v. *Federal Trade Commission, supra,* we conclude that the purchases by Albers Colonial for its Kentucky stores are in commerce as required by the statute, even though the movement of the products from Dean's processing plant in Louisville to Albers' individual stores in Kentucky was confined to one state.

The above findings that some of the purchases by customers located in the Kentucky portion of the Falls Cities market are in commerce are necessary to establish the Commission's jurisdiction over that part of the case concerned with injury to competition at the secondary or buyer level of competition in the Kentucky portion of the Falls Cities market, since there is no evidence that customers located in that portion of the market competed with Indiana customers. However, such findings are not necessary to establish jurisdiction over that part of the charge alleging injury to competition at the primary or seller level of competition in this market. The facts indicate that respondents and some of their competitors sold their products in both the Kentucky and Indiana portions of the Falls Cities market and that respondents made their quantity discounts available to customers in both states on the same terms. Newspaper advertisements of Dean products placed by chain stores applied to individual stores in both the Kentucky and Indiana portions of the market.[170] Thus, the Falls Cities market is an interstate market. Products purchased by customers in the Indiana section of the Falls Cities market were physically transported from Ken-

[167] CX 11, 610.

[168] See CX 54-55.

[169] CX 9 B-Z; tr. 165-69.

[170] CX 745

tucky to Indiana and are thus clearly purchases in commerce. Since there is no requirement that the customers receiving different prices compete with each other when the issue is injury to competition at the primary level,[171] the low prices paid by the favored customers in Indiana may be compared with the higher prices paid by smaller customers in Louisville and, conversely, the high prices paid by the disfavored customers in the Indiana section of the market may be compared with the lower prices paid by chains and other large purchasers in the Louisville part of the market. As a result, the requirement that "either or any" of the purchases which, when compared, constitute the discrimination be "in commerce" has been satisfied. As the Supreme Court noted in *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 120 (1954), quoting Congressman Utterback, manager of the Robinson-Patman amendment to the Clayton Act in the House of Representatives:

> Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. The Federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the State, and to protect interstate commerce itself from injury by influences within the State. 80 Cong. Rec. 9417.

Products purchased by stores in Evansville, Indiana, were transported from Kentucky to Indiana and clearly constitute purchases in commerce. The products purchased by stores in Henderson, Kentucky, were first transported to Evansville together with the products to be sold in Evansville and then delivered to the stores in Henderson. Moreover, the milk sold in Evansville and Henderson was processed at the Louisville processing plant. As previously noted, some of this milk was produced in Kentucky and some in Indiana. For these reasons, therefore, we think that the purchases made by retailers in the Evansville-Henderson market were purchases in commerce.

The findings of secondary line injury in the Terre Haute market were predicated upon price differences between favored Kroger stores and smaller purchasers which did not receive the maximum discounts. Respondents' only objection to this finding is an argument that none of the purchases occurred in commerce since the movement of products from the processing plant in Rochester, Indiana, to purchasers in Terre Haute was wholly intrastate. The

[171] *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

record shows that a substantial portion of the milk processed at the Rochester plant was acquired from out-of-state producers.[172] As a result, purchases by customers in Terre Haute are in commerce. *Foremost Dairies, Inc.* v. *Federal Trade Commission, supra.* Moreover, Dean's Illinois headquarters rather than the Rochester plant negotiated with the Kroger office in Indianapolis concerning the prices of products to be sold to the individual Kroger stores in Terre Haute, and Dean's Illinois office billed Kroger's Indianapolis office for payment for the products delivered to the individual Kroger stores in Terre Haute.[173] Thus, the formation of the contract to sell and billing pursuant to the contract occurred across state lines, even though the product movement was confined to one state. As previously noted, we think these factors support a finding that the purchases occurred in commerce.

VI

For the reasons we have stated, an order will issue requiring respondents to cease and desist from the practices found to be in violation of Section 2(a) of the Clayton Act, as amended. Both corporate respondents will be prohibited from charging competing customers different prices in all areas in which such customers purchase respondents' products in commerce. In addition, but subject to the conditions noted below, both respondents will be ordered to cease charging lower prices in cities or definable market areas where they are competing with other sellers than they are charging in different cities or definable market areas. The findings of the examiner are adopted in all respects except where they are in conflict with the views of the Commission as expressed herein.

In issuing this order, the Commission notes that the findings of price discrimination resulting in injury to competition in the line of commerce in which respondents compete are predicated upon differences in prices in various cities served by the same processing plants. There is no indication in this record that differences in price as between customers located in cities served by different processing plants have caused, or might cause, injury in this line of commerce. As a result, that portion of the order designed to prevent price discrimination which may substantially affect seller level competition will apply throughout areas served by one processing plant, but will have no application as between cities or definable market areas served by different processing plants. Moreover, this portion of the order does not require that respondents

[172] Initial Decision, Findings of Fact, par. 54.
[173] *Id.*, par. 55.

maintain similar prices in all markets served by the same processing plant. Instead, it only prevents respondents from selling to purchasers at a price which undercuts the lowest price offered to such purchasers by competitors of respondents in the various markets, while simultaneously maintaining higher prices in other markets. It is the belief of the Commission that these limitations on the scope of the order will permit respondents to compete on a par with other sellers in all markets, yet at the same time will prevent the price differences most likely to cause substantial injury to competition at the seller level.

Commissioner MacIntyre has filed a separate statement.

Commissioners Elman and Jones dissented and have filed dissenting opinions.

APPENDIX I

Annual net sales in dollars and profit and loss statements of major Louisville dairies

(In Approximate Thousands)

Dairy	1952		1953		1954		1955		1956		1957		1958		1959		1960		1961	
	Sales	Profits or (Loss)	Sales	Profits or (Loss)	Sales	Profits or (Loss)	Sales	Profits or (Loss)	Sales	Profits or (Loss)	Sales	Profits or (Loss)	Sales	Profits or (Loss)	Sales	Profits or (Loss)	Sales	Profits or (Loss)	Sales	Profits or (Loss)
Mellwood (Tr. 1109-58; CX 656-57)	1,044	11	957	5	894	.3	941	(7.9)	962	1.9	911	(1.8)	857	(17)	60	(17)				
Purity Maid (Tr. 1293-1333; CX 721)	2,104	43	2,164	28	1,597	8	2,004	8	1,890	(5.8)	1,859	(62)	390	(1.2)						
Cream Top (Tr. 859-996; 1462-92; CX 631-43)	810	7.9	780	14	811	0	930	(.1)	955	(5)	959	(10)	907	2.9	638	(1)	962	(2.8)		
Cherokee (Tr. 1159-93; CX 658-91)	1,025	31	960	21	910	26	926	26	927	12	902	1.5	864	(13)	844	(21)	859	(11)	1,014	1.8
Walnut Grove (Tr. 1079-1107; CX 654-55)	614	15	742	24	846	22	964	20	1,054	17	988	23	1,005	11	901	3	774	(1.2)		
Carrithers (Tr. 1194-1225; CX 692-698)	333	2.9	319	9	277	1	268	(6)	262	(10)	286	(11)	333	(9)	399	(8)	470	(4)		
Shannon's (Tr. 1227-52; CX 699)	......	16	......	9	......	10	......	12	......	13	......	5	......	.06	......	2	......	(1.3)		
Oscar Ewing (Tr. 998-1078; CX 644-53)	2,973	46	3,098	69	2,735	68	2,764	64	2,890	(1.4)	2,957	(14)	3,059	(19)	3,314	(11)	3,473	(111)		
Plainview (Tr. 1254-92; 1334-56; 1417; CX 700-20)	1,721	62	1,816	70	1,898	61	1,914	36	1,966	(26)	2,078	(59)	2,044	(36)	1,974	(116)	1,898	(86)		
Kannapel's (Tr. 1389-1450; CX 733-35)	605	53	573	49	524	34	548	18	551	(1.6)	531	(.8)	515	.08	519	(9)	550	(4)	609	10
Oehrle's (Tr. 1532-42; CX 739-40)	109	....	108	....	98	7	103	5	108	10	105	7	99	9	88	1.5	88	2.9		
Von Allmen (Tr. 1419-29; CX 736)			......	(7)	574	1.4	620	(5)	690	(5)										
Sealtest (RX 105)					6,056		6,478		7,128		6,797		6,328		5,871		5,885		5,294	
Dean Kentucky (CX 746-55)			1,612	(3.9)	2,273	53	2,919	50	3,544	41	4,400	67	4,742	113	5,326	94	5,989	141		

APPENDIX II

Class I utilization of major Louisville dairies in pounds

Dean	1953	1954	1955	1956	1957	1958	1959	1960
1. Louisville	6,228,644	8,075,542	10,675,502	13,472,368	15,626,988	17,954,275	22,036,916	23,703,831
2. Vendors	6,534,065	10,453,943	12,578,336	13,673,419	13,462,828	14,788,431	16,995,121	18,342,344
3. Total	12,762,709	18,529,485	23,253,838	27,145,787	29,089,816	32,742,706	39,032,037	42,046,175
4. Total Dean Kentucky	13,022,789	19,346,087	25,548,309	29,828,684	37,431,618	41,027,118	48,402,648	49,633,231
Plainview Farms	13,287,175	14,893,785	15,253,306	14,699,473	15,672,295	14,168,172	13,033,296	11,801,462
Oscar Ewing		15,659,564	18,495,340	18,188,734	19,064,014	16,399,859	18,734,421	19,599,108
Kannapel's	4,428,083	4,554,212	4,855,889	4,611,242	4,515,415	4,236,394	4,307,276	4,474,321
J. W. Haywood			3,161,006	3,826,419	4,445,492	4,937,253	5,478,876	8,264,601
Creamtop			7,507,191	7,707,214	7,501,339	6,845,157	6,729,907	7,438,787
Walnut Grove					6,813,536	6,394,824	5,567,593	4,686,023
Sure Pure					7,172,072	7,707,328	10,164,041	11,173,255
Purity Maid					11,644,185	9,613,970		
Bowman							14,401,920	24,625,818
Beatrice (Model Farms)							25,931,704	28,566,300
Grand Ave						3,258,235	3,372,395	3,283,774
Ehrlers						8,680,256	9,882,152	11,675,833
Cherokee					5,933,156	5,381,099	5,652,864	6,027,860
Carrithers						3,130,449	3,255,154	3,296,858
Sealtest		82,393,298	88,535,215	97,319,854	89,490,476	84,349,106	79,285,727	74,410,029

SEPARATE STATEMENT

OCTOBER 22, 1965

BY MACINTYRE, *Commissioner:*

At the outset, I wish to make it clear that I join in and support the Commission's findings of fact that respondents' price discriminations violated Section 2(a) of the Clayton Act, as amended. I cannot agree, however, that the order framed by the Majority adequately prohibits future discriminations of a nature similar to those documented by this record and which may be reasonably anticipated in the future. My disagreement with the view of the Majority involves the provisions of subparagraph 1 of the order which limits its application to primary line price discriminations in market areas "served by the same processing plant" and the decision to include in the order the provision in the same subparagraph which limits its application to such discriminations among purchasers "at the same level of distribution." In view of these defects, it is with the greatest reluctance that I join in the decision to enter and issue this order. My reluctance is overcome only as a result of the understanding that should I do otherwise no order to cease and desist would issue.

