1. Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who competes with the purchaser paying the higher price;

2. Paying or contracting for the payment of anything of value to or for the benefit of any customer as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of the products in the Sealtest product line, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

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

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

Commissioner Elman dissented and has filed a dissenting opinion. Commissioners MacIntyre and Jones did not participate. Commissioner Reilly concurred and has filed a concurring opinion.

IN THE MATTER OF

TRI-VALLEY PACKING ASSOCIATION

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

Dockets 7225 and 7496. Complaints, Aug. 6, 1958, and May 15, 1959— Decision, July 28, 1966

Order modifying, pursuant to a decision and remand of the case by the U.S. Court of Appeals, Ninth Circuit, dated March 18, 1964, 329 F. 2d 694 (7 S.&D. 859), an order of May 10, 1962, 60 F.T.C. 1134, which prohibited a San Francisco, Calif., canner of fruits and vegetables to cease discrim-

inating in price and paying promotional allowances among its competing customers, by adducing additional evidence in support of the charges against respondent association.

Mr. Jerome Garfinkel for the Commission.

Mr. Ricardo J. Hecht, Mr. Francis Kerner, San Francisco, Calif., and *Mr. Melville Ehrlich,* Washington, D.C., for respondent.

INITIAL DECISION ON REMAND BY EDGAR A. BUTTLE, HEARING EXAMINER

APRIL 15, 1965

The above-entitled matter [1] was remanded for further proceedings by the United States Court of Appeals (9th Circuit) in connection with certain Clayton Act section 2(a) and (d) issues hereinafter discussed. Incident thereto, the Commission's cease and desist order entered on May 10, 1962 [60 F.T.C. 1134], was set aside by the court's order of remand dated March 18, 1964 [7 S. & D. 859]. In remanding the case the court invites the attention of the Commission to certain omissions of evidence which it believes, if available, could better resolve some of the issues. In setting aside the Commission findings and conclusions as to the section 2(d) charges, and order as to both section 2(a) and (d) charges the court seems to imply that a completely revised reissuance thereof might be appropriate based upon the evidence adduced initially in relation to the additional evidence adduced upon remand in accordance with the court's suggestions.[2] The findings, therefore, hereinafter cited, relate to all of the evidence in the case, including the evidence adduced before and after remand to the Commission, and by the Commission to the hearing examiner, within the meaning of the 9th Circuit disposition consistent with the law of the case thereby established.

With regard to the section 2(a) charges, the court appears to be of the view that there may not be anything in the record to in-

[1] Respondent, Tri-Valley Packing Association, incorrectly named in the complaint in Docket No. 7225 as Tri-Valley Packing Association, Inc.

The name of respondent has been changed on June 1, 1963, from Tri-Valley Packing Association to Tri-Valley Growers. It was stipulated that the complaint be amended to incorporate this change (Tr. 1297–1298).

By stipulation between the parties, Dockets 7225 and 7496 were consolidated under Docket 7225 (Tr. 1107–1108).

[2] Since the section 2(a) order has been set aside, more complete findings consistent with the law of the case enunciated by the court on the issue of relief as well as findings re deficiencies in evidence enumerated by the court are essential. Furthermore, there is a relationship between the new findings on matters resolved by the court and evidentiary deficiencies cited by the court. See Conclusions for full discussion.

dicate that there was or is any obstacle which prevented or prevents nonfavored purchasers from buying Tri-Valley products in the so-called "California Street" market in San Francisco where they would have been obtained at the same low prices as offered to favored purchasers in that market. As pointed out by the court, disposition of this question is dependent upon the facts pertaining to the availability to nonfavored purchasers of the low prices for Tri-Valley products on the "California Street" market and the application of the law to these facts. In other words, are the lower prices discriminatory if available on "California Street" to all competitors although not elsewhere in the same market area.

The court also states counsel for the Commission took the position before the court that a section 2(b) defense contemplated a good faith meeting of competition to each individual competitive demand rather than a good faith meeting of competition in response to a pricing system such as that represented by the "California Street" market. Furthermore, the court seems to be of the view that the Commission should ascertain by evidence whether or not Tri-Valley was engaged in the "California Street" market in meeting "an equally low price of a competitor" within the meaning of section 2(b). If the evidence indicates that Tri-Valley is not so engaged in meeting "California Street" prices, no further consideration need be given to the section 2(b) defense. On the other hand, if the evidence discloses to the contrary, then the Commission must decide as a matter of law whether a section 2(b) response may be directed to a pricing system as well as an individual competitive demand.

As for the section 2(d) issue, the court points out as follows at page 22 [7 S. & D. 859, 878] of its decision:

> In our opinion, where a direct customer of a seller, operating solely on a particular functional level such as wholesaling or retailing, receives a promotional allowance not made available to another direct customer operating solely on the same functional level, it is unnecessary to trace the seller's goods of like grade and quality to the shelves of competing outlets of the two in order to establish competition. It is sufficient in that case to prove that one has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and that the two customers purchased goods of the same grade and quality from the 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.

Relative to the Boston area, the court suggests the need for evidence that Tri-Valley engaged in a course of direct dealing with the retail outlets of Central Grocers as indirect customers of Tri-Valley since Central Grocers are not in functional competition with wholesalers. It is pointed out by the court that the only way of showing a section 2(d) violation would be to treat Central Grocers' retail outlets as indirect customers of Tri-Valley, but that this may not be done in the absence of a showing that Tri-Valley engaged in a course of direct dealing with those retail outlets.

Relative to the Portland area, the Court of Appeals indicates as follows:

> In the Portland area, Meyer, which received an allowance, is a retailer, and Hudson House, which did not receive a proportionally equal allowance, is principally a wholesaler, but may also be a retailer.[3] No section 2(d) violation was shown as to the wholesale operation of Hudson House, because that operation was not in functional competition with Meyer, and it was not shown that the independent retailers served by Hudson House were "indirect" customers of Tri-Valley.[4] No section 2(d) violation was shown as to the retail operation of Hudson House, if there was such an operation, because it was not shown that any Tri-Valley goods were purchased indirectly by those Piggly-Wiggly outlets, during the period in question. This could only have been shown by tracing Tri-Valley goods to the shelves of those stores by means of the best evidence available.

Although the hearing examiner has advised counsel for the complaint and counsel for the respondent that, for purposes of clarity and since the court of appeals has set aside the 2(d) findings and order of the Commission entirely, it is his intention to issue an entirely new initial decision, inclusive of new findings and a new order for the consideration of the Commission, respondent has elected to submit proposed findings which essentially relate only to incomplete evidentiary facts cited by the court in suggesting the adduction of additional evidence or record citations. Respondent's proposed findings are as follows:

1. Subsequent to March 18, 1964, an employee of respondent, without first counsulting his superior or respondent's counsel, destroyed certain documents belonging to respondent, produced by

[3] If Hudson House does any retailing, it is because of its ownership of several Piggly-Wiggly stores in the Portland area. Each of these is apparently a separate corporate entity and Tri-Valley contends that they are dealt with by Hudson House just as if they were independent retailers. [Footnote No. 22 in court decision.]

[4] See *Klein* v. *Lionel Corp.*, 3 Cir., 237 F. 2d 13; Rowe, *supra*, §13.11, pp. 398–399; contra *Krug* v. *International Tel. & Tel. Corp.*, D.N.J., 142 F.Supp. 230. Examples of direct dealing sufficient to give application to the "indirect" customer concept, are to be found in *American News Co.* v. *Federal Comm'n.*, 2 Cir., 300 F. 2d 104; *Elizabeth Arden, Inc.* v. *Federal Trade Comm'n.*, 2 Cir., 156 F. 2d 132; *K. S. Corp.* v. *Chemstrand Corp.*, S.D.N.Y. 198 F. Supp. 310; *Champion Spark Plug Co.*, 50 F.T.C. 30, 44. [Footnote No. 21 in court decision.]

it for copying and inspection by representatives of the Commission, pursuant to order of the United States District Court. These documents were so inspected beginning on or about October 12, 1959. The court order did not require that these documents be thereafter preserved for any given period of time. The employee destroyed these documents acting under the mistaken belief that the decision of the Court of Appeals, announced on March 18, 1964, had put an end to the proceedings brought against respondent. There are no facts in evidence that would justify the finding that the destruction of said documents was "willful," "intentional," or with "fraudulent design," as those words are used in connection with the presumption relating to the application of the maxim of evidence, "omnia praesumuntur contra spoliatorem."

2. There are no facts in evidence showing that there was or is any obstacle which prevented or prevents nonfavored buyers from purchasing respondent's products in the so-called "California Street" market in San Francisco, and there is no causal connection between respondent's discriminatory prices and the competitive injury that its nonfavored buyers may have suffered.

3. Respondent's lower invoice prices to its favored buyers were made *in good faith* to meet the equally low prices of its competitors in the "California Street" market.

4. In 1957 and 1958, respondent paid an allowance of ten (10) cents a case for each case of canned fruits purchased from respondent to Central Grocers of Boston, Massachusetts. Central Grocers operated solely at the wholesale level during this period of time. Respondent did not offer or make available this allowance on proportionally equal terms to any other customer in the Boston area. There is no evidence that respondent during approximately the same period of time sold any good of the same grade and quality as those it sold to Central Grocers to any customer who competed solely at the wholesale level with Central Grocers.

5. In September and October 1957, Meyer, a retailer in the Portland, Oregon area, instituted a coupon book program. Respondent contracted with Meyer to participate in this promotion and to pay $350 as part of the cost of printing a page in the coupon book and agreed to redeem each such page at the rate of $0.248. These payments or allowances were made in consideration of the promotion and purchase of large quantities of respondent's peaches packed under Meyer's label during said months of September and October. The only other retailer customer of respondent in that area at that time was Safeway. There is no evidence that respondent

during approximately the same period of time sold any goods of the same grade and quality as those it sold to Meyer to Safeway.

6. There is no evidence that Central Grocers' retail outlets were indirect customers of respondent.

7. There is no evidence that Hudson House's retail outlets, including the Piggly-Wiggly outlets, were indirect customers of respondent.

It is obvious, however, that new findings must be rendered since the Court of Appeals points out that it is setting aside the Commission's order as to both the section 2(a) and 2(d)[4a] issues, which order is necessarily premised upon findings which the court considers inadequate to support the order. Furthermore, it is obvious from the opinion of the court that the record may be augmented by additional evidence of discriminatory transactions within the scope of the complaint in order to adequately resolve the questions raised by the court. The rendition of supplemental findings only, because of the many questions raised by the court in its opinion, would only tend to confuse the issues and their disposition. However, the hearing examiner has not only considered the limited proposed findings presented by respondent's counsel incident to the remand, but the prior proposed findings originally submitted. Since the complaint counsel has submitted entirely new proposed findings relating to the evidence taken before, as well as after, remand, the hearing examiner has disregarded the prior proposed findings of complaint counsel.

The hearing examiner has carefully reviewed and considered the proposed findings of counsel in support of the complaint and counsel for respondent as heretofore indicated. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent Tri-Valley Packing Association is a nonprofit, cooperative corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 240 Battery Street, San Francisco, California.[5]

2. Respondent is now and has been engaged in the business of

[4a] As to the 2(d) charges the court also set aside the findings and conclusions.

[5] Admitted by answer. See also Tr. 14.

selling and distributing canned fruits and vegetables of many varieties, all of which it processes and cans at its plants in Modesto, San Jose, and Stockton, California. Respondent sells and distributes its canned fruits and vegetables under private labels and also under its own labels or brands.[6]

3. Respondent sells its products to customers located throughout the United States for use, consumption, or resale. Its products were sold to wholesalers and retailers, including chain stores.[7]

4. Respondent's sales of its products are substantial, amounting in the fiscal year ending January 31, 1956, to $19,698,531.[8]

5. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the amended Clayton Act, in that respondent ships its products, or causes them to be shipped, from its place of business to customers located in States other than the State of California.[9]

6. In the course and conduct of its business in commerce, respondent is in substantial competition with other corporations, partnerships, individuals and firms engaged in the canning, sale and distribution of canned fruits and vegetables.[10]

7. Many of respondent's customers are likewise engaged, directly or indirectly, in competition with each other in the resale of respondent's products within the same trading areas.[11]

8. In the course and conduct of its business, respondent sold its products to Hudson House, Inc., of Portland, Oregon, at higher

[6] Admitted by answer.

[7] Admitted by answer.

[8] Admitted by answer; see also CX's 108, 109 and 111, where it is disclosed that respondent's sales for fiscal year ending January 31, 1957, were $21,328,283; sales for the year ending January 31, 1958 were $19,935,747; and for the year ending January 31, 1959, were $22,329,877. CX's refers to Commission Exhibits; RX's refers to Respondent's Exhibits; and Tr. refers to record page citation.

[9] The answer admits that ". . .respondent ships its products or causes them to be shipped from its place of business to purchasers." That respondent shipped its products in the course of commerce is further borne out by CX's 33–49 which show sales to customers located in Denver, Colorado; Portland, Oregon; Boston, Massachusetts; Portland, Maine; New York City; and Pittsburgh, Pennsylvania, among others.

See Appendices A through R, attached to the proposed findings of complaint counsel, for evidence of sales by respondent in the course of commerce.

[10] The answer admits that respondent " . . . is in competition with other corporations engaged in the canning, sale and distribution of canned fruits and vegetables." See also statement of the general manager of respondent at Tr. 43, that ". . .every canner who is selling the same merchandise is a competitor."

[11] Respondent's answer admits that ". . .some of its purchasers are directly in competition with each other in the resale of its products." That many purchasers from respondent are engaged in competition with each other directly or indirectly in the same trading areas is shown by CX's 33–49, and the transcript testimony of purchasers within the trading areas of Portland, Oregon; Denver and Pueblo, Colorado; Portland, Maine; Boston, Massachusetts; New York City; New Jersey; and Pittsburgh, Pennsylvania. Details of this competition are hereinafter set forth.

prices than it sold its products of like grade and quality to Fred Meyer, Inc., and Regent Canfood (Safeway Stores).[12]

Under the 1957 Fred Meyer, Inc., coupon book program, in which Tri-Valley participated, Fred Meyer was given free canned goods amounting to one free can of peaches for every two sold by Fred Meyer. The total participation amounted to 20,750 free cans of peaches valued at $.232 each, or a total rebate value of $4,814. The price differential involved was 33½ percent. During the same time, Hudson House, Inc., purchased peaches of like grade and quality, paying the regular price with no rebate or discount or free goods.[13]

9. Hudson House, Inc., of Portland, Oregon, an unfavored purchaser of respondent in goods of like grade and quality, is a wholesale grocery distributor whose customers compete with the retail outlets owned and operated by the favored purchasers Fred Meyer, Inc., and Safeway Stores (Regent). The customers of Hudson House compete with the favored purchasers in the sale of respondent's products.

Hudson House, Inc., is a wholesale distributor with some 279 retail grocery customers serviced from its Portland warehouse. Of the approximately 279 retail grocery customers serviced by Hudson House, 138 of such customers are located in the Portland, Oregon, metropolitan area.[14]

The record discloses that Safeway Stores, a favored retail purchaser from respondent, owns and operates 103 Safeway retail outlets in the Portland trade area that are serviced by Safeway's Portland warehouse. Respondent's canned food products were purchased by Safeway Stores for its Portland trade area operations.[15]

Fred Meyer, Inc., Portland, Oregon, another favored purchaser from respondent, is a locally owned, locally operated retail chain. This retail chain operates at least ten retail food stores which sell canned fruits and vegetables to consumers throughout the Portland area. It purchases for resale to the consumer respondent's canned food products directly from said respondent.[16]

10. In the course and conduct of its business in commerce, respondent sold its products to Central Grocers, Inc., and Standard

[12] See CX's 10–22, 24, 26, 33, 34; RX 1 and Appendix A.

[13] See CX's 26 and 33. See also CX's 33–49 to effect that this price differential was in excess of three times any other demonstrated on these exhibits.

[14] See Tr. 154–157, 196–197; CX 29.

[15] See Tr. 185–186; CX's 31–32; Tr. 61, 184–185, 206, 209–212, 1436; CX's 33–34.

[16] See Tr. 116, 118; CX 27; see statement under "Fred Meyer, Inc."; Tr. 117–119, 61–62; CX's 33–34.

Grocery Company, both of Boston, Massachusetts, at higher prices than it sold its products of like grade and quality to First National Stores, and A & P, both of Boston, Massachusetts.[17]

11. Central Grocers, Inc., and Standard Grocery Company (unfavored purchasers) are wholesale grocers whose customers compete in the Boston trading area with the retail outlets owned and operated by the favored purchasers First National Stores and A & P. The customers of Central Grocers, Inc., and Standard Grocery Company compete with the favored purchasers in the sale of respondent's products.

More particularly, Central Grocers, Inc., Boston, Massachusetts (an unfavored purchaser) is a membership group of retail stores, whose gross sales are shown in CX 61, *in camera*. It has been referred to as a quasi cooperative, selling to some twenty-five "affiliate" accounts as well as to retailer stockholder members. The stockholder members number approximately 100, and sales by Central Grocers to the stockholders approximate 85 percent of the total. All goods purchased by Central Grocers from respondent are placed in its Boston warehouse and distributed to retailers within a 15-mile radius of Boston.[18]

Standard Grocery Company is a wholesaler of grocery products with one warehouse located in Boston supplying some 700 small or medium size independent grocers in the Boston area. It is an unfavored purchaser of respondent.[19]

First National Stores (a favored purchaser) is a retail chain owning and operating approximately 135–140 retail stores in the Boston trade area, which are among the 197 First National retail stores which are serviced from the Boston (Somerville Division) warehouse.[20]

The Great Atlantic & Pacific Tea Company (A & P) services 163 retail A & P stores from its Boston warehouse, some 81 of which are in the Boston metropolitan area.[21]

In the course and conduct of its business in commerce respondent sold its products to Hannaford Brothers Company, Portland, Maine, at higher prices than it sold its products of like grade and quality to A & P, of Portland, Maine.[22]

13. Hannaford Brothers Company (unfavored) is a wholesale

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[17] See CX's 35, 45 and Appendix B.
[18] See Tr. 348–353; CX's 67–68.
[19] See Tr. 369, 368, 370; CX 35, Appendix B.
[20] See Appendix B; Tr. 384; CX 63A–E.
[21] See Tr. 406–407; CX 69A–L.
[22] See CX's 36, 37, 46; Appendices C, D, and E.

distributor of food products whose customers compete in the Portland, Maine, trading area with the retail outlets owned and operated by A & P. The customers of Hannaford Brothers Company compete with A & P in the sale of respondent's products.

Hannaford Brothers Company is a wholesaler. It is a corporation which supplies products to members of a voluntary group of some 122 retailers which are "Red and White" stores, and it also serviced some 70 "contract stores" which buy the same products as the "Red and White" stores, but do not handle the "Red and White" private label. Many of the stores serviced by Hannaford are in small towns in which A & P stores sell to consumers, and the majority of the Hannaford serviced stores are in the same area of distribution as that of the A & P Portland warehouse.[23]

14. In the course and conduct of its business respondent sold its products to Bozzuto's, Inc., Waterbury, Connecticut, at higher prices than it sold its products of like grade and quality to First National Stores, Hartford, Connecticut, and to A & P, Springfield, Massachusetts.[24]

15. Bozzuto's, Inc. (unfavored), is a wholesaler whose customers compete in the Hartford, East Hartford, and Waterbury trading areas with First National Stores and A & P. The customers of Bozzuto's, Inc., compete with First National Stores and A & P in the sale of respondent's products.