The most serious inadequacy of subparagraph 1 of the order is that it prohibits price discriminations by respondents which may result in injury to the primary line of competition only when such discriminations occur in market areas served by the same processing plant. In explanation of this limitation the majority opinion states:

> There is no indication in this record that differences in price as between customers located in cities served by different processing plants have caused, or might cause, injury in this line of commerce. As a result, that portion of the order designed to prevent price discrimination which may substantially affect seller level competition will apply throughout areas served by one processing plant, but will have no application as between cities or definable market areas served by different processing plants.

I cannot agree with this evaluation of the significance of the evidence. Fortuitously or otherwise, the evidence establishes injury to primary line competition only in the area served by respondents' Louisville processing plant. It also discloses, however, that essentially the same pattern of discounts and price discriminations were followed by respondents in at least one area, Terre Haute, Indiana, served by their Rochester, Indiana, processing plant. In these circumstances, I am not satisfied that injury in the primary line of competition may not result from differences in price as

between customers located in cities served by different processing plants.

Under this limitation of the order a price by respondents which undercuts a smaller competitor's lowest price, but which does not discriminate among customers served by the same processing plant, would not violate the order, regardless of how much lower it might be than respondents' price to customers served by another processing plant, and regardless of the extent to which it may injure or destroy competition with respondents.

It is no answer to say that such a predatory price throughout all areas served by a single processing plant is likely to be too costly to be sustained by respondents for an effective period, or that for any other reason the postulated situation is not likely to occur. If it is assumed that such a situation is not likely to occur, it is apparent that this limitation of the order is unnecessary and meaningless. If, on the contrary, it is assumed that the situation is likely to occur, the limitation is improvident. In either case, the limitation has no place in the order and should be stricken.

A large multimarket company is capable of engaging in geographic price discrimination because it can transfer its financial resources from market to market. This is a critical distinction between respondents and the single market operators who are included among their injured competitors. Their multimarket operations, which are served by processing plants located in Huntley and Chemung, Illinois, Rochester, Indiana, Flint, Michigan, Louisville, Kentucky, Memphis, Tennessee, and Conway, Arkansas, enable respondents to subsidize their position in some markets out of profits earned elsewhere. In exercising this power, it is of little consequence to respondents' competitors, and to the effect on competition in the various markets, whether the markets involved are served by the same or by different processing plants. The number and location of respondents' processing plants are based upon business considerations which are not necessarily related to the competitive impact of their price discriminations.

Suppose, for example, that today respondents' Louisville plant serves three separate definable market areas. The order would prevent price discrimination among these markets only so long as each was supplied from the same plant. If respondents should build or acquire a plant in each of these markets, they could engage freely in geographic price discrimination among them without violating the order. Quite obviously, the competitive effects of such discrimination are the same whether the milk in a particular city originates in a plant located in that city or in another city.

The effect of this limitation conceivably may be to encourage the respondents to proliferate their plants in order to avoid the prohibitions of the order. Such a course of action would probably represent an inconvenience to respondents and might even interfere with their operating efficiency. To the extent warranted by business considerations, however, this represents one possible way of evading the order, and illustrates that its effectiveness in protecting the public interest may be dangerously curtailed.

The Commission has had many years of experience with problems in the dairy industry. It is intimately familiar with the market structure and competitive conduct in that industry, and should readily appreciate the danger of evasion inherent in this limitation which it has written into the order in this case. It is imperative, in my opinion, that when the Commission is faced with the problem of framing an appropriate remedy, it should draw upon its full expertise in the industry for the purpose of framing an order which is sufficiently broad to deal effectively with the immediate violation and to prevent foreseeable possible evasions.

I do not understand, and the Majority does not explain, the reason for the provision of subparagraph 1 of the order which limits its application to primary line price discriminations among purchasers "at the same level of distribution." This limitation is wholly unnecessary for the purposes of this case, and is not warranted at this time or on this record.

Neither the majority opinion nor the order defines the meaning of "level of distribution" as used in the order, but the opinion does discuss in some detail sales at two levels of distribution which are of considerable significance in this proceeding: sales at retail to consumers by home delivery, and sales at wholesale to retailers, especially retail food stores. Respondents sell to purchasers only at the wholesale level. The opinion specifically states:

> Respondents made no home delivery or other retail sales directly to consumers, but instead functioned in the Falls Cities market, and in other markets with which this case deals, as wholesalers and, as a result, sold their products only to grocery stores.

Since respondents' sales of milk are made to all purchasers "at the same level of distribution," the wholesale level, the limitation of the order on this point is meaningless with respect to respondents' present operations.

The danger inherent in this limitation lies in the mischievious implication that it would exempt from the order discriminations by respondents between purchasers at different levels of distribu-

tion which may injure the primary line of competition if at some time in the future respondents' operations should involve such purchasers. In this connection, it is necessary to recognize the basic characteristics of the fluid milk distribution system.

Typically, a differential, reflecting cost differences, necessarily exists between prices to consumers who purchase at stores and those who receive home deliveries, and consumers shift back and forth between store purchasers and home deliveries, depending on the existing price differential between them. In this situation a multimarket enterprise may injure or destroy smaller competitors and competition by skimming off the largest wholesale accounts in a particular city through discriminatory prices to them, or by selling to all of its wholesale accounts in a particular market at prices which are discriminatorily low with respect to its prices to such accounts in other markets. In either case, the discriminatorily low prices to the wholesale accounts are ordinarily reflected in prices to consumers at retail stores, which frequently result in out-of-store prices far below home delivered prices. The result may be to shift consumer purchases from home to store delivered milk, with disastrous results to independent dairy processors who depend for a substantial part of their sales upon their home delivered outlets.

It is well recognized that in many retail markets the local independent dairies depend on home delivered outlets for much of their business. Because of greater personalized service, long-standing local reputation, and for other reasons, many independent dairy processors have achieved a sizeable home delivered milk business and have exerted a real and significant competitive force in their markets. When, however, retail store prices are depressed to the point where they no longer reflect the cost differential between store sales and home delivery as a result of discriminatory price cuts or sales below cost, then the competitive position of those dairies dependent on home delivery may become critically impaired. Obviously the resulting competitive injury to independent dairies relying substantially on home delivered outlets is the same regardless of whether such depressed prices may have been caused by price discriminations at the wholesale or at the home delivered level, or at both levels.

The record discloses that a number of respondents' local competitors had achieved sizeable home delivered outlets which represented substantial and economically necessary protions of their total sales, and that, in the aggregate, they represented a significant competitive force in the markets with which this case

deals. The majority opinion recognizes that respondents' discriminatory prices were a contributing factor in initiating and sustaining the trend away from the home delivery of milk, and that they "played an important role in the decline of home delivery sales and the correspondence loss of business—both actual and potential—by dairies engaged in the retail distribution of milk and milk products."

The price discriminations in the primary line of competition which have been found in this proceeding have all occurred in sales to purchasers "at the same level of distribution." They have, however, profoundly affected sales by respondents' competitors to purchasers at a different level of distribution, with serious injury to the primary line of competition. In these circumstances, it is inappropriate for the order to include an unexplained limitation susceptible of a construction which may permit price discriminations in the future by respondents at a different level of distribution which may result in serious injury in the primary line of competition.

The importance of the Commission's failure to enter an adequate order here transcends this case. Recently, in the separate statements I appended to the Commission's decisions in FTC Docket No. 7207, *In the Matter of Forster Manufacturing Company, Inc.* [p. 210, herein], and in Docket No. 7908, *In the Matter of Lloyd A. Fry Roofing Company* [p. 217 herein], I noted how the Commission's decisions in those cases were infected by this same failure to enter adequate orders which would be effective in halting the destructive discriminations found to exist in situations involved there. My reference at this time to those instances is to emphasize this widespread and growing failure of the Commission to act effectively in instances where it finds price discriminations destroying primary line competition.

At any rate, the issue is out in the open. Hard core violations of the Robinson-Patman Act which involve the use of destructive price discrimination practices will not be dealt with effectively where the principal impact of injury is in the primary line of commerce. In other words, large diversified multi-market sellers will be left free to discriminate in price to the destruction of smaller companies who are confined in their operations to single small market areas. Indeed, there is a growing and perhaps a commanding point of view at the Federal Trade Commission that no such price discrimination practice should be challenged by the Commission unless it can be proven beyond doubt that predatory intent is involved. To put it another way, this present viewpoint at the

Federal Trade Commission would require a showing in a primary line Robinson-Patman Act case sufficient to sustain a monopolization case brought under Section 2 of the Sherman Antitrust Act. The legislative history of the Clayton Act and the Robinson-Patman Act amendments to that law teaches us that this is contrary to the intent of Congress. I am unwilling to speculate on the question whether this growing point of view at the Federal Trade Commission can be sold to the Congress in the future. Likewise, I am unwilling to speculate on whether the present climate in the business community is such as to justify the Federal Trade Commission in departing from the plain words and intent expressed in existing laws entrusted to the Commission for administration and enforcement. If these laws are to be changed, I believe Congress should change them in clear and unequivocal language. Then the business firms of this country will know the meaning of the Congressional mandate.

The actions and words of those who protest are far more informative and eloquent than my statement about their position.

Dissenting Opinion

OCTOBER 22, 1965

By Elman, *Commissioner:*

I

The most important issue involved in this case is the question of the proper standard for determining the legality of geographic price differences. It is a common and widespread practice of national firms to sell the same product at different prices in different areas of the country, depending on local market conditions or needs. In each local market the price to all buyers is uniform and nondiscriminatory. Hence, the "discrimination" is not between competing buyers in the same market but between non-competing buyers in different markets. This is sometimes called "area" or "territorial" price discrimination.

The standards for judging area price discrimination under the price discrimination law (Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act) are stated in the statute, which forbids "any person * * * to discriminate in price between different purchasers * * * 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 [the grantor of the discrimination]." The statute itself settles two points. First, proof of discrimination, without

more, does not establish a *prima facie* violation; there must also be a showing that the challenged discrimination was injurious to competition. Second, the injury to competition must be caused by the discrimination.

The first point has special relevance in an area price discimination case. I would emphasize that the word "discrimination" in the context of area price differences is a completely neutral term, carrying no invidious connotation and meaning simply a price difference. *F.T.C.* v *Anheuser-Busch, Inc.*, 363 U.S. 536. "[O]f course, there is nothing inherently or *per se* unlawful in the territorial or area price differences." *Lloyd A. Fry Roofing Co.*, F.T.C. Docket 7908 (decided July 23, 1965), p. 254. See also *Forster Mfg. Co.*, F.T.C. Docket 7207 (decided July 23, 1965), p. 214 & n. 2 (concurring opinion). Unlike a discrimination between competing buyers in the same market, where the discrimination itself may contain the seed of anticompetitive effect (*cf. F.T.C.* v *Morton Salt Co.*, 334 U.S. 37, 50), the existence of a difference in prices in different markets may in itself have little competitive significance. Certainly in an industry like milk, with which this case is concerned, where the larger sellers all have numerous separate plants scattered throughout a multi-state area and where raw material prices are to a large extent determined by federal marketing orders on an individual-area basis, territorial price differences are not exceptional. Proof of such a difference is obviously just the beginning not the end of inquiry into its effects on competition. *F.T.C.* v. *Anheuser-Busch, Inc., supra.*

It is also plain from the statute that a mere shift of business between competing sellers as a result of an area price difference does not, standing alone, establish a *prima facie* violation.[1] Section 2(a), like other antitrust provisions, is designed not to insulate competitors from competition but to protect them against practices destructive to competition. The natural and legitimate object of all competition is to gain business: "People will not compete without some hope of success; and successful competition necessarily diverts business from rivals." Edwards, *The Price Discrimnation Law* (1959), p. 637. Consequently, as the Commission itself argued to the Supreme Court in the *Anheuser-Busch* case, it is necessary in area price discrimination cases to distinguish between "normal and legitimate pricing activities designed to obtain a larger share of business in a marketing area," on the one hand, and "those which represent a punitive or destructive attack on

[1] See, *e.g.*, *Anheuser-Busch, Inc.* v. *F.T.C.*, 289 F. 2d 835, 840 (7th Cir. 1961); *Atlas Bldg. Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 954 (10th Cir. 1959).

local competitors and impair the vitality and health of the processes of competition," on the other.[2]

In an area price discrimination case, proof of illegality cannot consist solely of a showing that the respondent diverted business from a rival or diminished the latter's profits. A conclusion of illegality must—as in any Clayton Act case[3]—be based on the long-term, probable, foreseeable effects on competition of the respondent's conduct, not merely its immediate short-range impact on competitors. Is the respondent's discriminatory pricing likely to effect changes in the market structure adverse to competition? Does it present a substantial danger to competition by increasing concentration of the business of the market in the hands of too few sellers? Will it, by eliminating or crippling competitors, tend to lessen competition substantially or create a monopoly in any line of commerce? Or is the health and vigor of competition and competitors in the market not likely to be impaired by the challenged price discrimination? These and related questions are pertinent to an inquiry into competitive injury in an area price discrimination case.

To put this another way, the competition that the law protects is qualitative. Competition may be injured though no competitor suffers losses in his business; conversely, it may thrive in markets where firms suffer losses or even go under as a result of intense price rivalry. *Cf. United States* v. *Brown Shoe Co.*, 370 U.S. 294, 320. Thus, in passing on the legality of an area price difference, the Commission may not apply a simple formula of "discrimination plus loss of sales, profits, or customers by other sellers equals illegality." We must go further in identifying and defining the essential characteristics of those area price discriminations which Congress forbade by Section 2 of the Clayton Act; and, to this end, we must look to the statute, its history and background, and the course of administrative and judicial construction and enforcement. And in formulating standards for area price differences challenged under Section 2(a), we must bear in mind the Supreme Court's warning, in *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 63, that "simplified enforcement" of the statute "might readily extend beyond the prohibitions of the Act and, in doing so, help give rise to price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"; and its admonition

[2] Reply Brief for the Federal Trade Commission, p. 8, filed in the Supreme Court in *F.T.C.* v. *Anheuser-Busch, Inc.* (No. 389, October Term 1959), 363 U.S. 536. See *Quaker Oats Co.*, F.T.C. Docket 8112 (decided November 18, 1964), p. 5 [66 F.T.C. 1131, 1193].

[3] See, *e.g.*, *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 362; Edwards, *Tests of Probable Effect Under the Clayton Act*, 9 Antitrust Bull. 369 (1964).

that the statute be interpreted to harmonize "with the broader antitrust policies that have been laid down by Congress." *Id.*, at 74. It is fundamental that the standards under Section 2(a) should be consistent with and support basic antitrust principles and policies—in short, that they be designed to promote, not lessen, competition.

II

Among the classic monopolistic practices in which the great trusts of the late nineteenth and early twentieth centuries were alleged to have engaged was drastic price cutting calculated to punish, destroy, or discipline local competitors. See, *e.g.*, *Standard Oil Co.* v. *United States*, 221 U.S. 1, 43; Stevens, *Unfair Competiton* (1917), ch. I. Once it had eliminated competition in a number of local markets and could consequently charge monopoly prices and reap large profits in those markets, the trust was in position to wage ruinous price warfare in other markets where there were still aggressive competitors. Price cutting of the sort employed by the trusts has usually been called "predatory"; and the word, with its suggestion of a ruthless bird of prey devouring small, defenseless creatures, is apt. The trusts' monopoly or near-monopoly power in many geographical markets enabled them to set high prices returning huge profits, with the result that even prices below the cost of production could be maintained by the trusts in selected local areas for as long as might be necessary to punish or eliminate a competitor; and they wielded their power with a destructive design. Their objective was to obtain or maintain monopoly, and prevent or crush competition. As a means of effectuating this objective, price discrimination—charging different prices for like products in different markets—was the lever by which the trusts transferred their monopoly power to the few local markets where competition had not yet been eliminated.

While such price tactics were clearly pernicious and had no redeeming economic value or legitimate business purpose, their illegality under the antitrust laws was not settled until the enactment in 1914 of Section 2 of the Clayton Act. Such conduct had, to be sure, been among the practices of the great trusts declared illegal by the Supreme Court under the Sherman Act in *Standard Oil Co.* v. *United States*, 221 U.S. 1, and *United States v. American Tobacco Co.*, 221 U.S. 106. But the Court had based decision on a broad, and inherently imprecise, "rule of reason." See 47 Cong. Rec. 1225 (1911) (remarks of Senator Newlands on the *Standard Oil* decision). The Court did not make clear whether predatory

local price cutting in and of itself was unlawful under Section 2 of the Sherman Act as monopolizing or attempting to monopolize, or whether such practice might be lawful if pursued by firms less dominant and powerful than the great trusts.

The Clayton Act was born of dissatisfaction with what was felt to be the vagueness of the Sherman Act as construed by the Supreme Court. See, *e.g.*, Henderson, *The Federal Trade Commission* (1924), pp. 15-18, 27-28. It was thought that the Rule of Reason left the courts too much at large, and that certain practices followed by the great trusts should be dealt with specifically under stringent legal standards. One of these was predatory local price cutting. Section 2 of the Clayton Act, as finally adopted, 38 Stat. 730, forbade persons and firms engaged in commerce "to discriminate in price * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." It also provided that "nothing herein contained shall prevent * * * discrimination in price in the same or different communities made in good faith to meet competition."

In enacting Section 2, Congress intended to outlaw the kind of unfair and destructive local price cutting used by the trusts—as the Supreme Court has put it, "to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers," *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543—rather than to prevent, as such, the practice of geographically diversified sellers in selling at different prices in the various markets in which they operated.[4] Thus, the statute required proof of at least probable injury to competition, and the challenged area price difference itself had to be the source of injury. Only if the seller's low price in one market was subsidized out of higher prices maintained else-

[4] "The necessity for legislation to prevent unfair discriminations in prices with a view of destroying competition needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of this same class of commodities above their fair market value in other sections or communities. Such a system or practice is so manifestly unfair and unjust, not only to competitors who are directly injured thereby but to the general public, that your committee is strongly of the opinion that the present antitrust laws ought to be supplemented by making this particular form of discrimination a specific offense under the law when practiced by those engaged in commerce." H.R. Rep. No. 627, 63d Cong., 2d Sess. 8-9 (1914). See also S. Rep. No. 698, 63d Cong., 2d Sess. 2-4 (1914).

where could the effect of the discrimination, rather than of the lower price alone, be anticompetitive. If the seller faced keen competition in every market where he sold, he would be unlikely to derive sufficient profits from sales in some markets to constitute a "war chest" out of which to finance destructively low prices in others, and in such a case any price differences between markets would not evidence a monopolistic or anticompetitive scheme or pattern. Not every area price difference, then, would have the adverse competitive effects specified in the statute. The good faith meeting of competition proviso was intended to underscore that the statute would not be violated if the seller was merely responding in good faith to varying competitive conditions encountered in different localities. Anticompetitive, destructive exploitation of market power was thus the gist of the offense.

Between 1914 and 1936, when Section 2 was amended by the Robinson-Patman Act, only one decision was rendered by a higher court on the legality of area price differences. *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929). It presented a classic instance of destructive and monopolistic local price cutting. American Tobacco, a powerful firm selling throughout the nation, had "intent to punish, and, if possible, eliminate" a small local competitor in Puerto Rico who had the temerity to compete vigorously against it. 30 F 2d, at 237. The Commission's decisions in this period, which likewise involved clear-cut examples of predatory local price cutting, did not read Section 2 as broadly forbidding non-predatory price cutting as well.[5] Thus by 1936 Section 2 had crystallized as a ban on *predatory* area price discrimination.[6]

The principal changes in Section 2 made by the Robinson-Patmon Act amendments were, for present purposes, two. First,

[5] See *Fleischmann Co.*, 1 F.T.C. 119; *Wayne Oil Tank & Pump Co.*, 1 F.T.C. 259; *Galena Signal Oil Co.*, 2 F.T.C. 446; *Pittsburgh Coal Co.*, 8 F.T.C. 480.

[6] To be sure, Section 2 had application to other practices besides local price cutting. It was early established that Section 2 might be violated by collusive pricing among competing sellers, by means of a basing-point system or otherwise eliminating competition at the seller level. *United States Steel Corp.*, 8 F.T.C. 1. See also *United Fence Mfrs. Assn.*, 27 F.T.C. 377; *Ferro Enamel Corp.*, 42 F.T.C. 36; *F.T.C.* v. *Cement Institute*, 333 U.S. 683. Moreover, since the statute proscribed price discrimination causing probable competitive injury in *any* line of commerce, the Supreme Court held that price discrimination was unlawful even if the only injury was felt at the buyer's rather than the seller's level. *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U.S. 245. Other forms of price discrimination besides local price cutting have been held unlawful (albeit in only a very few cases) under Section 2 by reason of injury to competition at the seller level. See, *e.g.*, *American Optical Co.*, 28 F.T.C. 169. One is involved in the present case. See pp. 820-822, *infra*. For the present, we can put these discrete applications of the statute to one side; they do not help answer the question of how far the prohibition of the statute extends with respect to area price differences challenged under Section 2 solely because of alleged injury to competing sellers.

the test of competitive injury was enlarged by the addition of a third clause, forbidding discrimination where its effect may be "to injure, destroy, or prevent competition with any person who * * * grants * * * such discrimination * * *." Second, the good faith meeting of competition proviso was shifted to a new Section 2(b), which allowed the seller to defend by showing that the lower price was made in good faith "to meet an equally low price of a competitor."

The effect of these amendments on the standard for judging the legality of area price differences is somewhat obscure, due to Congress' overriding concern in 1936 with discrimination arising from abuse of buying power and injuring competition at the buyer's level, rather than that arising from abuse of selling power and injuring competition at the seller's level.[7] The tightening up of the good faith proviso was designed mainly to facilitate proof of violation in buyer-level cases, not to change the test of legality for seller-level cases.[8] There was, however, one possible loophole with respect to protection of competition at the seller's level which Congress determined to close: The new Section 2(b), in limiting the defense to meeting the "equally low price of a competitor," not competition generally (see H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936)), made clear that a powerful seller who "met" the "competiton" of a weak local competitor by undercutting the latter's price in order to punish him could not interpose the defense. See 80 Cong. Rec. 8235 (1936) (remarks of Congressman Patman).