Bozzuto's, Inc., Waterbury, Connecticut, is a wholesale grocer that supplies groceries to a voluntary group comprised of approximately 250 retail members. These 250 retailer customers of Bozzuto not only are located in the same cites and trading areas in which A & P and First National Stores own, maintain and operate retail outlets, but compete with the outlets of the two retail chains.[25]

16. In the course and conduct of its business respondent sold its products to Associated Grocers, Inc., Spiegel Bros., Star Markets, General Grocery, W. E. Osborn Co., and Pittsburgh Mercantile, all of the Pittsburgh, Pennsylvania, trading area, at higher prices than it sold its products of like grade and quality to A & P of Pittsburgh (Homewood), Pennsylvania.[26]

17. Associated Grocers, Inc., Spiegel Bros., W. E. Osborn Co. (unfavored purchasers) are wholesalers whose customers compete in the Pittsburgh, Pennsylvania, trading area with A & P,

[23] See Tr. 409, 411; CX's 70, 72.
[24] See CX's 38, 45; Appendices F, G, and H.
[25] See Tr. 488–490, 492; CX's 64, 71, 89.
[26] See CX's 39, 40A and B, 49; Appendices I and J.

the favored purchaser. The customers of said three unfavored Wholesalers compete with A & P in the sale of respondent's products.

Associated Grocers, Inc., is a corporation owned by retailers and which resells grocery products to about 140 of such retailers. It operates a warehouse in the Pittsburgh trading area. Approximately 90 percent or better of the business of Associated Grocers, Inc., is to retailer members located in Allegheny County. These retailer members compete with all of the major chains and all of the large independent retailers.

Spiegel Bros. is a wholesale grocer located in McKeesport, Pennsylvania, which is just outside the Pittsburgh metropolitan area. From its warehouse in McKeesport, Spiegel Bros. services approximately 400 retailers in the greater Pittsburgh trading area, of which approximately 90 are located in Pittsburgh proper. Testimony discloses that the retailer customers of Spiegel Bros. compete with A & P.

W. E. Osborn Company, located in New Brighton, Pennsylvania, approximately 30 miles north of Pittsburgh, is engaged in the wholesale grocery business, distributing to approximately 150 retailers located in Beaver County, Lawrence County, part of Allegheny County, all in Pennsylvania, and to retailers located in Ohio and West Virginia. Of the total number of such retailers, at least eight are located in Pittsburgh proper, and many others are located in the Pittsburgh metropolitan area. Testimony in the record reveals that the retailer customers of W. E. Osborn Company compete with A & P outlets.

A & P (the favored purchaser), through its Pittsburgh Unit, sells and distributes to some 156 stores in the same trading areas as those operated in by the retail customers of the unfavored wholesalers. In Pittsburgh proper, A & P owns, maintains and operates approximately 21 retail outlets.[27]

18. Star Markets, Inc., General Grocery Company, and Pittsburgh Mercantile Company (unfavored purchasers) are retailers who compete in the sale of respondent's products with A & P in the Pittsburgh trading area.

Star Markets, Inc., until August 1959, was a local independent retail food chain located in Pittsburgh, consisting of some 13 stores, of which approximately four were located in Pittsburgh proper. These retail stores sold food products to consumers lo-

[27] See Tr. 517; CX 96; Tr. 518, 520, 523; CX 95; Tr. 531–533; CX 99; Tr. 534, 544; CX 102B; Tr. 548; CX's 112–113.

cated in the area surrounding each store and as far away as 40 miles.

General Grocery Company is a single store operation located at 2115 Penn Avenue, Pittsburgh, Pennsylvania, which combines a retail (80%) and wholesale (20%) business. This company sells to retail customers and directly to consumers which it draws from approximately a 20-mile radius.

Pittsburgh Mercantile, 2600 Carson Street, Pittsburgh, Pennsylvania, is a local independent retail chain comprised of some nine stores, combining department store and food operations. The stores operated by Pittsburgh Mercantile sell Tri-Valley products in competition with A & P.[28A]

19. In the course and conduct of its business respondent sold its products to Walkay Grocery Co., Jersey City, New Jersey; Middendorf & Rohrs, New York City; Grand Union, Paterson, New Jersey; Packard Bamberger, Hackensack, New Jersey; Wakefern Foods, Cranford, New Jersey; and Middlesex Foods, Inc., New Brunswick, New Jersey; at higher prices than it sold its products of like grade and quality to A & P (Paterson and Hawthorne, New Jersey), Safeway Stores (Kearney, New Jersey), and American Stores (Newark, New Jersey).[28B]

20. Walkay Grocery Co., Middendorf & Rohrs, Wakefern Foods, and Middlesex Foods, Inc. (unfavored purchasers) are wholesalers whose customers compete in the New York City—New Jersey trading areas with A & P, Safeway Stores, and American Stores.

Walkay Grocery Co. is a wholesale grocer located in Jersey City, New Jersey, which distributes to approximately 300 retail stores located in Hudson County, Essex County, Union County, and Bergen County, New Jersey. Customers of Walkay resell canned products in the aforesaid general trade areas in competition with A & P.

Middendorf & Rohrs, a wholesaler located in New York City, services approximately 400 retail stores in the metropolitan New York City area. The geographical area of distribution includes New York County (Manhattan), Bronx, Brooklyn, Queens, New York City; Nassau, New York State; Hudson and Bergen Counties, New Jersey. The retail store serviced by Middendorf & Rohrs competes with A & P and American Stores in the resale of food products.

[28A] See Tr. 509–510; CX 93; Tr. 521, 529, 525, 553–554; CX 105; Tr. 555–556.

[28B] See CX's 41–43; Appendices K, L, M, N, and O.

Wakefern Food Corporation is a cooperative wholesale grocery operation located in Elizabeth, New Jersey, which services some 86 retail member stores. These retail stores resell canned goods obtained from Wakefern to consumers in the general geographical area of the State of New Jersey.

Middlesex Foods, Inc., is a wholesaler located in Highland Park, New Jersey, that services approximately 700 to 800 stores. This wholesaler's customers are in competition with A & P.

The A & P warehouses in Paterson and Hawthorne, New Jersey, service approximately 100 retail stores in the New Jersey and New York areas. In addition to the distribution from its Paterson and Hawthorne warehouses, A & P services approximately 30 additional stores from its Newark, New Jersey, warehouse. These retail stores fairly saturate the New Jersey area of distribution.

The Safeway Stores' warehouse located in Kearney, New Jersey, distributes canned goods to some 200 Safeway retail stores located within a radius of approximately 50 miles around New York City, which includes a substantial area in New Jersey.

American Stores is a national chain with headquarters in Philadelphia, Pennsylvania, and maintains a warehouse for zone 7, located in South Kearney, New Jersey, from which it distributes food products to approximately 130 of its retail stores. Many of the American Stores' outlets are located in the trading areas serviced by the unfavored purchasers and/or their customers.[29]

21. Grand Union Company and Packard Bamberger & Company (unfavored purchasers) are retailers who compete in the sale of respondent's products with A & P, Safeway Stores, and American Stores in the New York City—New Jersey trading areas.

Grand Union is a retail food chain, presently comprised of approximately 222 retail stores in the metropolitan New York City area. In 1957, the chain operated 165 of such retail outlets, serviced by its Carlstadt and Mt. Kisco warehouses. These retail stores resell canned foods obtained from respondent to consumers in trade areas which include the Bronx, Manhattan, Long Island, Connecticut, and New Jersey.

Packard Bamberger & Company, located in Hackensack, New Jersey, operates a single department store that maintains a food department. It sells its food products to consumers within a 15-

[29] See Tr. 423, 428, 432, 434, 437, 440–441, 499–500; CX 91; Tr. 504, 460, 464; CX 85; Tr. 474–475; CX 86; Tr. 477, 480; CX 87; Tr. 481–483; CX 88; Tr. 486; CX 88.

mile radius from the store located in Hackensack. Competitors of Packard Bamberger include A & P, Grand Union, American Stores, Safeway, and Food Fair.[30]

22. In the course and conduct of its business respondent sold its products to Associated Grocers of Colorado and H. A. Marr, Denver—Pueblo, Colorado, at higher prices than it sold its products of like grade and quality to Safeway Stores, Denver, Colorado.[31]

23. Associated Grocers of Colorado, and H. A. Marr (unfavored purchasers) are wholesalers whose customers compete in the Denver—Pueblo, Colorado, trading areas with Safeway Stores. The customers of said unfavored purchasers compete with Safeway Stores in the sale of respondent's products.

Associated Grocers of Colorado, a retailer-owned cooperative, purchases canned fruits and vegetables from respondent and has such products shipped to its Denver and Pueblo, Colorado, warehouses. From these two warehouses, Associated Grocers services its retailer members. There are approximately 539 retailer members within the geographical area of Colorado and parts of Wyoming, Nebraska, New Mexico, and Kansas serviced by the Denver and Pueblo, Colorado, warehouses. A specific customer of Associated Grocers testified that he was in competition with a Safeway store located three blocks away.

H. A. Marr Company (another unfavored purchaser), located in Denver, Colorado, was, prior to January 1, 1960, principally engaged in the wholesale grocery business, reselling grocery products from its warehouse located at 3001 Broadway, Denver, Colorado. H. A. Marr was also engaged in the retail grocery business since it owned and operated some retail stores. From its Denver warehouse, H. A. Marr distributed its canned fruits and vegetables to some 128 retail stores in its area of distribution, which included all of Colorado, and very small parts of Kansas, Nebraska, and Wyoming. Furthermore, four retailer customers of H. A. Marr testified that they were in close proximity to retail outlets operated by Safeway Stores.[32]

24. Respondent's practice of charging certain purchasers higher prices than other purchasers in each of the trading areas previously discussed may have the probable effect of substantially

[30] See Tr. 443, 444; CX 77; Tr. 445; CX 77D and E; Tr. 451–454, 457.

[31] See CX 44; Appendices P, Q, and R.

[32] See Ninth Circuit's opinion concerning actual competition in respondent's goods between customers of H. A. Marr and outlets of Safeway Stores. (329 F. 2d 701–702) See also Tr. 231–232, 235, 237; CX 52; Tr. 237, 228, 284, 286–287; CX 56; Tr. 215–217, 274, 309–311, 314, 328–331; CX 56L.

lessening competition with, or the probable effect of injuring, destroying or preventing competition with, the favored purchasers.

The record discloses that respondent has discriminated in price between purchasers located in various cities. These differences ranged from 2 percent to 10 percent. The record contains many citations revealing that the grocery industry is highly competitive, with very low margins of profit.[33]

25. The lower prices granted by respondents to certain purchasers in the trading areas previously discussed were not made available to the unfavored purchasers in each such trading area. Respondent failed completely either in assuming the burden of proving availability if this be a part of a section 2(b) defense or in going forward with the evidence if the ultimate burden is on complaint counsel.

It is the contention of counsel supporting the complaint that once evidence is received that respondent has systematically discriminated in price between competing favored and unfavored purchasers or customers of the unfavored competing with the favored in a highly competitive industry with low margins of profit, a prima facie case has been made. The burden of attempting to justify such discriminations is on the seller. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44–45 (1948). That the lower prices were available to the unfavored purchasers is an attempt at justification wherein the burden of proof rests with the seller. Support for this argument may be found in the court's opinion in the *Morton Salt* case, wherein the court stated at 334 U.S. 45:

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[33] See Appendices A–R; Tr. 162, 166–167, 198, 287–288, 311–312, 318–319, 331–332, 340–341, 353, 355, 358–359, 372–373, 416, 428, 430–431, 438, 455, 457, 495–496, 501, 513, 521, 527–528, 534, 536–537, 548, 556; CX's 50 in camera, 53 in camera, 55 in camera, 57, 59, 60 in camera, 61 in camera, 62 in camera, 65–66, 73B–C in camera, 74, 75 in camera, 81, 82 in camera, 83 in camera, 90 in camera, 92 in camera, 94, 96–97, 101, 103–104, 106–107. See also opinion of the Court of Appeals in the within case 329 F. 2d 694 at page 702, to the following effect: This finding that the effect of the price competition "may be" substantially to injure competition, was essential to establish, under the circumstances of this case, a proscribed price discrimination within the meaning of section 2(a). The Commission, however, was not required to find that there had been actual injury to such competition, and it made no such finding. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46, 68 S.Ct. 822, 92 L.Ed. 1196. In the foregoing connection also see Rowe, Price Discrimination Under the Robinson-Patman Act, at pages 184–185, including footnotes 49–53, and more particularly to the following effect: The importance of the *Automotive Parts* decisions lies in their creation of another link in the chain of inference sanctioned by *Morton Salt*—by dispensing with any reflection of the supplier's price differentials in the customer's stable resale prices. In *Morton Salt*, a "substantial" price differential sufficient to "influence resale prices" supported an implicit inference of lost sales or diminished profits, which in turn indicated a potential competitive impairment. In the *Automotive Parts* cases the particular price differential alone, in the context of keen competition and tight profit margins, furnished the foundation for a conclusion of adverse competitive effects among the rival resellers of the supplier's products.

We think that the language of the Act, and the legislative history just cited, show that Congress meant by using the words "discrimination in price" in § 2 that in a case involving competive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors * * *.

Rowe, Price Discrimination Under the Robinson-Patman Act (1962), sec. 8.5, pp. 186, 188, appears to give merit to the position of counsel supporting the complaint. At page 186, in discussing the causal connection between a price discrimination and injury, it is stated:

* * * Hence sellers in secondary-line proceedings may vindicate their prices by the absence of any causal relationship between the discrimination and the competitive injury howsoever measured.

At page 188, in referring to competitive effect, it is also stated:

In sum, the refutation of prima facie detrimental competitive effects due to a seller's price differentiation by reason of dominant intervening economic factors depends on the degree to which these factors overshadow the supplier's price differential as a determinant of the customer's ultimate competitive situation.

Phrases such as "sellers in secondary-line proceedings may vindicate" or "the refutation of prima facie detrimental competitive effects" without question suggest that the burden with respect to availability of lower prices may well be on the seller as a part of a section 2(b) defense or as proof required of respondent in going forward with the evidence assuming he does not have the ultimate burden.

However, irrespective of the question of who has the burden, counsel supporting the complaint has introduced clear and convincing evidence disclosing that the granted lower prices to the large chain purchasers located on "California Street" were not available to the unfavored purchasers.

Walter Tewes of Walkay Grocery Company (an unfavored purchaser) testified that he had no discussions with any official or employee of Tri-Valley with respect to prices being paid to buyers located on "California Street." He further testified that he never discussed with anyone "California Street" prices. Furthermore, he stated that Tri-Valley's broker never said anything about "California Street" prices.

Samuel Arshan, Middlesex Foods, Inc. (an unfavored pur-

chaser), testified he never heard anything about "California Street" prices in 1957 and 1958. He further testified that he had never received any circulation of any material or data or price lists whatsoever from "California Street" indicative of what the "California Street" prices were. He stated that he purchased Tri-Valley products at prices quoted by the broker, believing he was paying the lowest possible prices. There were no statements on the invoices concerning "California Street" prices. Tri-Valley brokers did not furnish Walkay with any written information concerning "California Street" prices during the period from 1956 through 1958.

Walter Rohrs, of Middendorf and Rohrs (an unfavored purchaser) testified that he had no discussions with officials of Tri-Valley concerning "California Street" prices. Furthermore, invoices submitted to the witness contained no comments concerning "California Street" prices. He further stated that he received no information from either Tri-Valley or its broker that witness' company could receive prices lower than what was quoted him by Tri-Valley's broker.

Russell Snyder, assistant sales manager of Tri-Valley in 1957 and 1958, specifically stated that customers of Tri-Valley were not informed that they could get better prices by opening offices on "California Street." No instructions were given to Tri-Valley's brokers to inform its customers that better prices were available to customers having offices on "California Street." Further, the price lists issued by Tri-Valley made no mention of "California Street" market prices. "California Street" prices was not a question which the witness discussed with customers across the country.

The unavailability of lower prices to unfavored purchasers is also apparent from the fact that Bushey & Wright, a broker with offices in San Francisco, represented both H. A. Marr Grocery Company, Denver, Colorado, and Hannaford Brothers Company, Portland, Maine, in the purchase of Tri-Valley products and, nevertheless, these two purchasers consistently paid higher prices than Safeway and/or A & P. Apparently, having a buying representative on "California Street" is no guarantee that a purchaser will receive the lowest possible price from a supplier. If it were a guarantee it would seem that the unfavored purchasers would seek a favorable price on the "Street" through their brokers. If the prices identified were actually sought through the brokers, it is apparent that the brokers were unable to obtain the favorable

price on the "Street." Either inference, contrary to the contention of the respondent, must lead to the same conclusion.[34]

26. Respondent did not grant the discriminatory price concessions to the favored retail chains to meet in good faith the equally low price of a competitor.

Since the good faith meeting competition defense is a justification for a price discrimination which would otherwise be unlawful, the seller has the burden of sustaining this defense as enunciated by the court herein in remanding the case. See also *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231 (1951); *Federal Trade Commission* v. *A. E. Staley Manufacturing Co., et al,* 324 U.S. 746 (1945).

Respondent, relying on the section 2(b) defense, has failed to introduce any reliable evidence to sustain its burden. In attempting to explain away the individual discriminatory pricing transactions favoring certain chains as contained in Appendices A–R, respondent called as a witness, Mr. Russell Snyder, assistant sales manager of respondent at the time of the transactions. He testified about general market conditions on "California Street," and that the lower prices were given to the favored purchasers to meet competition. Mr. Snyder further stated he could not remember the individual transactions relating to price competition. In describing the individual pricing transactions, the witness was relying on testimony concerning general company policy and his adherence to such company policy. Respondent did not introduce any documents concerning the prices of competitors, nor call any competitors to substantiate what their market prices or market practices were at the time of the transactions in question. The witness also testified that his company kept no memoranda concerning policies to be followed by the sales force in connection with competitive market facts. The witness further testified that he did not keep a diary or memorandum of the prices charged by his competitors. He stated that he kept no records with respect to prices offered by competitors. When specifically asked for the identity of a particular competitor and the prices such competitor was charging, the witness was unable to answer.

Thus, a reading of the record clearly reveals that respondent's evidence on the section 2(b) defense is the conclusion of respondent's assistant sales manager that the company was meeting the

[34] See Appendices N and O; Tr. 1116–1117, 1120; Appendix L; Tr. 1132, 1134–1135; Appendices K and N; Tr. 1155–1157, 1353; CX's 193A–B–214; Tr. 1354; 338, 412–413; Appendices C, D, E, P, and Q.

competitive market prices unsupported by evidentiary facts such as prices met, the specific sources thereof, and justifying circumstances.

Respondent contends that it had a general policy of only meeting competitive pricing practices. Performance of this policy, however, does not appear to be demonstrated beyond assertion.

Commission Exhibits 216 through 219 indicate that in connection with the sale of tomato paste respondent did not meet the competitive market prices. Commission Exhibit 217 shows that the market price was $6, but, nevertheless, respondent sold tomato paste to A & P in early 1957 at $5.90, at 10 cents lower than authorized. Furthermore, the $5.90 price could not be explained, except that it was A & P's price.

Commission Exhibits 223–225 reflect that respondent developed special price lists in dealing with Regent (Safeway) and First National, two favored purchasers. In Commission Exhibit 199 (May 31, 1957, price list), the prices listed for apricots were substantially higher than those contained on Commission Exhibit 225. The same was true for yellow cling peaches. These special price lists were issued for internal use. Abraham P. Friedman, a former attorney-examiner for the Federal Trade Commission, testified that H. Ziegler Bare, sales manager for respondent during the period in question, informed him that the special price lists were prepared shortly before the market opened. Mr. Friedman further testified that Mr. Bare told him that as a copy of each special price list came out they destroyed a copy of such list.

Mr. Snyder, a respondent representative, attempted to explain away the price lists by statements that they were developed as a result of market conditions. However, when asked to name particular competitors who had the same prices or lower prices contained on the special price lists, Mr. Snyder was unable to do so. Furthermore, Mr. Snyder did not, or could not, challenge Mr. Friedman's statement that Mr. Bare informed him the special price lists were developed before the time the market opened. If the special price lists were developed before the market opening, then it is difficult to see how the prices contained on those lists were the results of prices being offered by competitors.

Evidence introduced subsequent to the remand appears to establish that there was no "California Street" market as distinguished from markets outside of California. In this connection Mr. Snyder testified (Tr. 1348) that in certain instances customers may get lower prices if they were not in "California Street."

He further testified that customers not on "California Street" could buy just as cheap as those on said "Street." No independent evidence was introduced showing that Mr. Snyder's description of "California Street" practices were followed by competitors. As previously observed, wholesalers who testified concerning "California Street" prices indicated they never heard of them until taking the stand.

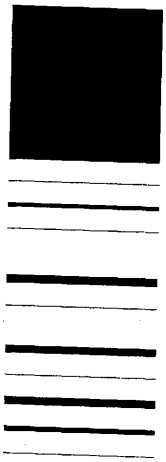
Apparently respondent adopted a pricing practice favoring large chain buyers with the "California Street" market as an excuse for the claim that "California Street" market prices had to be met. Absence of proof of specific prices or market prices met offers little probative weight to respondent's theory it was reducing prices to meet "Street" prices.

There also may be some merit to complaint counsel's theory that even assuming there was such a thing as a "California Street" market with lower prices, and that competitors were engaged in the same practices, respondent has met an unlawful pricing system requiring rejection of the section 2(b) defense. The evidence is not entirely clear on this point however. The original initial decision was premised on such illegality. Nevertheless, this initial decision on remand is not, after a more critical review of the evidence.

In the foregoing connection, Mr. Snyder testified that selling on "California Street" begins with a canner, including respondent, attempting to obtain from buyers located on said "Street" a reservation for a given number of cases of the commodity to be packed, but substantially in excess of that purchased the previous year. A reservation is an informal record or memorandum where the canner agrees to supply a prospective buyer with a specific quantity of goods during the buying season. A buying season is not a contract of sale because the seller is not obliged to deliver, and the buyer is not required to take any merchandise unless and until there is a meeting of minds on the price. It is for this reason, therefore, that prices are seldom specified in the reservation.

After reservations have been entered into, the canners, including respondent, announce their "opening prices." The buyers note the opening prices. These prices are accumulated and analyzed by the buyers. When this analysis is completed, the buyers set the market price at the level of the lowest prices offered by reliable canners and go on to purchase goods at this price.

Mr. Snyder also testified that under the reservation system as practiced by Tri-Valley and competitors, the whole reservation



would not be shipped to a purchaser in a single shipment. Competitors as well as respondent would sell only a portion of the reservation at a time to a purchaser. Prices charged by Tri-Valley and competitors to chain stores on "California Street" were not dependent on the quantity sold to such purchasers. Tri-Valley and competitors use the same manufacturing methods for all customers, whether those customers be on "California Street" or elsewhere. Competitors use the same means of transportation as Tri-Valley in transporting goods to customers across the country.

The evidence does suggest, however, that probably neither Tri-Valley nor its competitors could cost-justify the "California Street" prices. As the facts disclose, the lower prices on the "Street" were not established as based on savings resulting from differences in the manufacture, sale or distribution of the sellers' products to purchasers. Respondent's officials were thoroughly familiar with the canning industry, respondent being a member of various associations with canning interests. Respondent probably knew, or should have known, that prices on "California Street" could not be cost justified,[35] but this does not entirely resolve the question as to the illegality of the system.

27. Respondent, pursuant to a coupon book program, granted promotional payments to Fred Meyer, Inc., a retailer located in Portland, Oregon, in 1957.

The record discloses that Fred Meyer, Inc., caused to be printed coupon books for distribution to the consuming public. These books contained coupons illustrating various products sold by Fred Meyer to the public. The coupons advertised that they may be detached and returned for either a free supply of the products illustrated, or for purchase of such products at reduced prices.

Respondent participated in Fred Meyer's 1957 coupon book program by executing an agreement wherein respondent agreed to pay Fred Meyer $350 for the illustration and advertisement, on a single page in the coupon book, of sliced or halved peaches under Fred Meyer's private label "My-te-Fine." Fred Meyer, in 1957, received $350 from respondent.[36]

28. Respondent did not offer nor pay promotional payments or allowances on proportionally equal terms to Safeway Stores, Portland, Oregon, Division.

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[35] See Tr. 743–751, 770–854, 825, 782–783, 1350, 1507, 1512, 1514, 1523, 1505–1506, 1512–1513, 1448–1450; CX 218; Tr. 1420, 1425–1426, 1448, 1502–1506, 1353, 1356–1357, 741, 764–765, 746–749, 933–934, 937–938, 754–757, 1327, 1330–1331, 1333, 1336–1339,1326, 1321–1325.

[36] See Tr. 64, 129; RX 1; Tr. 119–122; CX's 10, 11, 24, 26; RX 1, p. 60; Tr. 97, 109–111; CX's 24, 26.

The coupon book program for 1957 was initiated by Fred Meyer, Inc., with the amount of the allowance fixed by Fred Meyer. Further, the Fred Meyer bulletin with respect to the 1957 coupon book program specifically provides: "OFFER MUST BE EXCLUSIVE AT FRED MEYER DURING THE 4 WEEK PERIOD." The evidence clearly supports the finding that Tri-Valley was aware that the program was to be an exclusive one with Fred Meyer.

Mr. Leslie Larsen, partner of Kelley-Clarke, as respondent's Portland, Oregon, broker, was under specific instructions to pass along to Tri-Valley headquarters any requests for an allowance. Pursuant to such instructions, Mr. Larsen indicated that he passed along Commission Exhibit 221 to his principals. In this connection, Mr. Larsen testified as follows:

Q. Now, to whom did you distribute CX-7 (CX 221) or copies thereof?
A. Well, I probably sent them to our principals.
Q. Did you send it to Tri-Valley in 1957?
A. Well, like the other day, I can't swear that I did, but I assume I did.
Q. Is that your normal procedure, to send it?
A. That's normal routine procedure, yes, for anything we get. That's our business.

That the coupon book program was an individually negotiated and exclusive deal with no offers of promotional allowances being made on proportionally equal terms to other customers in the Portland, Oregon, area, was attested to by officials of Safeway Stores who testified that as far as they recall they had not received offers of promotional allowances from Tri-Valley at any time in 1956 or 1957, with respect to either private labeled or Tri-Valley labeled products.

Further evidence that respondent had a policy of not offering promotional allowances on proportionally equal terms may be found in the testimony of Phillip Mark, executive head of Tri-Valley at the time, and H. Ziegler Bare, sales manager of respondent. At page 47 of the transcript, Mr. Mark testified that Tri-Valley would rarely promote a private label. Mr. Bare testified at page 77 that cooperative allowances were offered on more or less an individual basis within a specified territory.

Respondent has introduced no evidence to indicate that it did offer promotional payments or allowances on proportionally equal terms to Safeway Stores in the Portland, Oregon, area.[37]

29. The record discloses that both Fred Meyer, Inc., and the Portland, Oregon, Division of Safeway Stores were retail custom-

[37] See Tr. 64-65, 84, 149-150; CX's 10, 221, 226, CX 221; Tr. 1454, 1456, 1410, 1414-1415; CX 226; CX 226C; Tr. 1475, 1479.

ers of Tri-Valley competing in the distribution of respondent's canned peaches, which was the subject of the advertisement in the 1957 coupon book program.[38]

30. Respondent, in 1957 and 1958, granted Central Grocers, Inc., promotional payments for the latter's promotion of products purchased from Tri-Valley in its order-guide book.

The order-guide, as published by Central Grocers, Inc., and in connection with which respondent made payments, consisted of a book, published monthly or periodically, listing by some code all the products sold by Central Grocers, and the selling prices. Central Grocers would then distribute the order-guide books to its members and independent retailers. In connection with its order-guide books, Central Grocers solicited various suppliers, including respondent, for the purpose of getting these suppliers to feature their products in the order-guide books at a specified cost. The rate charged the suppliers, including Tri-Valley, was fixed by Central Grocers. Through a mat, or some wording, the product of the seller making payments would be brought to the attention of the retailer customers of Central Grocers.

The payments made by Tri-Valley to Central Grocers in 1957 and 1958, in connection with the order-guide program, were based on any product purchased by Central Grocers. The rate was $150 on 1500 cases of any product purchased by Central during the year, plus 10 cents a case for purchases of any product in excess of the first 1500 cases. Furthermore, the payment was made in connection with any product purchased from Tri-Valley under the private label of Central Grocers.[39]

31. Respondent did not offer, nor pay, promotional allowances on proportionally equal terms to Standard Grocery Company, Boston, Massachusetts, a customer of respondent competing with Central Grocers.

The Circuit Court, in its opinion in this proceeding, found competition in the Boston trading area between Central Grocers, Inc., a quasi cooperative wholesaler, and Standard Grocery Company, also a wholesaler. However, in remanding the case, the court was disturbed by the Commission's failure to indicate where in the re-

[38] See Tr. 116–119, 184–186; CX's 11, 31–33. In view of the date of committee approval (2–27–57), as shown in CX 11, it is apparent that negotiations between Tri-Valley and Fred Meyer concerning participation in the 1957 coupon program occurred prior to the end of February 1957. Safeway was a customer of Tri-Valley in the purchase of canned peaches from January through March of 1957, at about the time Fred Meyer was also a customer of respondent in peaches of the same grade and quality, and at the time when negotiations were under way for participation in the 1957 coupon book program.

[39] See Tr. 1281–1284, 920–921, 1431, 920; RX 9E–M.

cord it is shown that Central Grocers, Inc., purchased goods at around the same time that Standard Grocery Company purchased from respondent in order that it could be said both customers were in competition with respect to respondent's products.

Unfortunately, the attention of the court was not invited to Respondent's Exhibit 9D, which expressly shows purchases made by Central Grocers on March 22 and April 29, 1957, which were in close proximity to the date Standard Grocery Company made purchases from respondent.

Mr. Hecht, counsel for respondent, stipulated that Tri-Valley did not make offers to other wholesalers in the Boston area that it would be willing to paticipate in order-guide programs. [40]

32. Respondent did not offer, nor pay, promotional payments or allowances on proportionally equal terms to Food Centre Wholesale Grocers, Charlestown, Massachusetts, a customer of respondent competing with Central Grocers.[41]

33. Respondent's acts in granting discriminatory promotional allowances to Fred Meyer, Inc., and Central Grocers, Inc., were in violation of section 2(d) of the amended Clayton Act.

All of the elements for finding a violation of section 2(d) of the amended Clayton Act with respect to respondent's granting of promotional payments to Fred Meyer are hereinbefore set forth.[42] Summarized these elements include:

(1) Offer and payment to Fred Meyer;

(2) No offer or payment to Safeway;

(3) Both Fred Meyer and Safeway are retail customers of respondent in competition with each other; and

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[40] See 329 F. 2d at p. 709; see also Tr. 348–349, 352–353, 369, 372, 1428–1429, 1431; CX 45; Tr. 1432.

[41] See Tr. 1190–1191; CX's 131–142, 147–152 to the effect that Central Grocers and Food Centre Wholesale Grocers were both customers of respondent at the time respondent was making payments to Central Grocers under an order-guide promotional program. See also Tr. 1272–1274 indicating that Food Centre Wholesale Grocers is a wholesaler reselling in the same geographical area as did Central Grocers, and is in the same business as the latter. Also, Tr. 1274–1275, 1277, 1432 reflecting, that although Food Centre Wholesale Grocers printed a catalog similar to that printed by Central Grocers, Tri-Valley did not offer Food Centre Wholesale Grocers any sums of money for featuring Tri-Valley purchased products in its catalog, nor did Tri-Valley offer any sums of money for any other forms of advertising at the time when Central Grocers was receiving payments.

[42] These findings meet the necessary standards of proof established by the Commission and the courts for holding a supplier in violation of section 2(d). See *State Wholesale Grocers, et al.* v. *Great Atlantic & Pacific Tea Co., et al.* 258 F. 2d 831 (7th Cir. 1958), *cert. den. sub nom. General Foods Corp.* v. *State Wholesale Grocers*, 358 U.S. 947 (1959); *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480 (2nd Cir. 1962), cert. den. 372 U.S. 910 (1963); *Atalanta Trading Corporation* v. *Federal Trade Commission*, 258 F. 2d 365 (2nd Cir. 1958); *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89 (1954); *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956); *Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050 (1957); Commission's 1960 *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 1 C.C.H. Trade Reg., par. 3980, pp. 6073, 6076–6078.

(4) Both customers bought from respondent the product which was the subject of the promotional allowances to Fred Meyer.

All of the elements listed as applicable to the Fred Meyer arrangement in finding a section 2(d) violation are also present in connection with General Grocers' order-guide programs with the exception of the disclosure that the unfavored customers did not purchase from respondent goods of the same grade and quality as those purchased by Central Grocers. However, because of the uniqueness of the arrangement between Tri-Valley and Central Grocers, it would not appear to be necessary to evidence that the competing unfavored customers bought goods of like grade and quality.

Unlike the factual situation existing in the *Atalanta* case, 53 F.T.C. 565 (1956), *rev'd* 258 F. 2d 365 (2nd Cir. 1958), where the promotional allowances were given for the advertising of specific products, the payments to Central Grocers were granted to promote respondent's general line of products. Payments by Tri-Valley were made based on the purchase of the general line of respondent's products. It is clear that the only requirements under the Central Grocers' order-guide plan were: (1) a customer relationship; (2) purchase of any type product from respondent; and (3) listing of the product in the order-guide book, which is nothing more than a catalog containing the identity of the various suppliers' products and the prices being charged by Central Grocers on those products. Both unfavored Standard Grocery Company and Food Centre Wholesale Grocers were: (1) customers of respondent purchasing at the same time as did Central Grocers; and (2) able to list the products purchased either in an order-guide or on price lists to be distributed to retailers.

Since no specific product was the basis for promotional payments, then it is incumbent upon respondent to offer promotional payments to competing customers who purchased products at the time Central Grocers purchased such products, provided, of course, these customers would be willing to list respondent's products in order-guide books or on price lists.

CONCLUSIONS

The law of the case that must be applied, as reflected by the Ninth Circuit Court of Appeals in remanding it to the Federal Trade Commission, is reducible to the following summary of conclusions reached by the court in appraising the evidence and findings of the Commission.[43]

[43] *Tri-Valley Packing Association* v. *Federal Trade Commission*, 329 F. 2d 694.

(a) The Federal Trade Commission's order requiring the packing association to cease and desist from discriminating in the price of food products should not be set aside on the ground that the Commission adjudicated issues not raised in the complaint and at the hearings, where the association did not apply for leave to adduce additional evidence and therefore was not in position to argue that it was aggrieved by lack of notice as to the issues to be adjudicated. See opinion of the Court of Appeals at page 700.

(b) The evidence supports the finding of the Federal Trade Commission that certain food retailers who purchased from the wholesaler were in actual competition in a certain area with the retailer which purchased food products from the packing association at lower prices than those charged the wholesaler, in the proceeding for review of the Commission's order requiring the association to cease and desist from discriminating in the price of the products. See opinion of the Court of Appeals at page 702.

(c) The findings of the Federal Trade Commission as to the actual direct and indirect competition between the retailers who purchased from the wholesaler and the retail chain provide sufficient factual basis, insofar as existence of actual competition is concerned, for the order requiring the packing association, which sold directly to the chain and the wholesaler, to cease and desist from discriminating in the price of food products. See opinion of the Court of Appeals at page 702.

(d) The Federal Trade Commission's finding that the effect of price competition might be substantially to injure competition between the food retailers purchasing from the wholesaler which paid the packing association higher prices than those charged the retail food chain is essential to establish the proscribed price discrimination, but the Commission is not required to find that there had been actual injury to such competition. See opinion of the Court of Appeals at page 702.

(e) Whether disparity in prices charged by the packing association for goods sold to favored retailers and those sold to nonfavored wholesalers could endanger the ability of the retailers who purchased from the nonfavored wholesalers to compete with the favored retailers is a question for the Federal Trade Commission. See opinion of the Court of Appeals at page 703.

(f) In a price discrimination case, it is not the function of the Court of Appeals to find the facts and the Federal Trade Commission should first speak as to the application of the law to the facts which are found. See opinion of the Court of Appeals at page 704.

(g) The seller who has discriminated in the prices charged different purchasers of commodities of like grade and quality has the burden of showing that he acted in self-defense. See opinion of the Court of Appeals at page 704.

(h) The Federal Trade Commission's order requiring the packing association to cease and desist from discriminating in price must be set aside for the determination of the facts pertaining to the availability to unfavored purchasers of the low prices for the association's products at a certain market and whether the competition which the association faced in that market was the kind contemplated by the meeting of the competition defense available to the seller who had discriminated. See opinion of the Court of Appeals at page 706.

(i) The evidence warrants the finding of the Federal Trade Commission that allowances given certain customers by the packing association were compensation for the promotion, over a period of time, of the association's line of products and were not given exclusively to facilitate the original sale by the association to such customers. See opinion of the Court of Appeals at page 708.

(j) Where the seller's direct customer operating solely on a particular functional level receives a promotional allowance not made available to another direct customer operating solely on the same functional level, in order to establish competition, it is sufficient to prove that one customer has outlets in geographical proximity to those of the other and that customers purchased goods within approximately the same period of time. See opinion of the Court of Appeals at page 708.

(k) The purpose of the statute forbidding unequal treatment of customers as to promotional allowances is to require sellers to refrain from making allowances to one customer unless it is made available on proportionally equal terms to competing customers. See opinion of the Court of Appeals at page 708.

(l) In determining whether there has been a violation of the statute forbidding unequal treatment of customers with regard to promotional allowances, it may be assumed that the seller's direct customers which are in functional competition in the same geographical area and which buy the seller's products of like grade and quality within approximately the same period of time, are in actual competition. See opinion of the Court of Appeals at page 708.

(m) Violation by the packing association of the statute forbid-

ding unequal treatment of customers with regard to promotional allowances is not established where there is no showing of proximity as to the time of the purchases by a wholesaler given an allowance and another wholesaler in the same area not given an allowance. See opinion of the Court of Appeals at page 709.

(n) That the retailers, direct customers of the packing association, were not given a promotional allowance by the association comparable to that accorded the wholesaler is not a violation of the statute. See opinion of the Court of Appeals at page 709.

(o) Violation of the statute forbidding unequal treatment of customers with regard to a promotional allowance could be shown with respect to the packing association's giving a promotional allowance to the wholesaler but not to the retailers in the same area only by treating the wholesaler's retail outlets as indirect customers of the association, but that could not be done in the absence of a showing that the packing association engaged in a course of direct dealing with the retailers. See opinion of the Court of Appeals at page 709.

(p) The packing association's failure to give proportionally equal promotional allowances to a corporation, which was principally a wholesaler but might also be a retailer, as the association gave to the retailer in the same area was not unlawful as to the wholesale operation which was not in functional competition with the retailer or as to any retailer operation, where it was not shown that the association's goods were purchased indirectly by the retail outlets during the period in question. See opinion of the Court of Appeals at page 709.