In Section 2 in its original form, the good faith proviso had not been an affirmative defense; it had been included, as has been mentioned, to make explicit that the only kind of area price difference proscribed was destructive local price cutting such as the great trusts had employed. See 51 Cong. Rec. 9069, 9389 (1914). Although the Robinson-Patman Act narrowed the good faith proviso and made it an affirmative defense, it did not change the basic character of the statute. Indeed, under the statute as amended, the good faith defense comes into play only after a *prima facie* case of anticompetitive, unlawful price discrimination has been established.

The third clause of the competitive-injury test was adopted because of concern that some destructive or unfair local price

[7] See *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543-44; *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37, 43; *F.T.C.* v. *Henry Broch & Co.*, 363 U.S. 166, 168.

[8] See the review of the legislative history in the dissenting opinion in *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 256-61.

cutting might escape proscription through loopholes in the statutory language. For example, it was feared that Section 2, as originally drafted, might not reach the situation

where a nonresident concern opens a new branch beside a local concern, and with the use of discriminatory prices destroys and replaces the local concern as the competitor in the local field. Competition in the local field generally has not been lessened, since one competitor has been replaced by another; but competition with the grantor of the discrimination has been destroyed.[9]

Similarly, concern was expressed that since Section 2 required a showing of a general lessening of competition or tendency to monopoly, a seller who picked off his local competitors one by one might not be reached under the statute. See H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936). Under the amended statute, it is clear that destructive or annihilative area price discrimination aimed at a single competitor is forbidden.[10]

While the Robinson-Patman amendments were intended to tighten in certain respects the prohibition of price discrimination injurious to competition among sellers, "neither in 1914 nor in 1936 was it the intent of Congress that keen, vigorous and fair competition should be considered unlawful discrimination at the seller level." *Quaker Oats Co.*, F.T.C. Docket 8112 (decided November 18, 1964), p. 4 [66 F.T.C. 1131, 1193]. This is confirmed by the decisions since 1936 involving area price differences. In every case in which the Supreme Court or a court of appeals has upheld a finding that Section 2(a) was violated by area price discrimination, the court has been careful to distinguish " '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 processes of competition.' " *Id.*, p. 5 [66 F.T.C. 1193].

In the only Supreme Court decision in this group, *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, the Court found a "purpose to eliminate a competitor" which was realized with the competitor's "destruction." A geographically diversified firm with power in other markets engaged in a punitive attack on a weak, completely local competitor. The Court emphasized that the core of the offense was the subsidization of a destructively low price from sales

[9] 80 Cong. Rec. 9417 (1936) (remarks of Congressman Utterback). See also S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936).

[10] See, *e.g.*, *Maryland Baking Co.* v. *F.T.C.*, 243 F. 2d 716 (4th Cir. 1957); *E. B. Muller & Co.* v. *F.T.C.*, 142 F. 2d 511 (6th Cir. 1944). *Cf. Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207.

made in other markets where the seller was strong and could command higher prices for his product. In *E. B. Muller & Co.* v. *F.T.C.*, 142 F. 2d 511, 517 (6th Cir. 1944), the same factual situation was involved and a "deliberate intent to destroy" was found in *Maryland Baking Co.* v. *F.T.C.* 243 F. 2d 716, 718 (4th Cir. 1957), too, predatory local price cutting was involved, the court finding that "the price cut was initiated for the purpose of driving the competitor out of business." In *Atlas Bldg. Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2nd 950, 956 (10th Cir. 1959), the defendant was found to have "utilized its dominant market power for predatory ends." Predation was also relied on by the Commission in finding competitive injury in the recent *Forster Mfg. Co.* decision, F.T.C. Docket 7207 (January 3, 1963) [62 F.T.C. 852]; the reviewing court, while reversing the Commission's decision on other grounds, upheld this finding. 335 F. 2d 47 (1st Cir. 1964). And, very recently, the Commission issued a cease and desist order on a finding of predatory price discrimination. *Lloyd A. Fry Roofing Co.*, F.T.C. Docket 7908 (decided July 23, 1965), page 217. See also *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 346 F. 2d 661 (6th Cir. 1965). Similar findings were made in a Sherman Act case involving local price cutting. *United States* v. *New York Great A. & P Tea Co.*, 173 F. 2d 79, 86-87 (7th Cir. 1949). Those cases in which violation has not been found turned on evidence negating an inference that destructive or unfair local price cutting was involved. See *e.g.*, *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (9th Cir. 1955).

In short, as succinctly summarized by the Court of Appeals in *Anheuser-Busch, Inc.* v. *F.T.C.*, 289 F. 2d 835, 843 (7th Cir. 1961), some showing of conduct that can fairly be described as predatory or buccaneering has always been required. I do not understand the court to have meant by this that in every case a deliberate design or subjective intent to eliminate or destroy competition must be proved; and in its lengthy excursus on the question of whether such intent must be shown the Commission, in its present opinion (pp. 741-750), is merely setting up, and then demolishing, a straw man. The point, rather, is that neither the cases nor the legislative history support a sweeping condemnation of all area price differences. They have been outlawed only where found to be predatory, destructive, anticompetitive, foreign to any legitimate business purpose, or otherwise unfair in an antitrust sense. The law on this subject may be summarized as follows: A seller violates the statute if, by virtue of operating in a number of geographical markets, he has the power to lower his price in one market while

maintaining higher prices elsewhere, and does so in circumstances where, as a matter of reasonable business probability, the effect may be to eliminate, impair or lessen competition substantially, to tend to create a monopoly in any market, to destroy unfairly or cripple other sellers' capacity to compete, to block the entry of new competitors into the market, or to punish, discipline, or intimidate a competitor who has not "held the price line" or has otherwise shown competitive independence.[11]

III

A review of the pertinent authorities shows that Congress, the courts, and for the most part, the Commission have taken a cautious and circumspect approach to the problem of area price differences. Findings of illegality have been upheld only in the handful of cases where the predatory character of the discrimination was readily apparent. This reflects, I believe, recognition that such pricing often promotes rather than impairs the vigor of competition in local markets, and that a too sweeping prohibition of area price differences could have seriously detrimental effects on competition.

There are many circumstances in which it can be demonstrated that such pricing is not unfair or destructive in nature or probable effect. Suppose a firm that operates in a number of geographical markets desires to enter a market where it has not sold before and where one or a few firms are dominant. New entry into such a market would stimulate competition. But to gain a foothold in a market of well-entrenched sellers, a new competitor may be obliged to sell his brand at a low price, at least initially. Unless he is in a position to subsidize his initial low price from higher

[11] This formulation of the test of legality for area price differentials challenged under Section 2(a) is not vulnerable to the objection that it forbids no conduct not also forbidden by Section 2 of the Sherman Act or Section 3 of the Robinson-Patman Act. (Section 3, 15 U.S.C. § 13a, in part forbids any person "to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor.") Although local price cutting is forbidden by the Sherman Act in certain circumstances (see *e.g., Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555), it is not clear that such unilateral pricing, if intended, say, merely to discipline a competitor who undercut a prevailing industry price, would necessarily be deemed an attempt to monopolize forbidden by Section 2—but it would come within Section 2(a) of the Clayton Act. Furthermore, when Section 2 of the Clayton Act was enacted in 1914, there was some doubt, which Congress wished to still, whether the Sherman Act forbade even predatory local price cutting, except perhaps where employed by vast, full-blown monopolies like the oil and tobacco trusts. As for Section 3 of the Robinson-Patman Act, it is a criminal statute only. *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373. Not only is there a heavier burden on the government when it elects to challenge local price cutting under Section 3, but that statute unlike Section 2(a), expressly requires affirmative proof of a "purpose of destroying competition, or eliminating a competitor." *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, conviction on remand affirmed, No. 17,734 (8th Cir. August 27, 1965).

prices maintained elsewhere, entry may be impracticable for him. Geographically diversified sellers are, consequently, an important source of new competition in concentrated markets. *Beatrice Foods Co.*, F.T.C. Docket 6653 (decided April 26, 1965), pp. 38-39 [67 F.T.C. 473, 723-724]. Promotional local price cutting aimed at prying open such markets surely is not forbidden by the antitrust laws, even if some rivals cannot stand the increased competition and go under.[12]

Selective local price cutting may also be a necessary first stage in a general lowering of prices. A national seller is often reluctant to initiate a uniform price reduction, especially if he is so large a factor in the markets in which he sells that he can expect his competitors to match any such reduction. In such a situation, where an across-the-board price reduction might be hard to reverse should it prove unwarranted, a national seller may want to experiment with a projected price reduction in one or several local markets before establishing it throughout his entire marketing area. Such experimentation or test marketing is not anticompetitive. In addition, there are occasions when a local or regional firm may become dominant in its market area and set a high, monopoly price. Where local price cutting by a geographically diversified seller may pose the only real threat to the monopoly power of the entrenched local or regional competitor, plainly it is beneficial to competition. In general, when a firm sells in a number of different markets, there need be nothing unfair, abnormal, or anticompetitive in the fact that its prices vary from market to market. Such lack of uniformity may simply reflect the seller's promptness and flexibility in adjusting his price to meet different competitive conditions in different markets, and insistence on price uniformity in such situations could lead to high, rigid, and unresponsive prices and thereby hurt competition.[13]

Thus, the fact that a seller does not charge the same price in every area in which he does business does not *ipso facto* render him suspect as a violator of the antitrust laws. That is why, in cases where competitive injury only at the seller's level is alleged to result from an area price difference, Section 2(a) requires proof not merely of the discrimination but of its probable adverse effect

[12] See Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 212 (1954); Brooks, *Injury to Competition Under the Robinson-Patman Act*, 109 U.Pa. L. Rev. 777, 787 (1961); Note, *Competitive Injury Under the Robinson-Patman Act*, 74 Harv. L. Rev. 1597, 1610 (1961).

[13] See *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 367 (9th Cir. 1955); Henderson, *The Federal Trade Commission* 251 (1924); Edwards, *The Price Discrimination Law* 637 (1959). *Cf. Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 63.

on competition, and why actual or probable injury to competition does not inhere in, and cannot be presumed to flow automatically from, the mere existence of such price difference.

There are, to be sure, formidable difficulties in determining within the framework of a single litigation whether a particular course of local price cutting is destructive, or beneficial, or harmless, in its nature and foreseeable competitive effect; and to conduct in every case a full inquiry into all aspects of the structure and performance of the firms and markets involved is no more practicable in this than in other areas of antitrust enforcement. But that of course does not justify any and all shortcuts to a finding of violation. One simplified test of illegality that has been decisively rejected by the courts and the Commission, and properly so, is that of simple diversion of business from a competitor or competitors to the seller charged with violating the statute.[14] Change in market shares, fluctuation in sales volume, or gain or loss of customers is as consistent with fair as with unfair competition. Price competition in any form is bound to involve a shift in business from firm to firm; indeed, perfect stability as to price, customers, and market shares is often symptomatic of the weakness or absence of competition.[15] Thus, in the words of a former Chief Economist of the Commission, to make

> diversion unlawful is tantamount to a complete prohibition of the tactics of making price reductions or price increases that result in nonuniform prices. It is to forbid limited experiment with new price policies, adjustment of prices to varying conditions of demand, and response to competitive pressures that are neither general nor strong enough to induce a general price change. It is to reduce competition, not to protect it. Edwards, *The Price Discrimination Law* (1959), p. 637.