Although some of the findings herein relate to matters disposed of and resolved by the Court of Appeals in its opinion remanding the case to the Federal Trade Commission under the original findings and evidence supportive thereof, all the findings herein are consistent with the law of the case as enunciated by the court.[44A] These findings are considered in relation to the opinion of the court, and any discriminatory transactions enumerated are either those previously referred to by the court, or additional transactions consistent with the concepts recognized by the Court of Appeals in entering its remand order.

While some of the findings relating to the Clayton Act section

[44A] Although respondent's counsel urges to the contrary, *Morand Bros. Beverage Co.* v. *National Labor Relations Board*, 204 F. 2d 529, 532 (7th Cir. 1953) is inapplicable since in that case the findings were inconsistent with the law of the case and were unrelated to the issues required to be resolved by the "inferior tribunal" or to the issue of relief incident to the setting aside of an administrative agency order by the Apellate Court.

2(a) charges perhaps are partially redundant, they were included to clarify the evidence consistent with the court's version of the law of the case [44B] and to enable a better appraisal of the nature of the order that should be issued. In this connection it is observed that the court, with regard to the Clayton Act section 2(a) violations, did not set aside the findings and conclusions of the Commission, but invited the attention of the Commission to certain aspects of proof which required clarification or the adduction of other evidence, particularly as to the availability of "California Street" prices to unfavored customers of the respondent and certain phases of respondent's section 2(b) defense, which have been discussed herein incident to the findings. It is important that such findings be complete as well as consistent with the law of the case enunciated by the court in order to appraise the scope of the relief that should be granted, since the Court of Appeals in remanding the case has set aside the Commission's order with regard to the section 2(a) charge. Furthermore, there is a relationship between such evidence and the evidence concerning which the Court of Appeals stated further clarification and findings were necessary.

In permitting new findings as to the section 2(a) charges, pursuant to remand, the Court of Appeals clearly indicated its intention that further evidence could be adduced if necessary. As regards the section 2(d) charges, the court having set aside the findings, conclusions and the order, it is obviously mandatory that completely new findings, conclusions and an order be issued concerning facts which the court has permitted the Commission to adduce in the event that clarification alone on the present evidence is insufficient. To meet the requirements of proof as enunciated by the court and consistent with the established law of the case, additional competitive situations regarding promotional allowances have been included. Before the adduction of any evidence, respondent was made aware of the extent to which proof would be adduced and new findings rendered, both as to the section 2(a) charges and the section 2(d) charges.

The respondent has urged essentially that its lower invoice prices to its favored buyers were made in good faith to meet the equally low prices of its competitors in the "California Street" market, and that these prices were available to its nonfavored buyers. The orignial decision categorized "California Street" as an illegal system and that, therefore, respondent, if it was meet-

[44B] This is one of the purposes for which the case was remanded.

ing competition on "California Street," was meeting unlawful competition, and should have been cognizant of it. Therefore, it could not avail itself of a section 2(b) defense.

A more critical examination of the evidence since the original decision does not suggest that the reduced prices on "California Street" are either systematic or illegally systematic. Significantly, in this connection is the evidence that at least one purchaser on "California Street" did not receive a favorable price.[45] Supportive of this conclusion also is the absence of evidence as to whether or not Tri-Valley's competitors sold at reduced prices on "California Street" and, if so, the prices at which they consummated such sales. In the absence of price comparisons, there is an evidentiary vacuum as to any reduced prices on "California Street" from which any meaningful legal or illegal price system can be reasonably imputed. Under these circumstances respondent's theory that they are meeting "California Street" prices in good faith can have no merit since there is no substantial evidence as to what "California Street" prices or what competitiors' prices on "California Street" respondent is specifically meeting.

Furthermore, the evidence affirmatively establishes that Tri-Valley's prices to certain "California Street" buyers are not directly offered or directly made available to "off-California Street" buyers by Tri-Valley. The evidence also establishes that no "California Street" prices, as such, comparable to Tri-Valley prices on the "Street," are made available to "off-California Street" buyers. Such prices, even assuming their existence could be established on some systematic or market price basis, are not adequately made known to "off-California Street" buyers in the market area so that they may take advantage of these prices. The argument that such "Street" prices are available to "off-Street" California buyers becomes obscure in the absence of evidence sufficiently comprehensive as to the specific prices of certain Tri-Valley competitors or specific market prices that Tri-Valley claims it is forced to meet on "California Street." The ultimate burden of establishing such evidence is on the respondent as a part of its section 2(b) defense or in going forward with the evidence. Having failed to do so, respondent's section 2(b) defense is without merit, and it has failed otherwise in going forward with the evidence.

Additionally, the evidence does not suggest the need to join all competitors in consummating necessary relief under a cease and

[45] See Finding 25. Purchaser on "California Street" refers to broker representation on the "Street."

desist order since such over-all relief is unjustified in the absence of proof that the prices of Tri-Valley's competitors on "California Street," as well as Tri-Valley's, are reflective of an illegal competitive system demonstrated by some price-cutting formula or technique, which clearly establishes "California Street" as a preferential market for certain favored buyers thereon. The methodology of doing business on the "Street," which is evidenced, is entirely insufficient to establish any meaningful significance concerning the nature of the price system in the absence of specific comparative prices of "California Street" rival suppliers to particular buyers on the "Street." In fact, the evidence indicates that even on "California Street" some purchasers apparently buy at higher prices than others.[46] From this one must conclude that there is no "California Street" market price. Therefore, the respondent has failed to prove that its conduct in reducing prices on the "Street" has any relationship to such a market price resulting from necessary market procedures, systematic or otherwise, to which Tri-Valley must respond in order to remain in the "California Street" market place. These circumstances, as heretofore indicated, require that the respondent specifically prove the competitor's prices that Tri-Valley is meeting. Its failure to do so vitiates the need for dealing with all of the competitors jointly under the assumption that there is a relationship between their prices and "California Street" as a separate and significant market based upon the necessity of price differences on and off that market.

Nor can it be said that the "California Street" situation creates circumstances whereby no causal connection by the respondent's reduced prices and competitive injury is shown because Tri-Valley was confronted with a general systematic drop in prices on "California Street," to which it had to respond. In fact, the Ninth Circuit indicates proof of competition, and probable injury is established as to the section 2(a) charges.[47] The burden of establishing such circumstances requiring such responses is properly a part of a section 2(b) defense as heretofore suggested. Otherwise, the nonexistence of a section 2(b) defense would fall on com-

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[46] See Finding 25.

[47] 329 F. 2d 690, 702.

plaint counsel,[48] thereby contravening the very purpose of section 2(b) as an affirmative defense.

Tri-Valley's price differences remain unexplained, both "off-California Street" and "on-California Street." There is neither a showing that the favorable prices established were to meet the prices of identified competitors nor a showing of bona fide special circumstances necessitating price differences. Respondent's reliance upon general proof of "California Street" methods of pricing is entirely inadequate as evidence of competitive necessity in the absence of proving the specific level of "California Street" prices met or the specific prices of particular competitors met on "California Street" as of a relevant time period. Under the facts of this case, therefore, the distinction between systematic and individual pricing is without significance in determining the meaning of a section 2(b) defense. Also without significance is the issue of availability of rival prices on "California Street," since respondent has failed to introduce evidence of competitive prices or market prices met from which any meaningful inferences may be drawn as to the availability of such prices to unfavored customers of the respondent.[49]

Complaint counsel has established that respondent in a market involving the sale of food which is highly competitive with a low profit margin has sold at prices on "California Street" less than prices off "California Street," and, in one instance, to a customer that had representation on "California Street" at a higher price than to other customers on "California Street." The Commission is not obligated to assume the burden of otherwise establishing the non-availability of "California Street" prices to some customers in the absence of evidence as to what such prices met specifically are, particularly in view of evidence which suggests a variability of prices to customers on the "Street" itself, or the lack of a market price. Proof as to the availability of prices on "California Street" to any buyer does not connote the favorable price is always available. In fact, the evidence establishes an opposite inference.[50] The burden of going forward with the evidence to estab-

[48] See American Oil case 325 F. 2d 101 (1963) 7th Cir. However, in that case the result may have been the same in any event since the evidence sustained a price war situation to which, according to the court, the respondent was entitled to respond. Nevertheless, the court's indication that the Commission failed to prove causal connection between respondent's reduced prices and probable injurious competitive effect suggests the court may have overlooked the fact that the burden of showing noncompetitive effect under special circumstances involving a total market or segment thereof may be an integral part of proving a section 2(b) response as required in establishing the meeting of an individual competitive situation.

[49] Rowe, Price Discrimination Under the Robinson-Patman Act, pp. 234–235.

[50] See Finding 25.

lish equal availability of a particular relevant market price is on the respondent. This it has failed to do. Furthermore, the evidence indicates "off-Street" unfavored buyers were not aware of "California Street" prices, since such information was not disseminated. This also gives credence to the belief that a market price in the normal sense on "California Street" was nonexistent unless it was available only to favored large buyers on the "Street" with buying capacity to lower the price. However, the evidence is somewhat conjectural on this point.

With reference to the Clayton Act section 2(d) charges, the remand order of the Court of Appeals for the Ninth Circuit permitted the adduction of testimony and documentary evidence pertaining to respondent's failure to offer promotional payments or allowances to customers, which was not received in this case prior to the remand.

In remanding the case with respect to the section 2(d) charge, the court discussed the elements necessary for finding a section 2(d) violation. At pages 707–708 the court states:

> There are three essential elements which must be established in order to prove a violation of section 2(d). We designate them as (a), (b) and (c) in this paraphrase of the statute: Where (a) two or more customers of a particular seller compete with each other in the distribution of the products of that seller, (b) the latter shall not pay or contract for the payment of anything of value to or for the benefit of such a customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the sale, or offering for sale, of any products sold or offered for sale by the seller, (c) unless the allowance is available on proportionally equal terms to the competing customers.

After enunciating the necessary criteria, the court proceeded to indicate in what manner the evidence failed to measure up to the standards essential for a section 2(d) case. However, rather than dismiss the section 2(d) charge for lack of evidence, the court returned the case to the Commission, stating: [329 F. 2d, p. 710]

> For the reasons stated above we hold that the Commission findings and conclusions to the effect that Tri-Valley violated Section 2(d) must be set aside. As we have remanded this cause for further proceedings with regard to other matters we think it appropriate to afford the Commission, on such remand, the opportunity of calling attention to evidence presently in the record, or of producing additional evidence, which will overcome the present seeming, or actual, lack of factual support for the Section 2(d) charges as discussed above.

Respondent appears to argue that the court's remand order limited retrial to: (1) finding sales to Central Grocers, Inc., and Standard Grocery Company, at approximately the same time; (2)

indirect customer relationship between Tri-Valley Packing and the customers of Central Grocers, Inc., and Hudson House; and (3) tracing of Tri-Valley's goods to the Piggly-Wiggly stores serviced by Hudson House. Respondent's position is without merit.

Firstly, nowhere in the opinion does the court expressly command that the testimony on retrial be limited as suggested by respondent.

Secondly, the record is clear that it was to the criteria that the court was alluding when remanding the case for the taking of further evidence. In the first full paragraph of its opinion at 329 F. 2d 709, just prior to discussing purchases between Central Grocers and Standard Grocery, the court made references to the criteria. It stated: "In the case before us, however, no set of circumstances has been called to our attention which meets the criteria suggested above* * *."

It is obvious from the foregoing and the court's statement in connection with the taking of further evidence that the court was giving the Commission the opportunity to take testimony relating to the Fred Meyer coupon book program and Central Grocers order-guide program in accordance with the criteria set out in its opinion at 329 F. 2d 707–708. In effect, the court directed the Commission, in setting aside its findings, conclusion and order, to correct the record in accordance with the criteria enunciated.

In respect to the section 2(d) charges involving promotional allowances, the record discloses that the respondent had a policy of offering such promotional allowances on an individual basis within a specified territory (Tr. 77). Also, respondent's discriminatory promotional practices involved two separate and distinct type programs. The failure to offer Safeway Stores, one of the nation's largest chains, a promotional allowance when a competitor was offered one is a clear indication that respondent's basic policy is to ignore the availability and proportionality standards established by section 2 (d), and deal with each customer on an ad hoc basis. A reasonably broad order against respondent would appear to be appropriate in view of such policy. See *F.T.C.* v. *Ruberoid Co.*, 343 U.S. 470 (1952); *F.T.C.* v. *Mandel Brothers, Inc.*, 359 U.S. 385 (1959); *Vanity Fair Paper Mills, Inc.* v. *F.T.C.*, 311 F. 2d 480 (2d Cir. 1962), *cert. den.* 372 U.S. 910 (1963).

Subsequent to March 18, 1964, an employee of respondent, without first consulting his superior or respondent's counsel, destroyed certain documents belonging to respondent, produced by it for copying and inspection by representatives of the Commis-

sion, pursuant to order of the United States District Court. These documents were so inspected beginning on or about October 12, 1959. The court order did not require that these documents be thereafter preserved for any given period of time. The employee destroyed these documents acting under the mistaken belief that the decision of the Court of Appeals, announced on March 18, 1964, had put an end to the proceedings brought against respondent. There are no facts in evidence that would justify the finding that the destruction of said documents was "willful," "intentional," or with "fraudulent design," as those words are used in connection with the presumption relating to the application of the maxim of evidence, "omnia praesumuntur contra spoliatorem." The rule is that the destruction by a party of documents which are relevant and material to a proceeding and ordered produced by the opposing party to the proceeding leaves the rebuttal inference that the information contained in the matter destroyed is unfavorable to the spoliator. 2 Wigmore, Evidence, secs. 285, 291; 31 A Corpus Juris Secundum, Evidence, secs. 152, 153, 156(2). Thus, the further question is whether respondent has satisfactorily explained away the destruction of the documents. It would seem respondent has.

Following the filing of proposed findings, counsel for respondent made a motion to strike certain parts of the reply of counsel in support of the complaint to respondent's proposed findings relating to the documents destroyed by respondent's representatives.[51] It is the contention of respondent that it has been deprived of the opportunity of replying to Commission counsel regarding the destruction of the documents and that the remarks made by counsel supporting the complaint are scandalous. In the first place, the remarks of counsel in support of the complaint are not scandalous, and *Green* v. *Elbert,* 137 U.S. 615, 623–624 cited by respondent's counsel is entirely inapplicable to the circumstances herein. Complaint counsel was merely attempting to argue his position which is that the destruction of the documents in question was willful and that inferences unfavorable to the respondent should be drawn therefrom. In view of the carelessness exercised by the respondent in destroying such documents, it seems only just that complaint counsel should have the opportunity of arguing that the act was willful, although the hearing ex-

[51] See complaint counsel's reply "From a study of" page 1, and ending with the words "the destruction of documents," page 3; also beginning with the words "Also, had respondent not" and ending with the words "part of 1957," page 9.

aminer has decided otherwise. Furthermore, respondent's counsel, at the request of the hearing examiner, gave thorough consideration to the question relating to the destruction of the documents and there is no reason why counsel supporting the complaint, therefore, may not vigorously oppose the proposed finding of the respondent to the effect that its active destruction was not willful. Since the hearing examiner has concluded that the evidence concerning such destruction of documents does not warrant a finding that it was willful, there is, furthermore, no point in granting respondent's motion to strike. However, in this connection, the respondent should be admonished for its carelessness in destroying any of its documents relating to the within case, even though such documents were returned by the Commission to respondent.[52] Such destruction should have awaited termination of the case by an appeal which in this instance reasonably could be anticipated by the respondent.

However, in view of the decision of the hearing examiner favorable to respondent on the issue of documentary destruction, a motion to strike has no merit and would serve no purpose. Furthermore, to encumber or strike complaint counsel's argument to the point where he could not respond to respondent's proposed finding and argument on the issue would indeed be an injustice. Respondent's motion to strike, therefore, filed on April 5, 1965, with regard to the matter hereinbefore identified, is denied.

Premised upon the law of the case as enunciated by the Court of Appeals, it would appear that respondent has violated both section 2(a) and 2(d) of the amended Clayton Act.

Furthermore, incident to the section 2(a) violation heretofore discussed in full, there is no merit to respondent's section 2(b) affirmative defense. Respondent's meeting competition defense under section 2(b) seems to be premised on the "California Street" situation as demonstrated by "California Street" general practices rather than by the actual market or competitive prices met.[53] Mr. Snyder, a respondent representative, merely identifies the respondent's selling price in each instance as the market price, premised upon "California Street" practice unsupported by specific evidence of any cognizable market price or competitor's price on the "California Street" market as related to particular

[52] If the respondent's destroyed documents were delivered to the Commission in the first instance, someone must have thought they were in issue, thereby requiring care on the part of respondent to avoid destruction. Respondent also failed to consult its attorney to ascertain the possible need for retaining such documents.

[53] See statements of respondent's counsel, Mr. Hecht, Tr. 739 and 744.

contemporary sales by respondent on that market.[54] Such evidence adduced by respondent's qualified [55] representative and sales manager is entirely self-serving, has little or no probative weight in the absence of corroboration, and is without sufficient substantiality to sustain respondent's ultimate burden of proof in support of a section 2(b) affirmative defense.[56] The forgoing state of the evidence also strongly suggests that there is no established market price upon which availability thereof to any buyer may be established. Accordingly, the following order shall issue:

ORDER

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

1. Discriminating in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with customers of such purchaser.

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

[54] See testimony of Russell P. Snyder, Tr. 722–860 and 918–994.
[55] See Tr. 722–723, 737–741, 745–747, 748–758, 760–773.
[56] See Cabin Crafts Inc., Docket No. 7639.

APPENDIX A

TRADE AREA: PORTLAND, OREGON

CX No.	Date	Inv. No.	Buyer	No. of Cases	Price	Diff.	% of Discr.
Product: Std. Light Syrup Halves Unpeeled Apricots 24/303							
CX 34	9–24–57	9–24–18	Fred Meyer, Inc.	25	1.725 doz.	.125	7.8%
	11–27–57	11–27–37	Regent Canfood (Safeway)	45	1.60 "		
Product: Fancy Leaf Spinach 24/2½							
CX 34	11–18–58		Fred Meyer, Inc.	32	3.50	.15	4.5%
	12–19–58		Regent Canfood (Safeway)	150	3.35		
Product: Choice Heavy Syrup Halves Unpeeled Apricots 48/8							
CX 34		172769	Regent Canfood (Safeway)	100	1.15		
		1–13124	Hudson House, Inc.	30	1.20	.05	4.4%
Product: Choice Heavy Halves Unpeeled Apricots 24/2½							
CX 34	2–11–57	2–11–11	Hudson House, Inc.	50	6.15	.45	7.9%
	2–12–57	2–12–48	Fred Meyer, Inc.	500	5.70		
	2–12–57	2–12–49	Fred Meyer, Inc.	500	5.70		
	4–7–57	4–7–59	Hudson House, Inc.	60	6.15	.45	7.9%

APPENDIX B

TRADE AREA: BOSTON, MASS.