Suppose, for example, that three firms completely dominate a local market, each with 33⅓% of the total sales, and a new firm forces its way into the market by price cutting and succeeds in obtaining a 25% share. Each of the other firms in the market will thereby have suffered a substantial diminution of its market

[14] 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, 840 (7th Cir. 1961); *Atlas Bldg. Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 954 (10th Cir. 1959); *Minneapolis-Honeywell Regulator Co.* v. *F.T.C.*, 191 F. 2d 786, 790 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206; *Champion Spark Plug Co.*, 50 F.T.C. 30, 38; *Purex Corp., Ltd.*, 51 F.T.C. 100, 113-14; *Yale & Towne Mfg. Co.*, 52 F.T.C. 1580, 1603-04; *Quaker Oats Co.*, F.T.C. Docket 8112 (decided November 18, 1964) [66 F.T.C. 1131]; *Lloyd A. Fry Roofing Co.*, F.T.C. Docket 7908 (decided July 23, 1965), pp. 217, 259-260. See also pp. 796-798, *supra*.

[15] In a related context, the notion that the price discrimination law gives sellers a vested right to retain their customers as against competing sellers has been expressly rejected. *Sunshine Biscuits, Inc.* v. *F.T.C.*, 306 F. 2d 48, 52 (7th Cir. 1962).

share and a loss of business to the newcomer, but the structure of the market will be more competitive than before it entered. As this example shows, if all we know in a given case is that a geographically diversified firm cut prices in a local market, and thereby increased its share of the market, we do not have enough facts to decide whether the local price cutting was a normal and legitimate pricing activity designed to obtain a larger share of business in the marketing area, or a punitive or destructive attack on local competitors of the kind that impairs the vitality and health of the processes of competition. Conversely, the fact that a discriminatory pricing policy does not cause any immediate shift in business to the discriminating seller will not necessarily rebut an inference of probable long-run anticompetitive effect. *Lloyd A. Fry Roofing Co.*, F.T.C. Docket 7908 (decided July 23, 1965), pp. 217, 259-260.

A test based on the seller's intent may enable distinguishing competitive from anticompetitive local price cutting without undertaking an exhaustive examination into all of the surrounding circumstances. "Motive is a persuasive interpreter of equivocal conduct," *Texas & N.O.R.R.* v. *Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 559; "Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences," *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 372. If actual purpose or design to destroy, disable, or punish a competitor[16] by such means is proved, elaborate inquiry into the circumstances of the discrimination will ordinarily not be necessary to demonstrate its anticompetitive character and probable effect. *Lloyd A. Fry Roofing Co., supra*, p. 267 (concurring opinion).

Intent has played a very large role in area price discrimination cases. As noted earlier, there appear to be no cases in which a finding of illegality was upheld by a higher court where no anticompetitive purpose was easily discernible, either because of direct evidence of the seller's intent or because the circumstances demonstrated bad faith and predatory, disciplinary, or other unfair purpose. But, at least in principal, I am not convinced that in a Section 2(a) area price discrimination case, as in a criminal prosecution under Section 3 of the Robinson-Patman Act, a purpose to destroy competition or eliminate a competitor must affirmatively be shown. The language and design of Section 2(a) do not

[16] Intent merely to get a competitor's business is, of course, not predatory or unlawful. See, *e.g.*, *General Gas Corp.* v. *National Utilities of Gainesville, Inc.*, 271 F.2d 820, 822 (5th Cir. 1959).

support a reading that would make proof of unlawful intent an indispensable requirement of the *prima facie* case. Moreover, a test of intent may impose insuperable evidentiary obstacles in some cases, and in others may not be a completely satisfactory means of distinguishing harmful from harmless (or beneficial) area price differences.[17] See, *e.g.*, *Wilcox, Competition and Monopoly in American Industry* (T.N.E.C. Monograph No. 21, 1940), p. 6. Evidence of anticompetitive intent may be a sufficient, but is probably not an essential element of proof in demonstrating the illegality of an area price differential. See, *e.g.*, *Purex Corp., Ltd.*, 51 F.T.C. 100, 116; *Lloyd A. Fry Roofing Co.*, *supra*, p. 264, and cases cited therein.

Where predatory (in the broad sense of unfair or anti-competitive) intent is not shown, such factors as the relative size of the company charged with unlawful discrimination, its position in other markets, and the structure and competitive conditions of the local market affected, become pertinent in determining whether there is a reasonable likelihood of competitive injury. That does not mean that the same type or amount of evidence of competitive injury is required as might be appropriate in a Sherman Act case, or that actual impairment of competition or actual injury to a competitor must be shown. But complaint counsel cannot rest with a showing merely that there was a geographic price discrimination and that some business was diverted from competing sellers; as in other Clayton Act cases, he must analyze the economic circumstances of the seller's pricing.

One material circumstance is whether the seller's lower price is below his out-of-pocket costs. Below-cost selling is not *per se* illegal; often it is just a manifestation of extremely vigorous competition. But unless the seller's lower price is below his out-of-pocket costs, it may be difficult to demonstrate that such price is subsidized or "fed" by a higher price maintained elsewhere—and hence that the discrimination itself is anticompetitive. If the seller is making money selling at the lower price wholly without reference to his activity in other markets, it may be hard to trace to the area price difference any competitive dislocations engendered by the lower price. Even if the lower price is below cost, it may be supported not by higher prices maintained in other markets on

[17] Suppose, for example, that it is the practice of a powerful seller having an entrenched position in a number of local markets to dump his surplus production at distress prices in a single market. In such a case, even if the seller has no deliberate design to injure his competitors in that market, there may be a violation of Section 2(a), if, as a foreseeable result of the dislocations produced by the seller's conduct, competition in the market may be substantially lessened.

the same product but by higher prices on different products sold by the respondent. Here, too, there would be no violation of Section 2(a), though there might be a violation of Section 5 of the Federal Trade Commission Act.[18]

As the foregoing example suggests, a relatively full inquiry into the character and circumstances of an area price difference, which in the absence of proof of anticompetitive intent is the kind of inquiry that seems to me necessary to distinguish between competitive and anticompetitive price differences, may often be difficult and time-consuming. But the harm of oversimplified tests of legality in this area is also great. Pricing decisions of individual sellers constitute, in the Supreme Court's phrase, the "central nervous system of the economy," *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59, and price competition is, at least *prima facie*, precisely what the antitrust laws are designed to encourage. Geographic price differences, which are the competitive norm rather than the exception in many industries (like milk), are often a reassuring manifestation of vigorous legitimate price competition. To err on the side of strictness in the regulation of such pricing could have very harmful consequences for the vitality of our competitive system over the long run. An injunction or cease and desist order in a price discrimination case, if it is to be effective in preventing recurrence of the unlawful conduct, is bound to restrict the respondent's competitive flexibility, perhaps drastically, and impair his competitive initiative. Such an order, which may even make the sellers subject to it competitively sluggish and unaggressive, surely should not be imposed if there is serious doubt that the pricing conduct sought to be restrained is indeed substantially anticompetitive in character and probable effect.

As a practical matter, moreover, the antitrust laws in general and Section 2(a) in particular would appear to have only a limited though important role to play in policing the pricing decisions of individual sellers, as is indicated by the paucity of "primary line" cases in which illegality has been found. Anticompetitive area price discrimination usually depends on the possession of excessive market power by the seller; and where such power exists, the danger of its abuse also exists. See *Foremost Dairies, Inc.*, 60 F.T.C. 944; *cf.* Dirlam & Kahn, *Fair Competition: The Law and Economics of*

[18] "In the hands of a powerful firm, selling at unjustifiably low prices may be a potent weapon of predatory and destructive economic warfare, and hence unfair, especially where such sales are subsidized out of profits made in other product lines where the seller is strong and his competition weak." *Quaker Oats Co.*, F.T.C. Docket No. 8112 (decided November 18, 1964), p. 5 [66 F.T.C. 1131, 1193, 1194]. See also n. 22, *infra*.

Antitrust Policy (1954), p. 205. Section 2(a) cannot be regarded as a comprehensive charter of protection against the pricing abuses of powerful sellers. Being limited to cases where actual or probable competitive injury can be proved to have been caused by a price difference in sales of products of like grade and quality, it leaves untouched many unfair and predatory pricing tactics. *Quaker Oats Co.*, F.T.C. Docket 8112 (decided November 18, 1964), p. 5 [66 F.T.C. 1131, 1193]. It does not even reach all manifestations of anticompetitive area price discrimination, since the statute requires proof that the price *difference,* not just the lower price in the local market affected, caused the competitive injury. Moreover, the statute is encumbered with provisos that afford an absolute defense to price discriminations shown to have anticompetitive effects. See *Beatrice Foods Co.,* F.T.C. Docket 6653 (decided April 26, 1965), p. 37 [67 F.T.C. 473, 723]. In short, the inherent difficulties of establishing a violation of Section 2(a) in an area price discrimination case are great.

In many cases it would be simpler, more direct, and more practical for the Commission to proceed on the theory, not that a particular area price difference is a discrimination forbidden by Section 2(a), but that it is an unfair method of competition forbidden by Section 5 of the Federal Trade Commission Act. In a section 5 proceeding, attention would be focused where it properly belongs: on the competitive character and significance, the fairness or unfairness, of a seller's pricing practice—not on such tangential and elusive facts as whether the seller's products were of like grade and quality, whether his price differences were cost justified, whether the cause of competitive injury was the price difference or the lower price alone, etc.[19]

IV

I have discussed the general problem of area price discrimination at such length because the Commission's opinion plainly reflects an attempt to renovate Commission policy in this field—to jettison outmoded dogmas, bend a little more to the views expressed by the courts[20] and the Commission's responsible critics, and announce meaningful standards, drawn from the basic antitrust policy of pro-

[19] See, further, n. 18, *supra,* and n. 22, *infra.*

[20] A recent example is *Foremost Dairies, Inc.,* v. *F.T.C.,* 5th Cir. No. 20726, 348 F. 2d 674, 678 (1965): "The probability of a general injury to competitive conditions in the market in which the seller or the purchaser sells his product will support a cease and desist order * * *. An injury of this broad nature is more prevalent in primary-line cases, as where a dominant seller uses discriminatory pricing policies to enhance its market position and therefore diminish the general vigor of competition or to increase the concentration of market power in the industry."

moting competition, to be applied in area price discrimination cases. Along with other recent decisions (*Lloyd A. Fry Roofing Co.*, F.T.C. Docket 7908 (decided July 23, 1965), page 217; *Forster Mfg. Co.*, F.T.C. Docket 7207 (decided July 23, 1965), page 191), the Commission's decision in this case represents a heartening step away from the discredited *per se* approach to area price discrimination of, for example, *Borden Co.*, F.T.C. Docket 7474 (decided February 7, 1964), *rev'd*, 339 F. 2d 953 (7th Cir. 1964) [64 F.T.C. 534]. The Commission's opinion, however, shows all the stresses and strains of a transitional piece. It is irresolute and ambivalent, looking simultaneously backward and forward.