CX No.	Date	Inv. No.	Buyer	No. of Cases	Price	Diff.	% of Discr.
Product: Choice Heavy Syrup Sliced Y.C Peaches 24/303							
CX 35	5–16–58	5–16– 58	First National Stores	350	3.45		
	7–10–58	6–26–033	Central Grocery	50	3.70	.25	7.2%
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/303							
CX 35	8–29–58	8–11–075	Central Grocery	25	3.65	.15	4.3%
	9–19–58	8–25–171	First National Stores	650	3.50		
Product: Choice Heavy Syrup Halves Pears 24/303							
CX 35	8–29–58	8–11–075	Central Grocery	50	4.60	.40	9.5%
	9–22–58	8–28–069	A & P	75	4.20		
	10–17–58	9–25–096	A & P	50	4.20		
	11–11–58	10– 9–046	Central Grocery	50	4.60	.40	9.5%
Product: Choice Heavy Syrup Halves Pears 48/8							
CX 35	10–17–58	9–25–096	A & P	125	5.30		
	11–11–58	10– 9–046	Central Grocery	25	5.50	.20	3.8%
Product: Choice Heavy Syrup Halves Pears							
CX 35	9–22–58	8–28–069	A & P	150	6.50		
	11–11–58	10– 9–046	Central Grocery	25	7.00	.50	8%
Product: Corina Fancy Tomato Paste 96/6							
CX 45	4– 9–57	4–3400	A & P	350	5.90		
	4–16–57	4–3739	Standard Grocery	150	6.25	.35	5.6%

APPENDICES C, D, AND E

TRADE AREA: PORTLAND, MAINE

CX No.	Date	Inv. No.	Buyer	No. of Cases	Price	Diff.	% of Discr.
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 46	11–14–57	10–31–61	A & P	40	3.45		
	11– 4–57	10–24–46	Hannaford Bros. Co.	70	3.60*	.15	4.2%

*RX 3(f) indicates .0372/case Freight Allowance was given on this shipment altho A&P shipment is not clear on Freight Allowance; but see Inv. #10–3–66 dated 10–22–57 for 3 cases of same @ 3.60—no Freight Allowance granted showing clear cut 4.2% differential;

Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/2½							
CX 46	11–14–57	10–31–61	A & P	55	4.90		
	11– 4–57	10–24–46	Hannaford Bros. Co.	90	5.30*	.40	7.5%

*RX 3(g) indicates .40/case "count and recount" allowance was given on this shipment; but see Inv. #12–17–19 dated 12–27–57 for 30 cases of same on which *no* count and recount was granted; demonstrating undisputed 7.5% differential;

Product: Choice Heavy Syrup Halves Y.C. Peaches 24/303							
CX 46	11–14–57	10–31–61	A & P	35	3.40		
	11– 4–57	10–24–46	Hannaford Bros. Co.	50	3.55*	.15	4.2%

*RX 3(c) indicates .0372/case Freight Allowance was given on this shipment; but see 10–22–57 Inv. #10–3–66 where Hannaford purchased 30 cases of same at 3.55, *no* Freight Allowance granted showing clear cut 4.2% differential;

Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8 vs. 24/8*							
CX 36	7– 8–58	6–16–075	A & P	150	1.125 doz.		
	7–11–58	6–24–043	Hannaford Bros. Co.	60	1.20 "	.062**	5.8%
	9– 2–58	8–15–075	Hannaford Bros. Co.	100	1.20 "	.062**	5.8%

*See presentation on RX 3(a) on justifiable cost savings on 48/8.
**This .013 computes half of the differential set by respondent on RX 3(a) subtracted from .075, the initial price differential.

Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 36	9–17–58	8–29–057	Hannaford Bros. Co.	40	3.65		
	9–19–58	8–25–176	A & P	175	3.50		
	9–22–58	8–29–055	Hannaford Bros. Co.	50	3.65	.15	4.3%
	11–11–58	10–21–029	Hannaford Bros. Co.	60	3.85	.35	10.0%

Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/2½							
CX 36	9–17–58	8–29–057	Hannaford Bros. Co.	80	5.20		
	9–19–58	8–25–176	A & P	225	5.10	.10	2.0%
	9–22–58	8–29–055	Hannaford Bros. Co.	50	5.20	.50	9.8%
	1– 6–59	12–17–045	Hannaford Bros. Co.	120	5.60		
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/303							
CX 36	9– 2–58	8–15–075	Hannaford Bros. Co.	50	3.65		
	9–19–58	8–25–176	A & P	135	3.50		
	9–22–58	8–29–055	Hannaford Bros. Co.	75	3.65	.15	4.3%
	1– 6–59	12–17–045	Hannaford Bros. Co.	20	3.85*	.35	10.0%
*includes .05/case special handling charge							
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 37	9–17–58	8–29–057	Hannaford Bros. Co.	50	5.20		
	9–19–58	8–25–176	A & P	150	5.10		
	9–22–58	8–29–055	Hannaford Bros. Co.	25	5.20	.10	2.0%
	11–11–58	10–21–029	Hannaford Bros. Co.	30	5.60	.50	9.8%
Product: Choice Heavy Syrup Halves Pears 24/303							
CX 37	9–22–58	9– 3–031	Hannaford Bros. Co.	60	4.60		
	9–26–58	9– 4–078	A & P	90	4.20		
	9–29–58	9– 3–032	Hannaford Bros. Co.	40	4.60	.40	9.5%
	10–21–58	9–26–034	A & P	35	4.20		
	11–11–58	10–21–029	Hannaford Bros. Co.	20	4.60	.40	9.5%
Product: Choice Heavy Syrup Halves Pears 24/2½							
CX 37	9–22–58	9–3–031	Hannaford Bros. Co.	25	7.00		
	9–26–58	9–4–078	A & P	40	6.50		
	9–29–58	9–3–032	Hannaford Bros. Co.	30	7.00	.50	7.7%

APPENDICES F, G, AND H

TRADE AREA: EAST HARTFORD, WATERBURY, CONN.

CX No.	Date	Inv. No.	Buyer	No. of Cases	Price	Diff.	% of Discr.
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 45	9–27–57	8–28–64	First National Stores	400	4.90		
	9–25–57	8–26–49	John Bozzuto & Sons	125	5.20*	.30	5.8%
*Claim made on RX 5(c) for .10/case promotional allowance or net differential of .20 or about 4% differential; but see RX 5(c) for purchase by Bozzuto of same on Inv. #10–7–73 dated 10–19–57 of 100 cases @ 5.20 for unrebutted 5.8% differential;							
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/2½							
CX 45	9–27–57	8–28–64	First National Stores	725	5.00		
	9–20–57	8–26–49	John Bozzuto & Sons	125	5.30*	.30	5.7%
*Claim made on RX 5(e) for .10/case promotional allowance or net differential of .20 or about 4% differential; but see RX 5(f) for purchase by Bozzuto of same goods on Inv. #10–7–73 dated 10–19–57 of 200 cases @ 5.30 for unrebutted 5.7% differential;							
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 45	8– 9–57	8–7939	First National Stores	500	3.40		
	8–19–57	7–2984	John Bozzuto & Sons	150	3.60*	.20	5.6%
*Claim made on RX 5(e) for .10/case promotional allowance or net differential of .10 or about 2.8%; but see RX 5(e) for purchase by Buzzuto of same goods on Inv. #10–7–73 dated 10–19–57 for 75 cases @ 3.60 for unrebutted 5.6% differential;							
Product: Fancy Spinach 24/303							
CX 45	10–18–57	10–15–15	First National Stores	250	2.00		
	10–17–57	10– 7–73	John Bozzuto & Sons	25	2.15*	.15	7.5%
*Unrebutted by RX 5(a); in fact, RX 5(a) shows later purchase on Inv. #12–19–46 dated 1–13–58 showing .20 price differential with .10 Promotional allowance, or .10 price differential on 2.10 net price or about 5% differential;							
Product: Fancy Spinach 24/2½							
CX 45	10–18–57	10–15–15	First National Stores	200	2.70		
	10–17–57	10– 7–73	John Bozzuto & Sons	25	2.90*	.20	6.9%
*Unrebutted by RX 5(b);							
Product: Cocktail Choice Heavy Syrup 24/2½							
RX 5(g)	10– 7–57	8–28–61	First National Stores	1125	6.00		
	10–19–57	10– 7–73	John Bozzuto & Sons	150	6.20	.20	3.3%
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 38	12–12–58	11–24–094	John Bozzuto & Sons	50	5.60	.20	3.8%
	2– 6–59	1–26–079	A & P	375	5.40		

Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303								
CX 38	8– 1–58	7–17–002	John Bozzuto & Sons	100	3.60	.10	2.8%
	9–10–58	8–21–110	First National Stores	270	3.50		
	9–19–58	8–25–138	John Bozzuto & Sons	100	3.65	.15	4.3%
	2– 5–59	1–19–038	John Bozzuto & Sons	100	3.85	.15	4.0%
	2– 6–59	1–26–077	A & P	120	3.70		
Product: Fancy Leaf Spinach 24/2½								
CX 38	5– 9–58	5– 9–37	A & P	96	3.20		
	6–19–58	5–16–41	John Bozzuto & Sons	75	3.35	.15	4.7%
	8–13–58	7–24–044	A & P	64	3.20		
	12–12–58	11–24–094	John Bozzuto & Sons	75	3.50	.30	9.4%
Product: Fancy Leaf Spinach 24/303								
CX 38	8– 1–58	7–17–002	John Bozzuto & Sons	75	2.45	.15	6.5%
	8–13–58	7–24–004	A & P	60	2.30		
	12–12–58	11–24–094	John Bozzuto & Sons	25	2.45	.15	6.5%
Product: Fancy—26 Tomato Paste—96/6								
CX 38	10–13–58	9–12–075	A & P	320	6.00		
	12–12–58	11–24–094	John Bozzuto & Sons	200	6.25	.25	4.2%
	1–13–59	12–23–031	A & P	240	6.00		
	2– 5–59	1–19–038	John Bozzuto & Sons	300	6.25	.25	4.2%

APPENDICES I AND J

TRADE AREA: PITTSBURGH, PA.

CX No.	Date	Inv. No.	Buyer	No. of Cases	Price	Diff.	% of Discr.
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/303							
CX 49	11–15–57	11– 4–94	A & P	20	3.40		
	11– 4–57	8–19–52	Associated Grocers, Inc.	100	3.55	.15	4.2%
	11– 1–57	9–13–18	Spiegel Bros.	20	3.55	.15	4.2%
	9–11–57	8–30–22	Star Markets	75	3.55	.15	4.2%
	10–10–57	9– 3–44	W. E. Osborn Co.	24	3.55	.15	4.2%
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 49	11–15–57	11– 4–99	A & P	125	4.80		
	11– 4–57	8–19–52	Associated Grocers, Inc.	100	5.20	.40	7.7%
	10–10–57	9–23–38	General Grocery Co.	25	5.20	.40	7.7%
	11– 1–57	9–13–18	Spiegel Bros.	60	5.20	.40	7.7%
	10–10–57	9– 3–44	W. E. Osborn Co.	35	5.20	.40	7.7%
Product: Fancy Spinach 24/2½							
CX 49	9–13–57	9– 4–52	A & P	50	2.70		
	8– 9–57	8– 1– 2	Pittsburgh Mercantile	25	2.90	.20	6.9%
	8–23–57	7–22–57	Spiegel Bros.	40	2.90	.20	6.9%
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/2½							
CX 49	11–15–57	11– 4–94	A & P	75	4.90		
	10–10–57	9–23–38	General Grocery Co.	25	5.30	.40	7.5%
	10–10–57	9– 3–44	W. E. Osborn Co.	50	5.30	.40	7.5%
	11– 1–57	9–13–18	Spiegel Bros.	100	5.30	.40	7.5%
Product: Choice Heavy Syrup Halves Unpeeled Apricots 24/2½							
CX 49	9–13–57	9– 4–52	A & P	25	5.80		
	10–10–57	9–23–52	General Grocery Co.	25	6.15	.35	5.7%
Product: Fancy Spinach 24/303							
CX 49	9–13–57	9– 4–52	A & P	75	2.00		
	10– 5–57	9– 3–47	Pittsburgh Mercantile	25	2.15	.15	7.5%
	11– 1–57	9–13–18	Spiegel Bros.	40	2.15	.15	7.5%
	8–23–57	7–22–57	Spiegel Bros.	100	2.15	.15	7.5%
	10–10–57	9– 3–44	W. E. Osborn Co.	75	2.15	.15	7.5%

Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 49	11–15–57	11– 4–94	A & P	75	3.45		
	10–10–57	9– 3–44	W. E. Osborn Co.	24	3.60	.15	4.2%
	11– 1–57	9–13–18	Spiegel Bros.	100	3.60	.15	4.2%
	9–11–57	8–30– 2	Star Markets	75	3.60	.15	4.2%
Product: Choice Heavy Syrup Royal Anne Cherries 24/303							
CX 39	7–14–58	6–23–018	Star Markets	50	6.55	.15	2.3%
	9– 4–58	8–20–085	A & P	25	6.40		

APPENDICES K, L, M, N, AND O

TRADE AREA: NEW YORK CITY–NEW JERSEY

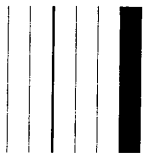
CX No.	Date	Inv. No.	Buyer	No. of Cases	Price	Diff.	% of Discr.
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 41	9–18–57	8–22–32	A & P, Paterson, N.J.	50	4.90		
	9–23–57	8–14– 7	Walkay Grocery Co., Jersey City	25	5.20	.30	5.8%
	9–11–57	8–26–43	Middendorf & Rohrs, NYC	100	5.20*	.30	5.8%
*Respondent argues that *these* peaches came under RX 14 d–e; but if so, only *some;* and if so, to no other Middendorf transaction; only 2½ choice peach.							
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8							
CX 41	9–18–57	8–22–32	A & P, Paterson, N.J.	100	4.40		
	9–23–57	8–14– 7	Walkay Grocery Co., Jersey City	50	4.70	.30	6.4%
	9–11–57	8–26–43	Middendorf & Rohrs, NYC	150	4.70	.30	6.4%
	8–27–57	8– 5–60	Grand Union Co., E. Paterson, N.J.	150	4.70	.30	6.4%
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 41	9–18–57	8–22–32	A & P, Paterson, N.J.	50	3.40		
	9–23–57	8–14– 7	Walkay Grocery Co., Jersey City	75	3.60	.20	5.6%
	9–11–57	8–26–43	Middendorf & Rohrs, NYC	100	3.60	.20	5.6%
	8–27–57	8– 5–60	Grand Union Co., E. Paterson, N.J.	800	3.60	.20	5.6%
Product: Standard Light Syrup Halves Unpeeled Apricots 24/2½							
CX 41	8–22–32	9–18–57	A & P, Paterson, N.J.	75	5.10		
	8–23– 8	9–10–57	Packard Bamberger Co., Hackensack, N.J.	15	5.30	.20	3.8%
Product: Standard Light Syrup Halves Y.C. Peaches 24/2½							
CX 41	9–18–57	8–22–32	A & P, Paterson, N.J.	75	4.70		
	10–12–57	9–26–70	Packard Bamberger, Hackensack, N.J.	20	4.95	.25	5.1%
	8–27–57	8– 5–60	Grand Union Co., E. Paterson, N.J.	100	4.95	.25	5.1%
Product: Standard Light Syrup Sliced Y.C. Peaches 24/2½							
CX 41	9–18–57	8–22–32	A & P, Paterson, N.J.	125	4.70		
	10–12–57	9–26–70	Packard Bamberger, Hackensack, N.J.	30	5.05	.35	6.9%

Product: Corina Fancy Tomato Paste 96/6								
CX 41	4–22–57	4–3855	A & P, Hawthorne, N.J.	75	5.90	.35	5.6%	
	4–22–57	5–4051	Middlesex Foods, New Brunswick, N.J.	100	6.25			
Product: Choice Heavy Syrup Bartlett Pears 24/2½								
CX 42	2–19–57	2–946	Regent Canfood, Kearney, N.J.	50	6.80			
	3– 4–57	3–1669	Regent Canfood, Kearney, N.J.	50	6.80	.20	2.9%	
	3– 8–57	3–1878	Wakefern Foods Corp., Cranford, N.J.	1000	7.00	.20	2.9%	
	3–11–57	3–1874	Wakefern Foods, Cranford	1000	7.00	.20	2.9%	
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/303								
CX 42	2–14–57	2–856	Regent Canfood Co., Kearney, N.J.	225	3.45	.15	4.2%	
	2–19–57	3–349	Grand Union Co., E. Paterson, N.J.	150	3.60			
Product: Choice Heavy Syrup Halves Unpeeled Apricots 48/8								
CX 42	2–19–57	2–946	Regent Canfood, Co., Kearney, N.J.	40	4.60			
	2–19–57	3–349	Grand Union Co., E. Paterson, N.J.	100	4.80	.20	4.2%	
	2–26–57	3–1122	Grand Union Co., E. Paterson	70	4.80	.20	4.2%	
Product; Standard Light Syrup Halves Y.C. Peaches 24/2½								
CX 42	2–26–57	3–1527	Regent Canfood Co., Kearney	150	4.95			
	2–19–57	3–349	Grand Union Co., E. Paterson	100	5.15	.20	3.9%	
	2–26–57	3–1122	Grand Union Co., E. Paterson	125	5.15	.20	3.9%	
Product: Choice Heavy Syrup Halves Unpeeled Apricots 48/8								
CX 42	4–12–57	4–4046	Regent Canfood Co., Kearney	40	4.60			
	4–18–57	4–4151	Grand Union Co., E. Paterson	130	4.80	.20	4.2%	
	4–24–57	5–4426	Grand Union Co., E. Paterson	100	4.80	.20	4.2%	

APPENDICES K, L, M, N, AND O—CONTINUED

TRADE AREA: NEW YORK CITY–NEW JERSEY—Continued

CX No.	Date	Inv. No.	Buyer	No. of Cases	Price	Diff.	% of Discr.
Product: Standard Light Syrup Halves Y.C. Peaches 24/2½							
CX 42	4–24–57	5–4422	Regent Canfood Co., Kearney	50	4.95		
	4–18–57	4–4151	Grand Union Co., E. Paterson	175	5.15	.20	3.9%
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8							
CX 42	5–29–57	5–21–46	Regent Canfood Co., Kearney	80	4.70		
	6–17–57	5–14–54	Grand Union Co., E. Paterson	120	4.90	.20	4.1%
Product: Standard Light Syrup Sliced Y.C. Peaches 24/2½							
CX 42	6–28–57	6–25–58	Regent Canfood, Kearney	350	4.80		
	6–17–57	5–14–54	Grand Union Co., E. Paterson	250	5.25	.45	8.6%
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 43	10–10–57	9–20–54	American Stores, Newark	125	3.40		
	9–23–57	8–14–7	Walkay Grocery, Jersey City	75	3.60	.20	5.6%
	11–21–57	10–30–6	Walkay Grocery, Jersey City	75	3.60	.20	5.6%
	9–11–57	8–26–43	Middendorf & Rohrs, NYC	100	3.60	.20	5.6%
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8							
CX 43	10–10–57	9–20–54	American Stores, Newark	125	4.40		
	9–23–57	8–14–7	Walkay Grocery, Jersey City	50	4.70	.30	6.4%
	11–21–57	10–30–6	Walkay Grocery, Jersey City	50	4.70	.30	6.4%
	9–11–57	8–26–43	Middendorf & Rohrs, NYC	150	4.70	.30	6.4%
	10–30–57	10–10–25	Grand Union Co., Rutherford, N.J.	15	4.70	.30	6.4%



Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 43	11–13–57	11–8–52	American Stores, Kearney	200	3.45		
	11–21–57	10–30–6	Walkay Grocery, Jersey City	75	3.60	.15	4.2%
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8							
CX 43	11–13–57	11–8–52	American Stores, Kearney	200	4.50		
	11–21–57	10–30–6	Walkay Grocery, Jersey City	50	4.70	.20	4.3%
	10–30–57	10–10–25	Grand Union, E. Paterson	15	4.70	.20	4.3%
RX 12(d)	11–22–57	11–11–53	Grand Union, E. Paterson	50	4.70	.20	4.3%
Product: Choice Heavy Syrup Halves Unpeeled Apricots 48/8							
CX 43	9–9–57	[See RX12 (a)]					
		8–22–39	American Stores, Newark	125	4.50		
	8–27–57	8–5–60	Grand Union, E. Paterson	75	4.60	.10	2.2%
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8							
RX 12(d)	10–10–57	9–20–54	American Stores, Newark	125	4.40		
	10–31–57	10–10–24	Grand Union, E. Paterson	15	4.70	.30	6.5%

APPENDICES P, Q, AND R

TRADE AREA: DENVER–PUEBLO

CX No.	Date	Inv. No.	Buyer	No. of Cases	Price	Diff.	% of Discr.
Product: Standard Light Syrup Pears 24/2½							
CX 44	2–15–57	2–779	Regent Canfood Co., Denver	145	6.10		
	2–11–57	2–193	Associated Grocers, Denver	300	6.50*	.40	6.2%
	2–11–57	2–194	Associated Grocers, Denver	200	6.50*	.40	6.2%
	3–27–57	4–2699	Associated Grocers, Denver	150	6.50*	.40	6.2%
	3–27–57	4–2788	Associated Grocers, Pueblo	140	6.50*	.40	6.2%
*Argument regarding count and recount allowance to Associated Grocers; [see Transcript 884–891;] Only on 1450 of total 2240 cases in brackets on RX 2(a); Consequently, at least to almost 50% of these pears, the 6.2% price discrimination applied.							
Product: Standard Light Syrup Halves Unpeeled Apricots 24/2½							
CX 44	3–19–57	3–2474	Regent Canfood, Denver	30	5.30		
	2–11–57	2–193	Associated Grocers, Denver	200	5.70*	.40	7.0%
	3–27–57	4–2699	Associated Grocers, Denver	150	5.70*	.40	7.0%
*Argument regarding count and recount allowance, see RX 2(a) and argument Tr. 890, and under pears above; However, RX 2(a) shows:							
	10–17–57	10–3–60	Regent Canfood	55	5.10		
	12– 9–57	11–25–7	Associated Grocers	20	5.45	.35 or 6.4% on	
Respondents own tabulation; note "List Price" column on RX 2(a)							
Product: Standard Light Syrup Sliced Y.C. Peaches 24/2½							
CX 44	3–19–57	3–2474	Regent Canfood, Denver	110	4.90		
	3–11–57	3–162	H. A. Marr, Denver	321	5.05	.15	3.0%
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 44	3–19–57	3–2474	Regent Canfood, Denver	105	5.20		
	3–11–57	3–162	H. A. Marr, Denver	80	5.45	.25	4.6%
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/2½							
CX 44	3–19–57	2–2474	Regent Canfood, Denver	150	5.30		
	3–11–57	3–162	H. A. Marr, Denver	120	5.55	.25	4.5%
Product: Choice Heavy Syrup Halves Unpeeled Apricots 24/303							
CX 44	3–19–57	3–2474	Regent Canfood, Denver	80	3.50		
	3–21–57	4–2882	H. A. Marr, Denver	40	3.60	.10	2.8%

Product: Choice Heavy Syrup Fruit Cocktail 24/303*								
CX 44	9–27–57	4–4–45	Regent Canfood, Denver	185	3.85			
	10–4–57	10–86–53	Associated Grocers, Pueblo	40	4.00	.15	3.8%	
	10–4–57	10–8654	Associated Grocers, Avondale	10	4.00	.15	3.8%	
	10–4–57	10–8655	Associated Grocers, Pueblo	35	4.00	.15	3.8%	
	10–4–57	10–8656	Associated Grocers, Pueblo	10	4.00	.15	3.8%	
	10–4–57	10–8657	Associated Grocers, Pueblo	35	4.00	.15	3.8%	
	10–4–57	10–8658	Associated Grocers, Pueblo	100	4.00	.15	3.8%	
	10–4–57	10–8659	Associated Grocers, Pueblo	20	4.00	.15	3.8%	
	10–4–57	10–8660	Associated Grocers, Pueblo	15	4.00	.15	3.8%	
	10–4–57	10–8661	Associated Grocers, Pueblo	25	4.00	.15	3.8%	
*see also RX 2(d)								
Product: Choice Heavy Syrup Fruit Cocktail 24/2½*								
CX 44	9–27–57	9–4–45	Regent Canfood, Denver	90	6.00			
	10–4–57	10–8653	Associated Grocers, Pueblo	15	6.20	.20	3.2%	
	10–4–57	10–8654	Associated Grocers, Avondale	5	6.20	.20	3.2%	
	10–4–57	10–8655	Associated Grocers, Pueblo	20	6.20	.20	3.2%	
	10–4–57	10–8656	Associated Grocers, Pueblo	15	6.20	.20	3.2%	
	10–4–57	10–8657	Associated Grocers, Pueblo	15	6.20	.20	3.2%	
	10–4–57	10–8658	Associated Grocers, Pueblo	50	6.20	.20	3.2%	
	10–4–57	10–8659	Associated Grocers, Pueblo	10	6.20	.20	3.2%	
	10–4–57	10–8660	Associated Grocers, Pueblo	10	6.20	.20	3.2%	
	10–4–57	10–8661	Associated Grocers, Pueblo	15	6.20	.20	3.2%	

*see also RX 2(e)

OPINION OF THE COMMISSION

JULY 28, 1966

This matter is before the Commission upon the respondent's appeal from the hearing examiner's initial decision on remand, filed April 15, 1965. The hearing examiner, considering the whole record, including the transactions referred to by the court and the new evidence on remand, found and concluded that respondent had violated Sections 2(a) and 2(d) of the amended Clayton Act, as charged in the complaint. His decision contains an order to cease and desist the practices so found to be unlawful.

The Commission previously, on May 10, 1962, entered an order to cease and desist in this matter (*Tri-Valley Packing Association,* 60 F.T.C. 1134), which order was appealed to the United States Court of Appeals for the Ninth Circuit. That court reversed the Commission's order and remanded the cause for further proceedings in accordance with its opinion. *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d 694 (9th Cir. 1964).[1] The court directed further findings or consideration on three points: (1) Whether or not a causal link existed between the seller's prices and the impact on customer competition, or, more specifically, whether the goods were generally available in the so-called "California Street" market so that in turn a determination can be made on whether the injury was due to the price discrimination rather than the failure of the disfavored purchasers to take advantage of the oportunity to buy (*id.* at 703, 704); (2) the threshold issue of whether the prices allegedly met were competitive prices within the contemplation of the Section 2(b) proviso (*id.* at 706), and (3) the question of the existence of evidence or the sufficiency of such evidence as may exist in the record to support the Section 2(d), Clayton Act charge (*id.* at 710).

STATEMENT AS TO THE FACTS

A recapitulation of the facts previously found by the Commission and concurred in by the court will help establish the framework within which the questions on remand are to be considered. Tri-Valley is a cooperative corporation located in San Francisco, California. It is engaged in the business of selling and distributing canned fruits and vegetables, all of which it processes and

[1] The court set aside the Commission's findings and conclusions on the Section 2(d) charge and it set aside the order of the Commission on both the Section 2(a) and Section (2)(d) charges. (*Id.* at 710.)

cans at its plants in California. It sells and distributes these products under the private labels or brands of its purchasers and also under its own brands or labels. In the course of this business products of like grade and quality are sold to a large number of customers located throughout the United States for use, consumption or resale. For the fiscal year ending January 31, 1959, its sales amounted to $22, 329, 877.

Respondent includes among its customers wholesalers, retailers, chain stores and cooperative associations. Certain of these customers, including some twelve to fifteen retail grocery chains, maintain buying agencies in San Francisco. In the course and conduct of its business Tri-Valley has sold its products to these customers at lower prices than it has sold products of like grade and quality to customers who did not maintain their own buying agencies in San Francisco. The difference in prices charged customers between those who maintained buying agencies and those who did not ranged from 5 cents to 50 cents or from 2 percent to 10 percent per case.

The record contains a large number of instances of price discriminations by Tri-Valley in favor of certain large chain stores and against wholesalers and retailers in the sale of canned fruits and vegetables of like grade and quality. Among the examples of price discrimination between direct buying purchasers previously listed by the Commission is the following:

> In March 1957, respondent sold products designated as Choice Heavy Syrup Sliced Y.C. Peaches to Safeway Stores in Denver, Colorado, at $5.30 per case, and to H. A. Marr in Denver, Colorado, at $5.55 per case. (60 F.T.C. 1180.)

The court considered this example in detail and it agreed that the Commission's finding of price discrimination was supported by the evidence. The court stated that the unchallenged evidence showed that Tri-Valley sold peaches of like grade and quality to Safeway at $5.30 per case and to Marr at $5.55 per case, a price differential of 4.5 percent. Further, the court concluded that, in this example, the evidence was adequate to support the Commission's finding of competition in retail sales between Safeway and Marr. (*Id.* at 701.)

The Commission additionally found the existence of competition in the sale of respondent's food and grocery products between the favored chain stores and "independent retailers who were selling private label canned goods which they had purchased from nonfavored wholesalers." (60 F.T.C. 1180.) The court con-

curred. It held the record evidence is sufficient to support the Commission finding that Foodland, Preisser, Piggly Wiggly No. 10 and Ce Buzz (retailers in the Denver area who purchased canned goods from wholesaler H. A. Marr) were all in actual competition with Safeway in the Denver area in 1957, in the resale of private label canned goods of the kind which each obtained that year from Tri-Valley. The court also held that while the evidence concerning actual direct and indirect competition between purchasers may be insufficient as to some of the other purchasers and areas "for most purchasers and areas [it is] sufficient to support the Commission findings." (329 F. 2d at 702.)

The price discriminations shown in the record are substantial. There was testimony that those engaged in the resale of such products operate on a very narrow margin—so narrow that it is essential to take advantage of two percent discounts for cash. These discriminations in price, on the other hand, range from 2 percent to 10 percent. In view of the highly competitive nature of the business, price disparities of this kind could well endanger the ability of the merchants paying the higher price to compete with the favored chain retailers. (329 F. 2d at 703.)

In the course of its business, Tri-Valley also granted certain allowances to Central Grocers, Inc. of Boston, Massachusetts and to Fred Meyer, Inc. of Portland, Oregon. Each of these allowances was granted pursuant to a specially tailored or negotiated arrangement, and no arrangement on proportionally equal terms was offered or made available to other purchasers of Tri-Valley products serving, at least in part, the same areas served by Central Grocers and Meyer. (329 F. 2d at 697.) Further details on the facts as to such allowances are stated hereafter in this opinion in connection with the discussion of the 2(d) Clayton Act charge.

Availability of the Lower Prices—First Issue on Remand

On the appeal before the Ninth Circuit Court of Appeals, respondent argued that the evidence affirmatively shows that the nonfavored buyers could have availed themselves of the lower prices for which Tri-Valley and its competitors sold these goods in San Francisco. The court, in its opinion, stated that if the lower price would have been available to the nonfavored buyer in the same market where the favored buyer made his purchase, the probability of competitive injury due to the fact that the nonfa-

vored buyer paid more for the product is not the result of the price discrimination, but of the nonfavored buyer's failure to take advantage of the opportunity, equally available to him, of buying at the same low prices.

Respondent's main position seems to be, as it was before the court, that there is no obstacle which prevented the nonfavored purchasers from buying Tri-Valley products in the so-called "California Street" market in San Francisco. This position, plainly, is based on respondent's assertion that there is a California Street market and a California Street price. The examiner, however, found that there is no California Street market price. He also found, on the evidence, including that adduced on remand, that the lower prices granted by respondent to the favored chains were not made available to the unfavored purchasers.

The record does not support respondent's argument about a California Street market. The main source of information on this claimed market and its prices is the indefinite and inconclusive testimony of respondent's assistant sales manager, Russell Snyder, which the hearing examiner apparently gave little weight. Pertinent excerpts follow:

[*Prior to Remand*]

By Mr. Snyder:

Q. And as a general statement; isn't it true that the "market price applicable to California Street" is lower than "the market price of the rest of the general market?"

A. I don't think we should use "California Street," that is too much of a colloquialism.

HEARING EXAMINER BUTTLE: Yes. What is it? Do you know what it means?

THE WITNESS: Yes, I know exactly what it means. It means these buyers out here for A & P and the rest of the chain stores, that is considered California Street. That is where most of our merchandise is sold in this business.

(Tr. 944.)

* * * * * * *

A. The prices are as low or lower as a general statement.

Whether we are bringing in this market again, that is a matter of interpretation, but the prices as a general statement are no higher on California Street than they are anywhere else.

By Mr. Snyder:

Q. As a matter of fact, they are generally lower; aren't they, Mr. Snyder?

A. Very often.

(Tr. 945.)

[*After the Remand*]

HEARING EXAMINER BUTTLE: But your testimony is in certain instances, if they were on California Street, they would get better prices; that's so, isn't it?

THE WITNESS: Yes. In certain instances, but, on the other hand, Your Honor, I may say in certain instances they may get lower prices if they weren't on California Street.

(Tr. 1353.)

* * * * * * *

HEARING EXAMINER BUTTLE: Well, how would I know, in looking at these price lists, that if I purchased on California Street I would get a better price than if I purchased elsewhere, if there was any knowledge in the industry of this fact? How would I ascertain it from the data which I would receive as a broker? * * *

THE WITNESS: Specifically, any prices that were quoted on California Street were to be available to any other customer, and he should know about it through other brokers, through publications, through cannery sales lists, through any number of sources. * * * I am speaking of generally, just of general pricing level of California Street we are talking about.

HEARING EXAMINER BUTTLE: Well, are you telling me that it was nationally known that you could do better on California Street than elsewhere? You are not telling me that, are you?

THE WITNESS: No, sir.

HEARING EXAMINER BUTTLE: It was not nationally known among brokers, I mean?

THE WITNESS: I think anyone could buy.

HEARING EXAMINER BUTTLE: What is that?

THE WITNESS: Your Honor, I think anyone could buy from California, could buy merchandise on the general market levels as cheaply as California Street, anywhere in the country.

(Tr. 1355–56.)

* * * * * * *

HEARING EXAMINER BUTTLE: In other words, you are telling me they could buy from Tri-Valley at the same price they could buy in California Street?

THE WITNESS: I am speaking of it generally, in general, yes. If it was a particular competitive situation we met on California Street, or a particular lot—

HEARING EXAMINER BUTTLE: Well, your testimony is that prices were only better in particular situations. What I am trying to find out from you is, if it isn't a particular situation, how is it all the brokers or purchasers should have common knowledge of it on a nationwide basis?

THE WITNESS: Well, they wouldn't have any particular situations, Your Honor, just general terms.

(Tr. 1357.)

This does not show, nor is there other evidence in this record showing, that the California Street market exists, as respondent

appears to contend, as a kind of commodity exchange and that the price quotations are open and notorious. While the prices, though not identified as California Street prices, assertedly were carried in various trade journals and financial journals, no such publications were offered in evidence. There is no precise information in the record as to the form and manner of such quotations. It appears fairly certain from Mr. Snyder's statements, however, that the listings in the journals did not mention specific transactions; rather, they showed just the "general pricing level of California Street." (Tr. 1356.) It was not explained how this would inform the prospective purchaser that Tri-Valley's goods were available at such prices and, in fact, the listing of the general pricing level would not necessarily mean the respondent was selling at those prices. Neither would this necessarily mean that a particular purchaser could obtain the goods from respondent at such prices.

Whether or not a prospective purchaser could have informed himself as to the "general pricing level" in California, it is clear that the unfavored purchasers had not heard of the so-called California Street prices. For instance, Walter Tewes, former owner of Walkay Grocery Company, testified:

> HEARING EXAMINER BUTTLE: Did you ever make any inquiry to ascertain whether or not prices on California Street were available to you?
>
> THE WITNESS: We never knew anything about it. We never knew about it, never heard about California Street.
>
> HEARING EXAMINER BUTTLE: You never heard about California Street prices at all?
>
> THE WITNESS: Never did, at no time. The first time we ever heard about it is here, at the last hearing.
>
> (Tr. 1118.)

Other witnesses in the trade testified to the same effect.

We conclude, on the basis of this record, that the California Street market is not a regular exchange, and that it apparently is no more than a location for individual buyers—mostly chain stores—who enter into their own private agreements with the various California canners. Further, so far as the favored customers were concerned, it made no difference whether the purchaser was located on the Street or off the Street. If the lower preferential prices were available to the unfavored customers, as asserted, they could only have been available on the basis of possible dealings with the respondent, directly or through a broker, aside from any so-called California Street market transactions.

Respondent stipulates in its brief that it did not "through its price lists, invoices, brokers, or employees, give any information

to these wholesalers [unfavored customers] regarding prices prevailing on 'California Street.' " (Respondent's reply brief, p. 5.) Its claim in effect is that the buyer should keep abreast of the market quotations and seek out the lowest prices.[2] There is no evidence in this record, however, that Tri-Valley would have given to the unfavored buyers the same low prices as those given to the chains had the unfavored buyers requested such prices. In fact, the circumstances generally suggest that such lower prices were not obtainable.

For instance, the record contains special price lists, identified Commission Exhibits 223 and 225, which lists appear to contain prices available only to the chains listed. They are both entitled "Special Price List for Regent and 1st National." Regent is a division of Safeway Stores, Inc.; 1st National is First National Stores, both of which were favored chain customers of the respondent. Respondent's officials claimed that these lists were documents for internal use only and that they were not distributed to customers. Yet, the further testimony is that the favored chains were notified as to the availability of these prices, lower than contemporaneous list prices, and that other customers and brokers were not so notified. The testimony of Mr. Snyder, whatever it may show so far as meeting competition is concerned, seems to clearly foreclose any argument as to availability. He stated in part as to these lists:

> At this time there were certain competitive offerings to these customers, certain offerings at below other list prices by our competitors to these customers, and we had to determine what we would do to meet those competitive offerings, and this is as far as we would go in meeting those competitive offerings to Regent and First National at this time, and we made up these lists so that all those within our sales department and in our billing department would know where we stood in meeting these competitive prices. . . . (Tr. 1502.)

The conclusion is inescapable that these were special prices for the chains mentioned only; they were not prices available generally.

Also, Snyder's testimony otherwise makes plain that the lower prices were tailored to the requirements or demands of the favored chains. Pertinent excerpts follow:

[2] Such a position on "availability" does not accord with the view of that term or concept under Sections 2(d) and 2(e) of the amended Clayton Act. There the term "available" has been interpreted to require some form of notification to the customer. *In the Matter of Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050, 1059 (1957). *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962).

Q. What would you then do, sir, to see to it that the balance of your reservation or a good part thereof was taken?

A. Well, you would know by the shipping instructions that it wasn't moving out in an orderly manner based on past experience in the industry movement. Therefore, you would check with the buyer to find out why.

If you are not in line, he will tell you that you are not in line.

* * * * * * *

Q. And after you brought your information to your superior, what would occur, if anything?

A. He would decide whether he wanted to move the merchandise or whether he wanted to pass the business. If he wanted to move some merchandise, after checking or verifying it for the prices, he would meet or beat those prices.

(Tr. 750–51.)

The low prices so obtained were clearly a result of the buying power of the chain stores, and it would be wholly unrealistic to hold that such prices were available to the smaller purchasers.

Though disfavored customers H. A. Marr Company and Hannaford Bros. Company were represented by a broker, Bushey & Wright, with offices in San Francisco, they did not participate in the lower prices. Respondent quibbles with the significance of this showing, asserting that the evidence fails to establish that Bushey & Wright was the broker on shown purchases or that the concerns made all their purchases through Bushey & Wright. We believe the evidence sufficiently supports the findings that the transactions in question were through Bushey & Wright, especially in the case of H. A. Marr. The witness representing that wholesaler testified that it was "barely possible" some items were purchased through a local broker but that most were purchased through Bushey & Wright. A situation such as this where wholesalers were paying the higher discriminatory prices at the time they were represented by a broker on California Street, who incidentally was not instructed to quote the lower prices, clearly demonstrates that the lower prices were not in fact available to disfavored purchasers.