On the plus side, I would note in particular the terms of the cease and desist order entered by the Commission. Not only does it contain the same limitations as the *Fry* and *Forster* orders (see my concurring opinions in those cases), but in addition it is limited to forbidding area price discrimination between customers of the same processing plant. The Commission now recognizes that in an industry like milk, no inference of competitive injury or unfairness can be drawn from the fact that a seller does not maintain a uniform price throughout his entire marketing area; that while selling milk from different plants at different prices may involve a technical price discrimination within the meaning of the statute, it has no necessary competitive significance; and that even sellers found to have engaged in unlawful area price discrimination should so far as possible be permitted, under any order entered by the Commission designed to prevent recurrence of the illegal conduct, "to compete on a par with other sellers in all markets" (Commission opinion, p. 787). The form of order here, strikingly different from that entered in *Borden, supra*, indicates a far more realistic understanding of the phenomenon of area price discrimination than the Commission evidenced in that case.

Furthermore, there are a number of indications in the Commission's opinion of a dawning recognition that the concern of Section 2(a) in the area price discrimination field is not to prevent but to protect and foster vigorous competition; not to shield individual competitors from the risks and stresses of competition but to maintain the health of "the competitive process" (Commission opinion, p. 745). Thus, the Commission has finally recognized that the law is concerned to prevent not "temporary diversion of business and minor losses of sales and profits" (*id.*, p. 749) or "temporary shifts in market shares" (*ibid.*), but "permanent changes in the market structure" (*ibid.*) and "permanent and pro-

found effects" on competitors (p 767; see also p. 768), resulting from or likely to result from area price discrimination. To support an inference or illegality, diversion must be "significant" (p. 750) in the sense of portending the "crippling" of competitors, "anti-competitive concentration," or a "significant reduction in the number of sellers in the market." *Ibid.* Any "finding of possible competitive injury is not [to be] bottomed solely upon the fact that there has been or may continue to be diversion of business or loss of profits"; that fact is to be deemed significant only if the "reasonably forseeable results" are a trend toward "further losses of business and profits," "increased concentration," etc. *Ibid.*

The proper focus is on "the condition of the market as a whole" (p. 775) and whether the respondent is "using its market strength fairly" (p. 750). Even if area price differences result in the actual "demise" of a competitor, that "will not automatically result in a finding of seller line competitive injury" (*ibid.*), though of course the elimination of a single seller may be highly significant in a market of "only a few sellers" *(ibid.)*. A *per se* approach is explicity rejected; and in determining whether an area price difference is unlawful such factors must be weighed as "the relative sizes of the new entrant and the local firms, the length of time the discrimination is practiced, the severity of the price cut, and the relationship between demand and price in the market" (p. 751). With respect to the problem of new entry (see pp. 804, 807, *supra*), the Commission now concedes that "a new entrant into a market may not be able to avoid prices which are below unit costs when it first begins selling" (p. 775, n. 147).

On the other hand, largely because it misreads the third clause of the competitive injury proviso of Section 2(a) (see pp. 801-802, *supra)*, the Commission's opinion lapses in a number of places into the discredited view that area price differences are illegal, regardless of their impact on "the condition of the market as a whole," if they hurt one or more competitors; if "there is a reasonable possibility that some sellers will be driven out of business" (Commission opinion, p. 750; see also p. 768) or that "competing sellers [will be] less able to compete with the discriminator" (p. 750). This is a distortion of the third clause, which only protects "competition" with the seller charged with violation. Impairment of the profits or business of individual competitors has legal significance only if "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]; *Lloyd A. Fry Roofing Co.*, F.T.C. Docket 7908 (decided July 23, 1965), pp. 217, 268 (concurring

opinion). An area price difference is not illegal merely because one or some of the seller's competitors go out of business—such results are inherent in the process of competition—unless, by reason of the circumstances, intent, or effect of the seller's actions, they may fairly be deemed anticompetitive, as would be the case, for example, if such competitors represented so large a segment of the relevant market that the seller would, by reason of their elimination, enjoy a monopoly, or the market would be substantially less competitive in structure and probable behavior.

The internal ambivalence of the Commission's opinion requires that we give close scrutiny to its application of the standards it announces to the particular facts of this case, to which I now turn.

V

Dean first began selling milk in Lexington, Kentucky, in December 1958. As a new competitor, selling an unfamiliar brand, Dean could not command the prevailing price in the market. It was obliged to undercut that price by a few cents as well as engage in other promotional efforts to stimulate public acceptance of its brand. Dean's prices in Lexington were lower than its prices in some other local markets, and, due to low sales volume in the area and high transportation costs, below cost. But the low prices enabled Dean to gain a foothold in the Lexington market. Four months after it had first begun selling there, it was able to and did raise its price to the prevailing price. In December 1958, Ashland Dairies, a local competitor in Lexington, lost some wholesale milk sales to Dean. Ashland sustained a loss for the month of some $5,000. On these facts, and no more, the hearing examiner found that respondents' conduct in Lexington violated Section 2(a). The Commission reverses that finding, but without discussion of the important issues at stake.

In finding violation, the examiner in effect applied the following formula: "an area price difference plus diversion of trade from another seller equals illegality." As already noted, this is not the statutory test. A mere difference in prices in different markets does not prove unlawful discrimination. Nor does a mere diversion of business from another seller. The statute requires proof that the effect of the price discrimination "may be substantially to lessen competition" or to "tend to create a monopoly" or "to injure, destroy, or prevent competition."

The fact that one competitor had a bad month due to Dean's admittedly temporary price cutting reveals nothing about the

probable effects on competition of the challenged discrimination.[21] Even if it had gone out of business as a direct result of Dean's price cutting, that in itself would not prove that Dean had injured, prevented, or destroyed *competition* between itself and Ashland. If Ashland was the loser in a fair competitive rivalry, there would be no antitrust violation; competition does not require that all competitors should succeed and that none should fail. A reasonable inquiry into the condition of the market and the status of competing dairies, not so narrow and limited as that undertaken by complaint counsel, would be necessary to determine what these probable effects were. So far as appears from this record, the intended, foreseeable, and actual result of Dean's price tactics was to increase competition in Lexington by enabling Dean's entry as a significant new competitor. It is unlikely that Dean could have obtained any share of the Lexington market without initially undercutting the prevailing price. And had Dean been prevented from confining its price cut to Lexington, it would probably not have attempted to penetrate that market at all. Gaining a foothold there would hardly have justified a uniform, nationwide reduction in the price of Dean's milk.

The practical consequence of a ruling that respondents engaged in illegal price discrimination in Lexington would be to raise a formidable barrier to the entry into new markets of dairy companies already selling in more than one market. This would be a particularly anomalous result in view of the Commission's expressed concern with the fact that many milk markets throughout the nation are highly concentrated and oligopolistic. The preservation of reasonably easy entry into such markets by multi-market dairy companies—especially firms, like Dean, which are not among the giants of the industry—is essential to effective competition in this industry. In *Foremost Dairies, Inc.*, 60 F.T.C. 944, the Commission recently found a merger between dairy companies unlawful because, but for their merger, they would probably have penetrated into each other's market areas and thereby increased competition:

> The decline in fluid milk distributors, the increasingly harsh technological and market factors confronting small businesses, the advantages going to firms with large financial resources, all indicate that small dairies are having an increasingly difficult time. This speaks ill for the prospects of new entrants in this industry. As pointed out above, in decades past, new competitors could enter this industry relatively easily. But, today, technology and other factors have created substantial barriers to prospective entrants. In

[21] See *Borden Co.* v. *F.T.C.*, 339 F. 2d 953 (7th Cir. 1964). *Cf. American Oil Co.* v. *F.T.C.*, 325 F. 2d 101 (7th Cir. 1963).

this situation *the chief source of new rivals in local milk markets is the entry of firms already operating in other markets.* [60 F.T.C., at 1088-89. Emphasis added.]

In a still more recent dairy opinion, the Commission again demonstrated an awareness that area price differences may actually increase competition where their purpose is to break into a market dominated by powerful, entrenched sellers:

A prospective entrant into a new market ordinarily faces an uphill fight. Because he has not sold in the market, his brand is unfamiliar and may at first lack consumer acceptance. Distributors may be unwilling to offend existing suppliers by dealing with the newcomer or may simply have a natural reluctance to do business with a firm not known to it. Natural business inertia will, therefore, make it difficult for a new entrant to gain a foothold. But entry may not be worthwhile unless the prospects for gaining substantial business from the existing competitors are reasonably good. A common method of penetrating a new market is to offer a low price during an initial promotional period. This tactic will come to naught if the dominant firms in the market are capable of offering immediate and sustained selective price cuts to their customers to hold their business.

When a powerful multi-market firm absorbs one of the dominant sellers in a concentrated market, the result may be not only to eliminate a source of potential competition, but to increase the difficulty of new entry and thus reduce the prospects for future new competition. Suppose that a local market is dominated by three firms, which, while they are large in that market, are small by industry standards and do no substantial business outside the one market. A company of the same size might be reluctant to challenge such firms for a share of the market. A powerful multi-market firm, however, having far greater resources than any of the dominant local competitors, might have no such inhibitions. Such a firm, in contrast to the single-market independent which must make a profit in that market or go under, is able to weather competitive storms in any particular local market by reason of its far-flung operations covering many markets. If one of the powerful multi-market firms absorbed one of the dominant local competitors, a prospective entrant would have to reckon not only with local oligopolists but with a powerful multi-market firm having a position of dominance in the local market and well able to repulse new competition, whether by price discrimination or by other tactics which can be effective in preventing new competitors from gaining a foothold. A multi-market company that would not be deterred from challenging merely local oligopolists in a new market might be deterred from challenging an entrenched firm of equal or greater strength. *(Beatrice Foods Co.,* F.T.C. Docket 6653 (decided April 26, 1965), pp. 37-39 [67 F.T.C. 473, 723-724].)

Since Dean is the kind of firm that is the most promising source of potential competition in concentrated markets in the dairy industry, an interpretation of the price discrimination law which blocked it from penetrating into new markets would surely be indefensible. As I mentioned earlier, we must heed the Supreme

Court's admonition, in *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 74, that the price discrimination law must be so interpreted and applied as to support, not frustrate, the basic policies of the anti-trust laws—to promote competition and prevent monopoly.

Respondents' pricing activities in Lexington could be deemed unlawful only under a test prohibiting all price differences in different markets of the country, thus requiring national sellers to maintain uniform prices in every market in which they operate in complete disregard of actual competitive conditions in the markets and industry involved. Such a test would sweep aside "realistic appraisals of relevant competitive facts" (which the Supreme Court in *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, 527, held to be required by the statute), replacing them by "mechanical word formulas" (*ibid.*) such as "an area price difference plus some diversion of sales from competitors equals illegality." It would injure competition in many industries, like milk, where area price differences are deeply rooted in the economic structure of the industry and where price uniformity throughout all markets of the country would be impracticable. In any event, the statute establishes no such mechanical and unrealistic *per se* test. As Congress wrote the law, it requires proof not only of a discrimnation in price but of a reasonable probability of injury to competition. The Commission cannot amend the law by loosening the statutory requirements of proof, so as to make it easier to issue cease and desist orders in this type of case.

The hearing examiner also found unlawful area price discrimination in the fact that Dean charged lower prices for its fluid milk in Evansville, Indiana, and Henderson, Kentucky, than it charged in Louisville, Kentucky. Here, too, however, although the Commission upholds the examiner, respondents' pricing conduct has not been proved reasonably likely to injure competition.