Moreover, the broad design and purpose of the amended Clayton Act was to protect the small independent against the enormous purchasing power of the large chains. Individual negotiations, like those shown here with the chains, would not be practical for the unfavored group. The smaller independents and many wholesalers are not equipped and they do not have the resources

to bargain on the same footing as the large chains. To construe the Act so as to require bargaining as a basis for price equality would be to deny the protection of the Clayton Act to the small customers.

The hearing examiner correctly concluded that the lower prices quoted by the respondent to certain favored chains were not in fact available to the unfavored customers. Respondent's appeal from this finding, asserting it to be erroneous, is rejected.

Section 2(b) Meeting Competition Defense—The Second Issue

The second issue upon which the court remanded this matter concerns the Section 2(b) defense and the stated "threshold" issue of whether or not Tri-Valley is engaged in meeting competitive prices within the meaning of the Section 2(b) proviso. Stated otherwise, it seems that the question is whether the alleged meeting of the so-called California Street market prices was in fact meeting "an equally low price of a competitor," *i.e.*, a response to individual competitive demand rather than the meeting of prices on a systematic basis not contemplated by the proviso. *Cf. Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401 (1958).

When this matter was first before the Commission, counsel supporting the complaint argued that respondent was meeting a market price—not the lower prices of other sellers in individual competitive situations—and that the meeting of this market price, claimed by counsel supporting the complaint to be unlawful, was not a good faith meeting of competition within the contemplation of the 2(b) proviso. Referring to the *Staley* decision,[3] he specifically argued in this connection that "the Supreme Court stated that good faith is not present where a seller adopts the discriminatory pricing system of a competitor, or where the discriminatory prices are not granted pursuant to an individual competitive situation" (answering brief of counsel supporting complaint, page 19).

The Commission neither accepted nor rejected this argument but instead dismissed the defense on an entirely different ground. It held in effect that regardless of whether respondent had reduced its prices pursuant to, or to meet, a pricing system, it knew or should have known that its competitors' prices were discriminatory and, consequently, was precluded from claiming that it

[3] *Federal Trade Commission* v. *A. E. Staley, Mfg., Co.*, 324 U.S. 746 (1949).

was meeting such prices in good faith unless it could establish that it had reason to believe that these prices were cost justified or otherwise excused under Section 2(a).

On respondent's appeal from the Commission's decision counsel for the Commission repeated the argument originally made by counsel supporting the complaint that a discriminatory price "is within the proviso of Section 2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system such as that represented by the California Street market."

The court has instructed us to consider the arguments made by counsel and to determine whether respondent has established that it was meeting the lower prices of other canners in individual competitive situations or whether it was selling pursuant to a pricing system. The court has specifically inquired, in this connection, whether "the competition which Tri-Valley faced in the California Street market is the kind of competition contemplated by the 'meeting of competition' defense of section 2(b)."

We wish to point out first of all that we do not agree with that part of counsel's argument that respondent's meeting competition defense should be rejected because its lower discriminatory prices were made pursuant to a pricing system or because they were made to meet a pricing system employed by competitors selling on California Street. While the record shows that respondent consistently discriminated in favor of chain store buyers, the record does not support a finding that either respondent or its competitors were selling pursuant to a pricing system. Certainly it does not show that they were selling pursuant to a system of the type condemned in *Staley, Corn Products,*[4] or any of the other cases cited by Commission counsel. *Cf. Standard Oil Co.* v. *Federal Trade Commission,* 233 F. 2d 649, 653 (1956). Moreover, aside from the question of whether respondent was meeting unlawful prices or had reason to believe that it was doing so, we believe that respondent could as a matter of law reduce its prices in individual transactions to meet lower prices of its competitors on California Street even if the latter were using a formal pricing system. *Federal Trade Commission* v. *National Lead Company,* 352 U.S. 419 (1957).

By holding that respondent's price discriminations were not made pursuant to or to meet a pricing system, we do not mean to suggest that respondent has shown that it reduced prices in re-

[4] *Corn Products Refining Co.*, 324 U.S. 726 (1949).

sponse to "individual competitive demand." In its first opinion the Commission accepted respondent's assertions that its price discriminations were made only in response to the prices of its competitors and rejected the 2(b) defense on respondent's failure to prove that in the circumstances shown to exist it had reason to believe that such prices were lawful.[5] The court has stated, however, that it would be unnecessary to reach the latter issue "If . . . Tri-Valley was not engaged . . . in meeting 'an equally low price of a competitor' within the meaning of the proviso to Section 2(b)." It is therefore incumbent upon us to resolve the "threshold question" of whether the proof offered by respondent in support of its 2(b) defense meets the basic requirement of *Staley, supra,* that as to the various discriminations found to be in violation of 2(a) respondent, as a reasonable and prudent person, had reason to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

In the first initial decision in this matter the hearing examiner in ruling on the 2(b) defense found on the basis of evidence adduced by respondent that respondent was meeting a market price.[6] He held however that there was an "absence of evidence sufficiently establishing that the discriminatory prices were to meet individual competitive situations." Subsequent to the remand the same hearing examiner has again held that respondent's proof was not adequate to show that its price reductions were made defensively to meet the prices of competing sellers in specific transactions.

We agree with this conclusion of the hearing examiner. Section 2(b) imposes upon respondent the burden of establishing that it

[5] Since the situation existing in California Street, *as described by respondent,* was on one which the Robinson-Patman Act was certainly intended to prevent, *i.e.,* a "market" wherein large buyers consistently received preferential treatment over their smaller competitors, the Commission held in effect that respondent, being aware of that situation, could not be deemed to have acted in good faith even though its discriminations in favor of the large buyers may have been made in individual transactions. It was the Commission's position that since the "lower price which lawfully may be met by a seller must be a lawful price," *Standard Oil Co.* v. *Federal Trade Commission,* 340 U.S. 231, 249, a seller cannot be said to be acting in good faith if he meets a price which he knows or has reason to believe is unlawful. See *Att'y Gen. Nat'l Comm. Antitrust Rep.,* 181–185 (1955).

[6] Testimony adduced by respondent after remand in support of its argument that California Street prices were universally available, *i.e.,* that anyone "could buy merchandise on the general market levels as cheaply as California Street, anywhere in the country," tends to distort the "California Street" market concept originally presented by respondent in support of its argument that it was required to sell at lower prices to meet the price level in the California Street market. In view of this testimony and respondent's failure to present evidence as to the prices charged by its "California Street" competitors, even though respondent asserted that these prices were carried in various publications, the hearing examiner quite understandably did not find in his second initial decision that respondent was meeting a market price.

was in fact acting defensively in response to lower prices of a competitor. As we stated in *Continental Baking*,[7] a seller must show that it was responding fairly to what it reasonably believed was a situation of competitive necessity. Respondent has failed completely to make this showing. Aside from the self-serving statements that it was a price follower and not a price leader there is nothing in the record to show that respondent's lower discriminatory prices were made in self defense in response to competitors' prices or offers. Insofar as we can determine from this record, respondent may have been primarily responsible for the low "California Street" prices.

General testimony to the effect that price discriminations were made to "meet competition," without documentation or specific evidence, is never sufficient to support a finding that a lower price was "made in good faith to meet an equally low price of a competitor." If it were, any seller who may be discriminating in price in favor of large buyers, including those who were not meeting competitors' prices, could successfully defend against a 2(a) charge simply by claiming that competition forced them to discriminate. In rejecting a 2(b) defense based upon such evidence the Circuit Court made the following statements in *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. 2d 212 (1944), *aff'd*, 324 U.S. 726:

> There was no testimony as to specific instances or facts but merely a conclusion upon the part of the witnesses that the *prima facie* case of discrimination was justified by competition. This, it seems to us, is not the sort of testimony sufficient to sustain a finding of exemption provided by Congress for meeting competition or to justify a finding that the *prima facie* case of discrimination as to booking practices has been rebutted. Indeed, if competitors' prices were arrived at in the same manner, to approve the defense, we would be driven to the inconsistent position of approving one evil practice because it was indulged in in order to meet a similar evil practice.

Having engaged in a practice which "may injure, destroy, or prevent competition," a seller may bring itself within the protection of the 2(b) proviso only by showing that as to each discrimination it used reasonable diligence in verifying the existence of a lower price of a competitor and that the discrimination was made in good faith for the purpose of meeting such lower price.

In summary therefore we find in response to the court's inquiry that the evidence does not support the conclusion that respondent was selling pursuant to or to meet a pricing system. We also find

[7] *In the Matter of Continental Baking Company*, Docket No. 7630 (1963) [63 F.T.C. 2071].

that respondent has failed to show that its lower prices were made to meet equally low prices of competitors within the meaning of the proviso to Section 2(b).

Evidence on the Section 2(d) Charge—The Third Issue

This matter was remanded on the Section 2(d), Clayton Act charge to afford the Commission the opportunity of calling attention to evidence presently in the record, or of producing evidence, to "overcome the present seeming, or actual, lack of factual support" for such allegation. (329 F. 2d at 710.) The evidence on the Section 2(d) allegation concerns the granting of allowances to Central Grocers, Inc. of Boston, Massachusetts, and Fred Meyer, Inc., Portland, Oregon.

In 1957 and 1958 Tri-Valley had an arrangement with Central Grocers, a "quasi-cooperative" owned by about 100 retailers in the area, the substance of which was that Tri-Valley would pay Central Grocers 10 cents per case or $150 for the first 1500 cases of private label products purchased by it from Tri-Valley and an additional 10 cents per case for each case purchased thereafter during the year. Such payments were made in consideration of supplying Central Grocers' private label canned fruits and other products and in "return for that business and to move that volume of merchandise," although, ostensibly, the payment was for an advertising mat in a buying or ordering guide, which Central Grocers distributed to its retail stores once a month, featuring its products. Tri-Valley did not offer or make available these arrangements upon proportionally equal terms to its other customers in the Boston area.

Among the respondent's customers in the Boston area were Central Grocers, a wholesaler and favored account, and Standard Grocery, a competing wholesaler. As the court noted, there was functional competition between them but the court's attention had not been called to any evidence indicating that during approximately the same period of time Tri-Valley sold canned goods to both. In respect to this, the examiner, in the initial decision, refers Respondent's Exhibit 9–D, which contains evidence of purchases in March and April of 1957 by Central Grocers. Commission Exhibit 45 shows a sale to Standard Grocery in April 1957.

The record on remand further shows that Tri-Valley was selling in the Boston area to three or more competing wholesalers, including Central Grocers, Inc., and Standard Grocery Company in

Boston, Massachusetts, and Food Centre Wholesale Grocers, Charlestown, Massachusetts. The latter distributed a catalog similar to that distributed by Central Grocers. It is clear that each of these wholesalers resells to retailers operating within the same general geographical area. The record establishes that in the time period in which Central Grocers received the advertising allowances each of the three-mentioned wholesalers were purchasing products from Tri-Valley. Although selling its products to various competing wholesalers in the area in 1957 and 1958, respondent granted the above-described advertising allowance solely to the Central Grocers and did not offer or in any way make available to the competing wholesalers such an allowance. These facts are not in dispute.

Respondent contends, however, that there is no showing that the products involved were of like grade and quality, relying on *Atalanta Trading Corporation* v. *Federal Trade Commission,* 258 F. 2d 365 (2d Cir. 1958). We disagree with the contention. The decision in *Atalanta* stressed the finding adopted by the Commission that the allowances were geared to specific products and the fact that the record failed to show anything to the contrary. (*Id.* at 370.) The cases are clearly distinguishable because here there is no question whatsoever that the allowance was given generally on all private label products purchased from Tri-Valley.[8] Thus, having given the allowance to promote a general line, respondent was obligated to make it proportionally available to competing purchasers buying any item in that line. Tri-Valley completely disregarded the requirements of subsection 2(d) of the amended Clayton Act. We believe a clear-cut violation of the subsection is shown in the Boston area.

In the Portland area in 1957, Fred Meyer, Inc., a chain retail organization operating twelve stores in that market, instituted a "coupon book" program. These books were pocket-sized pamphlets containing detachable coupons illustrating various products offered by Meyer to the purchasing public. Tri-Valley contracted with Meyer to participate in this coupon book program and agreed to pay $350 as and for the cost of the printing of the cou-

[8] Q. Now, Mr. Snyder, was that sum of $150 given in connection with any particular product? ***
A. Yes, these are products of Tri-Valley bought by Central Grocers under their labels.
Q. That is, all products purchased from Tri-Valley?
A. Yes. Not the total cases, but it would allow, apply indiscriminately to the product.
(Tr. 920-21.)

This was also stipulated by counsel.
(Tr. 1431.)

pons and to redeem each coupon at the rate of $0.248. Fred Meyer, in return, offered to sell three cans of its private label peaches (the product in the coupon offer) for the price of two. Tri-Valley complied with the terms of the contract and in 1957 redeemed 20,750 coupons turned in by Meyer. (329 F. 2d at 707.)

The court found that there was only one other competitor of Fred Meyer, Inc., namely, Hudson House, Inc., principally a wholesaler supplying 286 retail stores, of which 97 were in the Portland area. Hudson House also owns several Piggly Wiggly retail stores in Portland.[9] The court concluded that Hudson was not entitled to proportionalized treatment under Section 2(d) because as a wholesaler it was not on the same functional level as Fred Meyer, and, further, because it was not shown that the independent retailers served by Hudson House were indirect customers of Tri-Valley. The record on remand discloses that in addition to Hudson House, Safeway Stores of Portland, Oregon, was a customer of Tri-Valley, competing with Fred Meyer, Inc., in the retail distribution of respondent's canned peaches, the product involved in the 1957 coupon book program. The allowance was not made available to Safeway on proportionally equal terms.

There were other direct customers of Tri-Valley purchasing products of like grade and quality at or about the same time such products were purchased by the favored customers receiving the special advertising or promotional allowances. The court, however, as to the Boston area, ruled that such other customers, who in that instance were retailers, were not entitled to treatment comparable to that accorded Central Grocers, because they were not in functional competition with the wholesaler. (329 F. 2d at 709.) In regard to the Portland area, as noted above, the court similarly held that Hudson House, which is principally a wholesaler, was not in functional competition with Fred Meyer, the favored retailer. (329 F. 2d at 709-710.)

Scope of Order

The court ruled that if the Boston area allowance received by Central Grocers and not made available to Standard Grocery is shown to be the only Section 2(d) violation, that flagrant or extensive violations would not be disclosed and, accordingly, the cease and desist order should be of limited scope. The court cited *Swanee Paper Corp.* v. *Federal Trade Commission,* 291 F. 2d 833,

[9] The court stated that each of these is apparently a separate corporate entity. (Footnote 22, p. 710.)

838 (2d Cir. 1961).[10] Other violations have been shown, *i.e.*, a discrimination between Central Grocery and Food Centre Wholesale Grocers in the Boston area and between Fred Meyer, Inc., and Safeway in the Portland area. Moreover, the showing is that these allowances were given pursuant to specially tailored and individually negotiated arrangements without any attempt to make them available on proportionally equal terms or any terms to competing customers. Nevertheless, the court's decision on substantially the same facts, which we must follow, emphasizes the need for limiting the order. This we will accomplish by defining the prohibited conduct in the Section 2(d) provision in the order in terms of promotional allowances made "pursuant to a specially tailored or negotiated arrangement," which was the precise practice respondent engaged in in violation of that subsection.

Respondent, in its appeal brief, takes broad issue with the initial decision, contending in effect that some of the findings are inconsistent with those previously found by the Commission, including those approved by the court of appeals. In one particular, as we understand the argument, it claims that the Commission found that the injured competition was between persons competing in the resale of private label goods purchased under each purchaser's private label whereas the examiner assertedly found injury broadly in "the sale of respondent's products." We fail to see the distinction, since both decisions deal with goods of like grade and quality. This argument is rejected.

A final point raised by the respondent has to do with Finding No. 8 in the initial decision on remand. There the examiner found that the free goods given to Fred Meyer, Inc., in 1957 in connection with the coupon book program, amounting to a total rebate value of $4,814, was a price differential of 33 1/2 percent and that at the same time Hudson House, Inc., purchased products of like grade and quality for the regular price with no free goods or discount. The assertion is that the examiner erred in finding that respondent discriminated in price against Hudson by reason of the allowance it gave to Meyer in connection with the coupon book program; that such an allowance is only cognizable under Section 2(d) and cannot be made the basis of a price discrimination charge under 2(a). The court in *Fred Meyer, Inc.* v. *Federal Trade Commission,* Trade Reg. Rep. (1966 Trade Cas.) ¶ 71, 721 (9th Cir. 1966) [359 F. 2d 351, 362], in ruling on this identical

[10] But Compare *Vanity Fair Paper Mills* v. *Federal Trade Commission,* 311 F. 2d 480 (2d Cir. 1962).

allowance held that the $4,814 payment (which was the excess over the $350 flat rate per coupon book page paid by respondent) was an amount directly related to, and dependent upon, the amount of goods purchased and resold by Fred Meyer and that it was a price concession cognizable under Section 2(a). Respondent's claim of error in this regard is thus rejected.

Respondent's appeal is denied. The hearing examiner's initial decision, modified for clarification and to conform it to the views herein expressed by the Commission, will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Elman dissented and has filed a dissenting opinion.

DISSENTING OPINION

JULY 28, 1966

BY ELMAN, *Commissioner:*

On December 27, 1960, the Select Committee on Small Business of the House of Representatives submitted a comprehensive report on "Small Business Problems in Food Distribution." H. Rep. No. 2234, 86th Cong., 2d Sess. The report was based on lengthy investigations, hearings, and study conducted by Subcommittee No. 5 in 1959 and 1960. One of the principal subjects of the report was "The effect of a few large chain food retailers in making their purchases of canned fruits and vegetables through West Coast buying offices located on or near California Street, San Francisco, and alleged abuses incident to the so-called California Street buying." (P. 2.) Prior to its public hearings, the Committee had received numerous complaints about the pricing practices of large corporate chain food retailers in buying canned fruits and vegetables in the San Francisco market. These complaints "were subjected to study and investigation by members of the staff of Subcommittee No. 5. Out of the information developed were formal proceedings by the Federal Trade Commission, charging that three medium or small canners or processors of canned fruits and vegetables had discriminated in price in favor of large corporate chain food retailers." (P. 56.) The report referred specifically to the instant proceeding involving Tri-Valley Packing Association, in which the Commission issued its complaint on August 6, 1958. (P. 64.)

Subcommittee No. 5 held public hearings in San Francisco during October and November 1959. Its report reviewed in detail the

testimony and evidence showing the existence of widespread price discriminations resulting from the direct buying practices of the large retail chains in the California Street market. (Pp. 55-77.) The report made "particular reference" to "the price discrimination practice by the Tri-Valley Packing Association, and the testimony presented to Subcommittee No. 5 by representatives of independent food retailers who complained about the effect of these discriminations." (P. 73.) The Committee's findings on the California Street market were summarized in the report as follows:

> In brief, the record shows that representatives of organizations of a few food retailers do the bulk of the buying of canned fruits and vegetables offered for sale in California. Sometimes they are referred to as the "West Coast" buyers of the retail organizations they represent. Frequently they are referred to as "California Street" buyers because they maintain offices on or near California Street, San Francisco. The prominent California Street buyers appeared and testified before Subcommittee No. 5. There were 11 in number * * *.
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> This integration of functions resulting in direct buying through field offices has been extended to include the buying of fresh fruits and vegetables, citrus fruit juices, and a number of other food items.
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> Out of this integration of functions has developed a practice of inducing and knowingly receiving price discriminations and preferred treatment not accorded other food buyers. (P. 9.)