Had respondents attempted to sell milk in Evansville at the same price they were charging in Louisville, they could not have made a dent in the Evansville market, since the prevailing price there was below that in Louisville. Dean was not required to lower its milk prices throughout the nation, or even throughout the selling area of their Louisville processing plant, to the prevailing price in Evansville in order to enter that market lawfully. Prior to Dean's entry, the Evansville market had been dominated by strongly entrenched local competitors. They maintained their dominant position even after Dean gained a small foothold. The Commission's opinion ignores these facts—as well as that Dean's market share

in Evansville was never large during the eight-year period covered by the record and may, in fact, never have exceeded 2%.

The record contains evidence with respect to only four dairies selling in Evansville, though it shows that other dairies also sold there. Of the four, one (Dairy Service) sold out to a competitor apparently as a result of declining profits, and another (Blue Ribbon) went out of business after losing " 'quite a bit' of business" (how much "quite a bit" is we do not know) to Dean (Commission opinion, p. 773). There is no evidence that Dairy Service's declining profits were the result of Dean's pricing, however, or that Blue Ribbon went out of business because it lost some business to Dean. It seems more probable that the disappearance of just two firms in eight years following Dean's entry represented the normal rate of attrition in an industry where, as the Commission has found, small firms are finding it increasingly difficult to compete for technological reasons, *Beatrice Foods Co.*, F.T.C. Docket 6653 (decided April 26, 1965), pp. 21-23 [67 F.T.C. 473, 711-712], and must expect a "high mortality rate" (*id.*, p. 22 [p. 711]). "There are relatively few firms outside the leading eight [of the industry] which can be rated as really strong competitors under present market conditions." *Id.*, p. 25 [p. 714]; see also p. 43 [p. 728].

Moreover, any loss of customers or sales sustained by Dean's competitors in Evansville was apparently due, not to the established differential in the price of milk as between Louisville and Evansville, a differential which respondents observed rather than created when they first entered the Evansville market in 1952, but to respondents' decision to sell homogenized milk at the same price as creamline. Creamline was selling for 1¢ less than homogenized. Dean, which did not sell creamline, eliminated the 1¢ premium on a uniform basis in both Louisville and Evansville. The cause of the alleged competitive injury was thus a uniform, not a discriminatory, price reduction.[22]

[22] I do not mean to suggest that a seller who makes price reductions that are not discriminatory within the meaning of Section 2(a) cannot thereby violate the antitrust laws. See n. 18, *supra*. Depending on the circumstances, nondiscriminatory pricing may be an attempt to monopolize, in violation of Section 2 of the Sherman Act, or an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. As the Commission recently noted, "In the hands of a powerful firm, selling at unjustifiably low prices may be a potent weapon of predatory and destructive economic warfare, and hence unfair." *Quaker Oats Co.*, F.T.C. Docket 8112 (decided November 18, 1964), p. 5 [66 F.T.C. 1131, 1193, 1194]. Notwithstanding the language of *Sears, Roebuck & Co.* v. *F.T.C.*, 258 Fed. 307, 312 (7th Cir. 1919), I think that below-cost selling, even if nondiscriminatory, is unfair and unlawful under Section 5 where either its purpose or its probable effect is substantially to lessen competition. Moreover, "even nondiscriminatory, non-below-cost pricing may, in some circumstances, be an unfair method of competition." *Quaker Oats Co., supra*, p. 5 [66 F.T.C. 1193].

When Dean first entered the Henderson market, also in 1952, fluid milk was selling there for 2 cents above the prevailing price in Evansville, even though Henderson and Evansville are geographically adjacent. By selling its milk at the same price in Henderson and Evansville, Dean eliminated this arbitrary price differential. The record, completely ignored by the Commission on this point, indicates that the price in Henderson had been artificially high prior to respondents' entry and that their decision to sell at a lower price, far from being anticompetitive, had the salutary effect of injecting needed price competition into a market dominated by strongly entrenched local dairies. While Dean was selling in Louisville at 1 cent higher than in Henderson, it was not this "discrimination" that caused the alleged competitive dislocations in Henderson; it was respondents' decision to eliminate the artificial differential between Henderson and Evansville and sell at the same price in these adjacent towns. Furthermore, the only evidence of competitive injury in Henderson (as in Lexington) relates to a single dairy, Henderson Creamery, and shows that Henderson in the relevant period lost not a single account to Dean, although it was forced to split some store accounts with Dean, and that its total sales actually increased.

With respect to both Evansville and Henderson, all the record shows are slight market dislocations incidental to the entry of a new competitor who never did succeed in gaining more than a foothold; and if the Commission would only apply to the facts of this case the analysis of dairy industry conditions made in *Beatrice Foods Co., supra, Foremost Dairies, Inc.*, 60 F.T.C. 944, and other Commission decisions in this field, it would realize that in all probability Dean is being blamed for market dislocations traceable not to its actions but to basic changes in the technology and marketing patterns of the industry which are placing severe pressure on the small local dairies. Having no real evidence of competitive injury (in an antitrust sense) in this record, the Commission is forced to fall back on unfounded conjectures: that Dean is a large and powerful factor in the dairy industry (with sales of $27 million in 1954, Dean would be considered a smallish medium-sized firm, *Beatrice Foods Co.*, F.T.C. Docket 6653 (decided April 26, 1965), pp. 45-46 [67 F.T.C. 473, 729-730], in contrast to firms like National Dairy Products, Borden, Beatrice and other majors which have sales in the hundreds of millions); that its operating losses in 1958 and 1960 "were recouped either from cash reserves or from some other markets" (Commission opinion, p. 774; see also p. 775, n. 147) (there is no evidence

whatsoever on this; but if these losses were supported by general reserves rather than by higher prices on goods of like grade and quality in other markets, then any competitive injury in Evansville and Henderson was not the effect of price discrimination); that as a result of Dean's pricing its competitors will be unable to "continue competing with respondents through expansion of facilities or intensive advertising or promotional programs" (Commission opinion, p. 774) (there is, however, absolutely no evidence that to compete effectively these dairies must be able to expand their facilties or engage in intensive advertising and promotional efforts); or that "a consequential concentration of business" *(Ibid.)* to the point of impairing the prospects for vigorous and healthy competition in Evansville or Henderson can be predicted from the facts of record—the record failing to show that competitive conditions in the market as a whole have been adversely affected by Dean's pricing.

VI

This case also involves a challenge to respondents' quantity-discount system. The hearing examiner found that the system resulted in competitive injury at the customer level in Louisville and Terre Haute. Respondents do not contest this finding. On this appeal they contend only that complaint counsel has failed to establish that the commerce requirements of Section 2(a) have been fulfilled. I agree with the Commission that under the theory of *Foremost Dairies, Inc.,* F.T.C. Docket 7475 (decided May 23, 1963), pp. 2-3 n. 2, *aff'd,* 348 F. 2d 674, 676-78 (5th Cir. 1965) [62 F.T.C. 1344, 1360-1361], Dean's sales in Louisville were in commerce—though I cannot accept the Commission's effort to predicate jurisdiction on additional grounds squarely rejected in *Borden Co.* v. *F.T.C.,* 339 F. 2d 953 (7th Cir. 1964), a decision which the Commission in its opinion inexplicably fails even to mention. But *Foremost* does not support the Commission's finding that Dean's sales in Terre Haute were in commerce. It is true, as the Commission states, that some of the milk sold in Terre Haute was processed out of state. But the Commission neglects to mention that these interstate sales were limited to a six-month period in 1958, out of the six years of Dean's selling in Terre Haute covered by the record. It seems to me that respondents' interstate sales in Terre Haute were too "insignificant, trivial, and sporadic" to support entry of a cease and desist order. *Beatrice Foods Co., supra,* p. 47 [67 F.T.C. 730].

The examiner also found injury to competition at the seller's level resulting from respondents' grant of quantity discounts to selected customers in Louisville and Evansville.[23] The practice of granting quantity discounts is usually challenged under Section 2(a) on the ground of competitive injury to *customers* of the seller granting the discounts. But assuming that quantity discounts may in some circumstances be a method of unfair or destructive competition at the seller's level forbidden by Section 2(a),[24] the evidence here falls short of the statutory requirement.

In Louisville, the allegedly injured competitors of Dean were the local dairies. They sold principally, though not entirely, to small accounts which did not qualify for respondents' quantity discounts, so that to the extent that they suffered losses it was not to any great extent due to attempts by Dean to lure away *their* customers by offering quantity discounts. The bulk of respondents' business, in contrast, was concentrated in chain and group buying accounts. The purpose of respondents' quantity discounts in the Louisville market was to wrest some of these large accounts away from the firms that had them at the time of respondents' entry, in particular National Dairy Products Corporation (Sealtest). In the relevant period, National's market share in Louisville declined from 38% to 28%, while Dean's increased from 6% to 16%.

Respondents' gain appears to have been largely at the expense of National rather than the local dairies. Complaint counsel does not contend that respondents' inroads into National's market positon raise any question of Section 2(a) violation. National, the nation's largest dairy, with total sales in 1959-1960 of $1.67 billion (*Beatrice Foods Co., supra*, p. 15 [67 F.T.C. 706]), is a much more powerful firm than Dean and it was the dominant competitor in Louisville. Dean was a newcomer, whose challenge to National for the large chain and group buying accounts was calculated to increase rather than impair the vigor of competition in the Louisville market. Despite the absurdity of so doing, the Commission treats National (whose total annual sales are more than 50 times those of Dean) as an injured competitor in Louisville.

There is testimony that some local dairies in Lousville lost specific wholesale accounts to Dean as a result of Dean's quantity-discount offers. But the most the Commission can say about these losses is that "respondents' volume was expanding considerably more rapidly than the volume of their competitors and that respondents were taking the lion's share of the increment of ex-

[23] There is no commerce problem with respect to this charge.

[24] See n. 6, *supra;* Edwards, *The Price Discrimination Law* 218 (1959).

pansion in the market." (Commission opinion, p. 766.) It seems to be the Commission's position that Dean's competitors had a vested right not only to retain but to expand their business, and at a rate comparable to Dean's, even though the fact that Dean was expanding its business more rapidly than its competitors surely does not demonstrate actual or probable competitive injury.

Moreover, the evidence indicates that insofar as some local dairies may have declined in the period subsequent to Dean's entry into the Louisville market, their decline—as in the Evansville and Henderson markets—was due to business and economic factors unrelated to Dean's quantity discounts. Respondents sought to prove that at the time of Dean's entry into Louisville, the existing dairies were bound together in a conspiracy to eliminate price competition among themselves and maintain uniformly high and stable prices, and that its entry broke up the conspiracy and forced them to compete. The Commission brushes this evidence aside with the statement that the existence of a price-fixing conspiracy among Dean's competitors is not a defense to a charge of price discrimination. This misses the point. If in fact the Louisville dairies at the time of Dean's entry were enjoying the fruits of a conspiracy to eliminate competition and fix high prices, then the obvious explanation for their declining profits in the years following Dean's entry is not that Dean granted quantity discounts but that the termination of the conspiracy resulted in a decline of prices in the market from a monopolistic to a competitive level.

Finally, the evidence strongly suggests that Dean's prices in Louisville to recipients of its quantity discounts were not supported by the higher prices paid by customers not receiving such discounts, and hence that the quantity-discount system was not itself, as the complaint alleges, the cause of injury to competing sellers. The Commission argues that quantity discounts have the "inherent" effect of "tying" customers to the seller who grants them to the exclusion of competing sellers. (Commission opinion, p. 766.) This may be true in some cases, but it has not been proved here. As is perhaps indicated by the Commission's reliance on the term "inherent," there is no evidence that the asserted "tying" effect was "one of the principal purposes of" Dean's quantity discounts or that they had any "tendency to prevent competing dairies from breaking into the wholesale market or from increasing their sales in this market" (*ibid.*). There is accordingly no basis for an inference that the discriminatory quantity discount system itself, as opposed to the low prices which some purchasers received under the system, had an anticompetitive effect or tendency, as

must be proved for a violation of Section 2(a) to be established. See pp. 795, 800, *supra*.

As for the quantity discounts granted by Dean in Evansville, the examiner made no finding that Dean's lower net prices to customers to whom it granted such discounts were enabled or supported by the higher net prices paid by other customers. Since ninety percent of respondents' milk was sold to customers who received the maximum quantity discounts on their purchases, the *discrimination* between purchasers of various quantities—as in Louisville—evidently had no substantial competitive effects at the seller's level. The Commission ducks this issue entirely, by lumping Dean's quantity discounts in Evansville in with its area price differences there.*

DISSENTING OPINION

OCTOBER 22, 1965

BY JONES, *Commissioner*:

The Commission has concluded that respondent Dean Milk prices in the Louisville and Evansville-Henderson markets injured primary line competition in both these markets and secondary line competition in the Evansville-Henderson area, and that respondent accordingly has violated Section 2(a) of the Robinson-Patman Act. The Commission has also concluded that respondent's use of quantity discounts in Louisville had a restrictive effect in this market.

I cannot agree with the Commission's finding of competitive injury in these markets, nor with its conclusion respecting the restrictive effects of respondent's quantity discounts although I am in agreement with the Commission's discussion of the potentially restrictive effects which such quantity discounts could have. I agree with the Commission's conclusions respecting commerce and with its finding that no competitive injury resulted from Dean's pricing practices in the Lexington market.

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*Perhaps a final word should be added, in view of the closing observations in Commissioner MacIntyre's separate opinion. After referring to the Commission's order in this case and to the decisions in the recent *Forster* and *Fry* cases, he concludes that "large diversified multi-market sellers will be left free to discriminate in price to the destruction of smaller companies who are confined in their operations to single small market areas. Indeed, there is a growing and perhaps a commanding point of view at the Federal Trade Commission that no such price discrimination practice should be challenged by the Commission unless it can be proven beyond doubt that predatory intent is involved."

I do not read the opinions of the Commission, or of any other Commissioner, in any of these cases as expressing or implying such a point of view at the Federal Trade Commission; and surely there can be no doubt after reading my opinion that I likewise reject it. See pp. 802-804, 806-810, 812, 817 (esp. footnote 22), *supra*.

Because this is the first case in which the Commission has considered the lawfulness under Section 2(a) of an area price discrimination instituted by a new market entrant without any charges or findings of predatory intent, I feel it necessary to set down the reasons which have impelled me to dissent from the Commission's findings of liability. Accordingly, the discussion below is confined to this aspect of the majority opinion.

I

In considering, therefore, the crucial question of whether an area price has caused competitive injury, certain general principles of economic behavior must affect our analysis of the market shifts which follow upon a successful market penetration.

We must start with the fact that, as a general proposition, the entry of a new company into a market will act as an immediate spur to competition. Moreover, it is also axiomatic that a successful market entrant will of necessity cause a loss of business to the existing market members, unless the product demand is sufficiently elastic. Similarly, where a market is composed of firms operating with varying degrees of efficiency or is characterized by relatively inactive competitiveness, declines in profit margins may follow upon a successful penetration of that market. It must also be recognized that such business losses or declines in profits may also result in the disappearance of some companies from the market, thus creating an absolute increase in concentration in that market.

In considering, therefore, the crucial question of whether an area price discrimination by a new market entrant who has not engaged in a predatory conduct, has injured competition, we must start with the recognition, first, that market entries and price cuts are important competitive elements to be encouraged, provided, of course, that they are carried out within the law; and, second, that diversion of business, loss of sales, declining profit margins, or quantitative increases in concentration may be equally consistent with both competitive enhancement and competitive injury. Our inquiry must, therefore, start with these factors, not end with them.

II

In the Falls Cities (Louisville) market, the Commission finds competitive injury flowing from Dean's 1-cent price cut below the prevailing Louisville price levels, citing in support of this conclusion the facts that in the four years following its entry into that market, Dean's sales steadily increased to 16% of the market, while its eleven dairy competitors lost both wholesale and retail business,

suffered declining profits, and in some instances went out of business or merged with companies both in and outside the Louisville market (App. I and II, Opinion, pp. 755-766). In the course of its conclusion as to the illegal effects of these market shifts, the Commission observed that there was not only an actual lessening of competition in the Louisville market but also a distinct possibility that the operating losses of Dean's competitors would be "the forerunners of increased concentration."

I cannot agree that these shifts in the structure of the Louisville market can without more be inferred to signify competitive injury in that market, either actual or potential. The record in this case contains nothing which would enable us to conclude that these business losses and structural changes reflected an impairment of the vigor of competition in this market rather than merely the battle scars of an enhanced competitive struggle.

It is just as easy to infer from the record in this case that competition was enhanced by Dean's lower—and discriminatory—prices than that it was injured. Indeed on the present record, I could more easily draw the former inference than the latter. First, the post-entry price levels remained lower than the pre-entry price throughout the 4-year post-entry period for which evidence was offered in the record, thus suggesting that price competition is still operative in this market. Second, the pre-entry dominant position of Sealtest in this market (Sealtest had 38% of the market as compared with what is apparently a much smaller percentage for its nearest competitor) was in fact diminished by respondent's entry. It is possible, therefore, that after Dean's entry, Sealtest for the first time was confronted with a competitor more nearly equal to itself—a situation which may carry with it the seeds of intensified competition rather than an impairment of competition.[1] Third, the disparate profit margins on sales of many of the companies in this market allows the strong inference that prior to Dean's entry, competition in the market had been sluggish. This is further suggested by the direct evidence offered as to price collusion in this market during the period preceding Dean's entry. Thus, given this liklihood of pre-entry minimal price competition, the declining profit margins

[1] Similar arguments of competitive strengthening have been uniformly rejected by the Commission and the Courts where they are advanced by companies as purported justification for merging where the merger has substantially lessened competition in the market as a *whole* even though the competitive strength of individual market participants may have been enhanced. Here we are confronted with a determination as to whether the competitive vigor of the market as a whole has been strengthened or lessened. The only point being made here is that this cannot be determined on the basis of any *per se* increases in concentration just as the *per se* elimination of one competitor by merger is not determinative of whether Section 7 has been violated.

suffered by some companies may not evidence competitive injury at all, but rather a return to more competitive pricing.

Since the facts in the record are equally consistent with either competitive enhancement or competitive injury, it is not, in my judgment, possible to conclude, as the majority does, that any eventual increase in concentration, caused by business losses, would have a potential effect of lessening or injuring competition. If concentration should in the future increase, it could just as easily be the result of an increase in competitiveness in this market and could reflect a healthier market structure even though composed of fewer firms.

In the Evansville-Henderson market, I encounter a similar absence of proof for the majority's conclusion that respondent's price cut injured primary line competition. The majority relies for its finding of injury primarily on the qualitative increase in concentration which followed upon Dean's entry into this market. Again, I cannot attach such a significance to this bare increase in concentration even where, as here, it involved the disappearance from the market of two out of five local dairies constituting the pre-entry market. The record here strongly suggest that the Evansville-Henderson market may be an example of one of the situations where an increase in concentration resulted from an enhancement rather than of an impairment of concentration. Dean was only able to capture 2% of this market. This raises the probability that the volume of business accounted for by the disappearing firms (which figure is not available in the record) may have gone primarily to Dean's competitors and may have strengthened their competitive position vis-a-vis Dean. In any event, if Dean's entry into this market and its pricing practices had actually impaired the competitive vigor of the market, it is unlikely that its market share would have only remained at the 2% level.

In sum, the record in this case is not sufficiently complete to enable a determination to be made as to whether Dean's price cuts in either market injured competition. While the record does contain some evidence of various market shifts following Dean's pricing policies, the data is insufficient to permit an appraisal of the competitive consequences and implications of these economic phenomena.

Conscious of all of the difficulties involved in ascertaining "proof" of an economic concept such as competitive injury, nevertheless sufficient data must be available to permit the drawing of reasonable conclusions as to its liklihood or existence. For example, if business losses and declining profits and sales are to be correctly evaluated

as to whether they reflect competitive enhancement or impairment, it is essential that the record contain market share data showing changes over time including market entries, exits, business failures and mergers as well as the size and structures of the pre-entry and post-entry market. Moreover, if the effects in the market of the new entrant's price cut are to be properly gauged, comparative profit ratios on both sales and net worth of the market participants must be studied as well as the history of pre-entry prices, the incidence of price fluctuations and the identity of price initiators must be studied. In some situations, market characteristics such as price elasticity, distribution patterns, brand loyalties and the like, may furnish some indicia of the liklihood of competitive injury flowing from the area price discrimination.

It is, of course, obvious that no rule can be laid down as to the type of data which will be necessary in any given case since each will present its own special problems. However, applying these general principles to the case at bar, I am compelled to dissent from the conclusion of the majority since I cannot find adequate record support for their findings respecting the existence of primary line competitive injury in the Louisville and Evansville-Henderson markets.

Final Order

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission, having rendered its decision determining that the initial decision issued by the examiner should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision be modified by striking the order to cease and desist issued by the examiner and substituting therefor the following:

ORDER

It is ordered, That the respondents, Dean Milk Company and Dean Milk Co., Inc., corporations, and their officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale or distribution in commerce of fluid milk and milk products, do forthwith cease and desist from

discriminating, directly or indirectly, in the price of fluid milk and milk products of like grade and quality:

1. By selling any of these products to any purchaser in any city or definable market area in which respondents are in competition with another seller at a price which is lower than the price for such products charged any other purchaser at the same level of distribution in that or any other city or definable market area served by the same processing plant, 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 milk and milk products than respondents' annual volume of sales of those products.

2. By selling any of these products to any purchaser at a price which is lower than the price for products of like grade and quality charged any other purchaser who competes in the resale of such products with the purchaser paying the lower price.

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

It is further ordered, That the respondents, Dean Milk Company and Dean Milk Co., Inc., 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 Elman and Jones dissenting. Commissioner MacIntyre has filed a separate statement.

IN THE MATTER OF

SWISS LABORATORY INC., DOING BUSINESS AS FEDERAL LEAD COMPANY ET AL.

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

Docket C-1006. Complaint, Oct. 25, 1965—Decision, Oct. 25, 1965

Consent order requiring Cleveland, Ohio, distributors of commercial wire solders to jobbers, to cease misrepresenting the nature, quality or composition of any of their solders, by such practice as using the designation "50/50" on labels and price sheets to describe a commercial wire solder which was not a 50/50 solder as known in the trade, as said solder contained less than 50% tin and more than 50% lead by weight.