As already indicated, this Commission proceeding against Tri-Valley was initiated in August 1958. On May 10, 1962, the Commission issued a cease and desist order against respondent. On appeal, the Court of Appeals for the Ninth Circuit on March 18, 1964, vacated the order and remanded the case to the Commission for further proceedings. Thus, eight years after the complaint was issued, the case is again before the Commission.

Tri-Valley is a farmer-owned and operated, non-profit, cooperative organization. It is only one of a large number of packers which sell canned fruits and vegetables on the California Street market in San Francisco. In 1957 Tri-Valley, along with other California Street sellers, sold its products to buyers in that market at lower prices than were available to buyers in other markets. As is shown by the record in this case and the report of Subcommittee No. 5, and as is recognized in the majority opinion (pp. 277–282), (1) the California Street market is dominated by a few large retail food chains whose buying power enables them to set the prices in that market, which are generally lower than those prevailing elsewhere and are not available to buyers in other markets, and (2) the general level of California Street market prices

was known to sellers and buyers in that market through price lists, exchange of information among brokers, trade publications, and other means of communication.

Prior to the remand of this case from the Court of Appeals, the basic facts regarding the existence and operation of the California Street market were not in dispute. In their proposed findings of fact submitted to the hearing examiner, complaint counsel and respondent's counsel presented substantially the same factual description of the workings of the market.[1] Their description of the California Street market was accepted by the hearing examiner in his initial decision (Tr. 349–50), and by the Commission in Paragraph (9) of its Findings of Fact. These undisputed facts concerning the California Street market, and how prices in that market are determined, were summarized in the opinion of the Court of Appeals as follows:

> The canners and processors who participate in the California Street market sell most of their products in that market. As of 1957, the prices paid for goods in this market tended to be lower than the prices paid for the same or similar goods by purchasers who were not represented in it.
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> At the beginning of the pack year, the canners and processors who sell on the California Street market determine from their records the amount of goods sold to various buyers in previous years. The sellers then attempt to obtain "reservations" from the buyers for a given amount of merchandise to be delivered during the buying season, preferably in excess of that previously purchased.
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> After the reservations have been entered into, the canners announce their "opening prices." These opening prices are usually announced by the large or important factors in the industry comprised of the three or four nationally-advertised brand packers, or independent packers, of a particular commodity. When these price leaders have named their opening prices, the other canners, after examining their costs, will usually follow and name prices which are substantially similar to those of the leaders.
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> After the opening prices have been announced, they are analyzed by the buyers, *who then set the market price at the level of the lowest prices offered by reliable canners*, and proceed to place their orders. A canner whose prices are in line with the established prices will receive a fair share of shipping instructions. If he does not, or if he received instructions only for limited quantities, the canner checks with the brokers, buyers or with other canners to determine the reason. (329 F. 2d 694, 705, emphasis added.)

At every stage of this extended litigation, respondent's defense to the charge of price discrimination in the California Street market has been predicated on the above facts. Its defense has been simple and forthright: that the prices at which it sold these

[1] Complaint counsel's proposed finding No. 32 (Tr. 153–55); respondent's proposed findings on meeting competition (Tr. 320–25).

goods were the market prices which the large buyers were paying at the time to sellers in the California Street market and which were generally known to sellers and buyers in that market. At every stage, this defense of meeting competition has been contested by complaint counsel and rejected by the hearing examiner and the Commission; but the basic factual premise on which the defense has rested was not disputed, or even put in issue, prior to the remand from the Court of Appeals. Until this second round of litigation, it was accepted by all that the price discriminations challenged in this case were made at prices which "met" California Street market prices, *i.e.*, the prices at which respondent's competitors in that market were selling at the time.

It is elementary that a respondent asserting a 2(b) defense must show that his lower prices were made in response to the exigencies of competition. *Federal Trade Commission* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746, 759–60; *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 249–50; *Continental Baking Co.*, F.T.C. Docket No. 7630, decided December 31, 1963 [63 F.T.C. 2071]. In the present proceeding, it is conceivable that complaint counsel might initially have chosen to oppose respondent's 2(b) defense on the ground that its proof was not sufficiently specific to show that its prices were "meeting" the prices of competing sellers. Complaint counsel might have taken the position that respondent had to present specific documentation showing, as to each sale it made, that other sellers in the market were contemporaneously making sales at the same prices. Had complaint counsel raised such an objection, a clear issue would have arisen as to whether it was enough for respondent to show generally that it was "meeting" the market prices at which its competitors on California Street were selling. But such an objection was not interposed by complaint counsel for the simple and obvious reason that it would have been completely inconsistent with the legal theory on which, prior to the remand, he was opposing respondent's 2(b) defense.

Far from contending that the evidence was inadequate to show that respondent was "meeting" California Street market prices, complaint counsel affirmatively relied on such evidence to support his legal argument that respondent was not meeting competition "in good faith." In effect, complaint counsel conceded the adequacy of the proof that respondent was meeting California Street market prices. It was complaint counsel's position, consistently maintained throughout the entire proceeding prior to the remand from the Court of Appeals, that respondent's 2(b) defense should

be rejected on the ground that California Street prices were not individual sellers' prices but were general market prices and hence constituted an "unlawful pricing system." For example, in his cross-examination of respondent's sales manager, who testified that respondent's lower prices were made to meet competition and reflected the prevailing California Street market prices, complaint counsel sought to, and did, establish the facts that "in order to sell, you had to be competitive with the market"; that "you were competitive not with a competitor's price but with the market price"; that you were being competitive with the market price at that time"; and that "there is 'one market price' applicable to California Street and another 'market price' applicable to those that purchase through brokers not located in San Francisco." (Tr. 939–943.)

In his initial decision, the hearing examiner rejected the 2(b) defense, not on the ground that respondent failed to present evidence of specific prices of other sellers but rather on the ground that the California Street market prices met by respondent constituted an "illegal pricing system." Agreeing with complaint counsel's arguments of law, the hearing examiner found that "there were two market prices in respondent's business: one price represented by the 'market price' to all large chain buyers having representatives on California Street in San Francisco, and another 'market price' which applied to all other buyers not represented on California Street. * * * These respondent's exhibits show that * * * the favored purchasers were buying at the 'market price' of California Street which was consistently and systematically lower than the list price. * * * Such an inherently illegal system has no relation to meeting an individual competitive situation." (Tr. 349–50.)

As already indicated, the hearing examiner based this conclusion on the undisputed description of the California Street market and its operation, as set forth in the proposed findings of fact submitted both by complaint counsel and counsel for respondent. See footnote 1, *supra*. In his description of the market, which was substantially the same as that of complaint counsel, respondent's counsel also stated: "The situation which is disclosed by respondent's evidence is akin to one that might prevail in a commodity market where the prices are set as a result of the forces generated by the interchange of 'bid' and 'ask' prices originating with a large number of not readily identifiable buyers and sellers." (Tr. 320.)

In arguing before the Commission in support of the hearing ex-

aminer's rejection of the 2(b) defense, complaint counsel laid great emphasis on the facts of record showing the existence of the California Street market and of the lower market price levels available to the large purchasers maintaining buying agencies there.[2] Complaint counsel's legal contention that the California Street prices were market, not individual sellers', prices and constituted a "pricing system" was neither accepted nor rejected by the Commission. The majority opinion was wholly silent on the point. Instead, the Commission—while accepting complaint counsel's description of the facts, as summarized in Paragraph (9) of the Commission's Findings of Fact—rejected the 2(b) defense solely on the legal ground that respondent had failed to show that the lower prices of other sellers which it was meeting in the California Street market were "lawful" prices. The entire discussion of the 2(b) defense in the majority opinion (pp. 6–7) [60 F.T.C. 1134, 1173] consisted of the following paragraph:

> Respondent next contends that the hearing examiner erred in holding that it had failed to justify its discriminatory pricing practices under the "meeting competition" defense contained in the Section 2(b) proviso. In order to establish this defense, respondent has the affirmative duty of proving that it reduced its prices to certain customers in good faith to meet the equally low price of a competitor. The Supreme Court in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951), clearly indicated that the lower price which may be met by a seller under the proviso must be a "lawful" price. Certain it is, therefore, that as part of the good faith requirement of this defense, respondent must at least show the existence of circumstances which would lead a reasonable person to believe that the lower prices it was meeting were lawful prices. This, however, respondent has not done. It has succeeded only in showing that a number of competitors, whose prices it claims to have met, had engaged in pricing practices whereby they had usually sold goods to certain favored customers at a "market price" which respondent admits was set by the buyer. The evidence offered by respondent does not indicate whether these prices could be cost justified or otherwise excused under any of the exceptions to the prohibitions of Section 2(a) or that respondent had reason to believe that they could be justified. We are of the opinion, therefore, that respondent has failed to establish the good faith requirement of the "meeting competition" defense and its argument on this point is rejected.

When the case was appealed to the Court of Appeals for the Ninth Circuit, Commission counsel pressed the argument that the California Street market prices met by respondent were not individual competitors' prices but were part of a "pricing system." Again, Commission counsel—with numerous references to the record—described in detail the California Street operations as constituting a *market* where selling prices reflected market levels

[2] Answering Brief of Counsel Supporting the Complaint, pp. 18–19.

and where large buyers were able to secure goods at prices lower than those offered to customers in other markets.[3] Since this contention of counsel had not been dealt with by Commission, the Court of Appeals held that the case should be remanded "for further proceedings bearing upon * * * the question of whether the competition which Tri-Valley faced in the California Street market is the kind of competition contemplated by the 'meeting of competition' defense of section 2(b)."[4]

Now that the case is back here on remand from the Court of Appeals, the Commission remains adamant in its rejection of respondent's meeting competition defense. However, it expressly rejects the position taken by Commission counsel in the Court of Appeals, namely, that respondent's lower prices were not sheltered by 2(b) because they were made pursuant to a pricing system or because they were made to meet a pricing system employed by competitors selling on California Street. (Opinion, p. 283.)

Instead, the Commission rejects the defense on the ground that "respondent has failed to show that its lower prices were made to meet equally low prices of competitors." (P. 286.) In an extraordinary about-face, the Commission now abandons the view that California Street market prices are not individual seller's prices but general market prices set by the large chain buyers who dominate that market. Instead, the Commission indulges in the conjecture that respondent's prices were not made in response to competitive prices of other sellers in the market, and indeed that respondent itself "may have been primarily responsible for the low 'California Street' prices." (P. 285.) After eight years of litigation, the Commission now tells respondent for the first time that its proof of meeting competition was too general, and that it should have furnished specific documentation in each instance that "it used reasonable diligence in verifying the existence of a lower price of a competitor and that the discrimination was made in good faith for the purpose of meeting such lower price." (P. 285.)

It seems to me that such an objection to the adequacy of respondent's evidence comes rather late and with poor grace. *Cf. Forster Mfg. Co., Inc.* v. *F.T.C.*, Docket No. 7207, 1st Cir., May 24, 1966, 361, F. 2d 340, 343. In essence, the Commission is telling respondent after all these years that there is insufficient proof of the basic factual premise upon which both sides, the hearing ex-

[3] Brief for the Commission, pp. 6–9.
[4] 329 F. 2d at 706.

aminer, the Commission, and the Court of Appeals proceeded in dealing with the legal issues arising out of the 2(b) defense. This case was finally decided by the Commission on that factual basis in 1962, and the remand to the Commission from the Court of Appeals was not for the purpose of re-examining the sufficiency of the proof in that regard. The Court of Appeals remanded the case to the Commission, so far as the 2(b) defense was concerned, for the sole and limited purpose of having it pass on the question—not whether Tri-Valley was meeting competition in the California Street market—but "whether the competition which Tri-Valley faced in the California Street market is the kind of competition contemplated by the 'meeting of competition' defense of section 2(b)" (329 F. 2d at 706). That question the Commission now decides in respondent's favor.

The Commission does not indicate whether the facts of record regarding the California Street market, its existence and operation, and the method by which California Street market prices are set, were always inadequate, or whether they merely became so after the case was remanded by the Court of Appeals. Nor does the Commission tell us whether Paragraph (9) of its 1962 Findings of Fact is being vacated because it is not supported by substantial evidence, or because it does not jibe with the Commission's present theory for rejecting the meeting competition defense. The Commission now rejects the legal argument advanced by Commission counsel in supporting its prior order before the Court of Appeals. But does the Commission also disavow the facts on which that argument was based? Does the Commission take no responsibility at all for the arguments and representations made by its counsel before the Court of Appeals?

Flexibility in the administrative process is desirable and should be encouraged; but an agency is not wholly unrestrained in its conduct of prosecutions for alleged violations of law. The Commission's present disposition of the case does more than make the remand from the Court of Appeals an exercise in futility. By repudiating so late in the litigation the basic factual premise of respondent's defense which the Commission, its counsel and hearing examiner, as well as the Court of Appeals, all accepted prior to the remand; by constantly shifting from one ground to another, abandoning one dubious position as soon as it is challenged only to move to another even more vulnerable, the Commission invites the criticism that it will follow any road leading to the issuance of an order. An order based on findings of violation of law should

rest on more than the kind of quicksand the Commission stands on here. If the basis of its present decision should not be sustained on a further appeal, will the Commission keep on looking for some other basis, not yet advanced by counsel, for rejecting respondent's 2(b) defense? Surely, the basic rules essential to the fair and orderly conduct of litigation are not inapposite to agency adjudication.[5]

In this case, as in *National Dairy Products Corporation,* Docket No. 7018, decided July 28, 1966 [p. 79 herein], the Commission imposes an unrealistic and unreasonable burden on sellers asserting the 2(b) defense. The Commission requires proof by a seller that "it used reasonable diligence in verifying the existence of a lower price of a competitor" (p. 285). As I have stated in my dissenting opinion in *National Dairy* [p. 219 herein]:

> Presumably, a seller could satisfy the Commission that he "used reasonable diligence in verifying the existence of a lower price of a competitor" by showing that he called his competitor to ascertain whether the customer was truthfully quoting the competitor's price offer. This would take care of the seller under 2(b). But where would it leave him under the Sherman Act? Proof that two sellers discussed price and that they quoted the same price to a buyer is enough to send them both to jail for illegal price-fixing. In *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 73-74, the Supreme Court emphasized the duty of reconciling the Robinson-Patman Act "with the broader antitrust policies that have been laid down by Congress." The Court rejected any interpretation of the Act "putting the buyer [or seller] at his peril whenever he engages in price bargaining. Such a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." To require proof of "reasonable diligence in verifying the existence of a lower price of a competitor" is to place sellers in a dilemma where they must run the risk of criminal prosecution under the Sherman Act in order to protect against a charge of violating the Robinson-Patman Act. This is hardly the way to "reconcile" the two Acts.

In dissenting from the Commission's previous decision in this case, I noted that respondent is a relatively small farmers' cooperative selling in a market dominated by big buyers. The Commission's dogged determination to impose a cease-and-desist order on respondent is difficult to understand. As I stated in my original dissent, it is hard to see how an order driving this seller out of the California Street market will serve the objectives which Congress sought to achieve in passing the Robinson-Patman Act.

The divergence between the goals of the Act and its practical

[5] Section 6(a) of the Administrative Procedure Act provides: "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it * * *." *Cf. Deering Milliken, Inc.* v. *Johnston,* 295 F. 2d 856 (4th Cir. 1961).

applications is also illustrated by the Commission's holding that respondent violated Section 2(d). After eight years of litigation and two separate sets of hearings, two isolated instances of non-proportionalized promotional allowances, both involving paltry sums, are all the Commission can scrape together from the voluminous record. It is precious little justification for the broad "Do not violate the statute, or else" injunction which the Commission is issuing here. By imposing an order on Tri-Valley, a pygmy in the canning industry, on the theory that it has hurt Safeway, one of the giants of the food retailing industry, the Commission again turns the Robinson-Patman Act topsy-turvy. The Act was designed to curb abuses of the buying power of the big chains. Too often, however, it has been used to thwart the efforts of small businessmen to meet the competition of their larger and more powerful rivals. This case is another entry in that sad record.[6]

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the initial decision on remand and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having denied the appeal and determined that the initial decision should be modified for clarification and to conform it to the views set forth in its opinion and that as so modified it should be adopted as the decision of the Commission:

It is ordered, That the initial decision on remand be, and it hereby is, modified by striking therefrom the following:

The last two sentences in the first full paragraph on page 225.

The words "if this be a part of a section 2(b) defense", second full paragraph, page 237.

The words "as part of a section 2(b) defense or", in the paragraph beginning with the words "Phrases such as" on page 238.

The first sentence at the top of page 242.

The second paragraph of numbered paragraph 33 on page 246 beginning with the word "Summarized" and the first paragraph, page 247.

[6] *Cf. Central Retailer-Owned Grocers, Inc.*, Docket No. 7121 (May 14, 1962) [60 FTC 1208], *rev'd*, 319 F. 2d 410 (7th Cir. 1963); *Alhambra Motor Parts*, Docket No. 6889 (October 28, 1960) [57 F.T.C. 1007], rev'd, 309 F. 2d 213 (9th Cir. 1962), new order to cease and desist, December 17, 1965 [68 F.T.C. 1039]; Edwards, *The Price Discrimination* Law 150–52, 626 (1959); Note, *Small Business Before the Federal Trade Commission*, 75 Yale L.J. 487 (1966).

The third full paragraph, page 247.

Following the words "Federal Trade Commission" in the first paragraph under "Conclusions" on page 247, the comma and the phrase "is reducible to the following summary of conclusions reached by the court in appraising the evidence and findings of the Commission", and in this paragraph the word "that".

The paragraphs beginning with the paragraph identified as (a) under "Conclusions" on page 248 and ending with the paragraph identified as (p) on page 250, inclusive.

All of footnote 48, starting with the word "However".

It is further ordered, That the initial decision be, and it hereby is, modified by substituting the word "reservation" for the word "season" in the third sentence in the third full paragraph on page 242 thereof.

It is further ordered, That the order be, and it hereby is, modified to read as follows:

ORDER

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

1. Discriminating in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes with the purchaser paying the higher price or with customers of such purchaser.

2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent, pursuant to a specially tailored or negotiated arrangement, as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

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

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

Commissioner Elman dissented and has filed a dissenting opinion.

IN THE MATTER OF

PACIFIC MOLASSES COMPANY ET AL.

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

Docket 7462. Complaint, April 1, 1959—Decision, August 2, 1966

Order dismissing cease and desist order of May 21, 1964, 65 F.T.C. 675, pursuant to a decision and remand of the U.S. Court of Appeals, Fifth Circuit, dated Jan. 24, 1966, 356 F. 2d 386 (8 S.&D. 46), a complaint which charged an importer and distributor of molasses with price discrimination among its customers.

ORDER DISMISSING COMPLAINT

The Commission's order requiring respondent Pacific Molasses Company and certain of its officials to cease and desist discriminating in price against certain of its customers in violation of Section 2(a) of the amended Clayton Act, 15 U.S.C. 13, having been set aside by the United States Court of Appeals for the Fifth Circuit for procedural reasons and remanded to the Commission for further proceedings, if appropriate; and

The Commission having considered the relative staleness of the evidence in the record at this point and other relevant factors, and having determined that further proceedings, if any, should be directed to respondent's current pricing practices:

It is ordered, That the complaint in this matter be, and it hereby is, dismissed without prejudice.